



WASPA Appeals Panel – Complaint #23230

REPORT OF THE APPEALS PANEL

Date:	8 December 2014
WASPA member(s):	Why Play Interactiva SL (IP) (Membership No. 1387) / Mira Networks (Pty) Ltd (SP) (Membership No 0011)
Membership number(s):	See above
Complainant:	Consumer
Type of complaint:	Subscription Service
Relevant version of the Code:	12.4
Relevant version of the Ad. Rules:	2.3

1. INTRODUCTION

1.1 This appeal by the IP stems from an adjudicator's finding of breach of of the WASPA Code and Advertising Rules with regard to a subscription service being offered by the IP utilising the services of the SP. After reviewing the complaint's submissions and the IP's responses, the adjudicator determined that advertising and subscription mechanisms for the IP's services, as well as welcome and reminder messages, were not compliant with the Code and Advertising Rules. The adjudicator's report was delivered on 6 May 2014 and now appears at pages 23230_013 007 to 23230_013 007 of the annexed appeal bundle.

2. BACKGROUND TO THE COMPLAINT

2.1 On the 14th January 2014 the complainant lodged a complaint, alleging, *inter alia*, that the "terms of subscription [are] not visible on the same page as the subscription. Completely misleading info eg virus detected on your phone do you want to scan (& this is your subscription??). Completely misleading sms's which suggest you have been invited so you don't cotton on they have illegitimately subscribed you till they have stolen a month or more's income. These chaps should be in jail, &

nif they are members of waspa then your organisation is a worthless front for fraudsters.”

2.2 On the 15th January 2014 the IP responded that “[t]he user browsed the mobile internet and came across our banner advertisement promoting the Bempix Mobile Entertainment Subscription Service. The user clicked on a banner advertisement promoting our “Online messaging”, which is offered as part of the Bempix Subscription Service. Upon clicking the banner, the user was directed to our Bempix landing page where the user was required to complete specific Calls To Action to proceed. The user completed all stages and subscribed to the service. Subscription is not possible without user interaction. With every service we operate, users have the opportunity to read the Terms & Conditions of service prior to accepting the service. These are displayed throughout the process.” [This response can be found at page 23230_003 001 of the appeal bundle].

2.3 On the 20th January 2014 the complainant lodged the following in support of his earlier complaint above.

“Also just by the way, the links referred to in Bempix's response you emailed don't work, so I cant even see what nonsense they are trying use to justify their fraud, see printscreen below which comes up when you click their links Yes, after reading a myriad of hellopeter complaints, I fully expected this response, which is why I never even bothered to ask for a refund. It is not a refund I am after, I simply want them stopped & will be laying fraud charges shortly if that is what it will take. Their documentation is fictitious & based on illegal subscription process that is not compliant with WASPA's code. (the link I sent in the previous mail explains their typical illegal methodology) there is more than adequate empirical proof to show this is an ongoing manipulation / abuse of the system. They are attempting to hide behind fraudulent technical rubbish to try prove they have a valid case, which they don't. The sms system is also irrelevant in that if you didn't subscribe, (or knowingly subscribe), you don't believe you should have to unsubscribe. We are always told not to respond to unsolicited mails as they are probably phishing. Secondly the wording of the second sms I received said "reminder You have been invited to chat on Bempix click <http://bzm.tv/pr/2DBFEB612b-help?0105002341>" - quite clearly this say I have been invited, not that I have accepted. Again deliberate deception to keep you from unsubscribing for as long as possible. However, I am not asking for anything from Bempix, I have laid a complaint that these practices as described in my complaint are in conflict with WASPAS code. I am asking WASPA what they are going to do about this deviant / fraudulent member of the association, on behalf of myself, & thousands, (possibly hundreds of thousands), of defrauded members of the public.”

2.4 Upon receipt of the Escalation Notice on the 6th February 2014 the IP contacted the complainant directly and the communications exchanged

between them can be found at pages 23230_010 001 to 23230_010 005 of the appeal bundle.

- 2.5 On the 12th February 2014 the IP provided a further response to the WASPA Secretariat detailing additional information with regards to the complaint. This further response can be found at pages 23230_012 001 to 23230_012 004 of the appeal bundle.
- 2.6 It is evident that the complainant submitted a copy of an advertisement for a "Virus Scan" service that he alleged was misleading and amounted to a breach of the WASPA Code of Conduct ("Code"). He then followed up his complaint with information relating to another advertisement, which again he alleged to be misleading.
- 2.7 However, it is clear that the IP disputed that the complainant was ever subscribed to the "Virus Scan" (Antivirus) service. The IP alleged that the complainant was, in fact, subscribed to its KVIM Chat service, and the IP furnished evidence thereof in the form of subscription message logs that now appear at pages 23230_002 001 and 23230_002 002 of the appeal bundle.

3. SECTIONS OF THE CODE AND ADVERTISING RULES CONSIDERED BY THE ADJUDICATOR

- 3.1 The Adjudicator considered sections 11.2 to 11.8 of the Code, in particular sections 11.2.1, 11.2.2, 11.5.2, 11.6.1, 11.6.2 and 11.6.3, as well as sections 11.1 and 11.2 of the Advertising Rules ("Rules").

4. DECISION OF THE ADJUDICATOR

- 4.1 The Adjudicator found that the Code and Advertising Rules had been breached as follows:

11.2.1 and 11.2.2 require that any subscription must be separate to any other transaction. In my view, clicking on an advert for an anti-virus scan is not a separate transaction.

11.5.2. The welcome message must start with the text "Welcome: " and must also be a clear notification of the following information, in the following order:

The name of the subscription service;

The cost of the subscription service and the frequency of the charges;

Clear and concise instructions for unsubscribing from the service;

The service provider's telephone number.

Welcome:Bempix Click to start <http://bzm.tv/s/2DBFEB612B>
 Pass17391361 help@bempix.com subscription service R7/Day unsub
 sms stop to 43035 help0105002341.

11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

or

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

11.6.3. The entire reminder message must be sent in a single SMS, may not contain any line breaks or carriage returns and may not include any additional characters other than those specified in 11.6.2.

Reminder u r subscribed to Bempix. 1 New updates waiting. Click <http://bzm.tv/s/2DBFEB612B> to read cost R7/day help?0105002341.
 To unsub sms stop to 43035

In my view, and due to the exacting requirements of 11.6.3 the reminder message does not comply with the Code in that it has this text between the name of the service and the cost: 1 New updates waiting. Click <http://bzm.tv/s/2DBFEB612B> to read.

It also breaches 11.1 of the Advertising Rules which sets out this as the template for the reminder messages and states that no other characters may be included:

You'r<space>subscribed<space>to<space><SERVICENAME><space><i
 nclusive cost of service & the frequency of billing><space>from<name of
 content
 provider><period>To<space>stop<space>service,sms<space>STOP<sp
 ace><insert service name><space> to<space><insert
 number><space><open bracket><cost of MO><close
 bracket><period>Help?Call <space>0xy1234567<open
 bracket>VAS<close bracket>

The Advertising Rules relating to SMS and MMS services have also been breached in that it is not clear that the advert for a virus scan is actually a subscription service. The terms of the subscription service are not clearly displayed.

4.2 The Adjudicator's sanctions were as follows:

I find the IP in breach of the Code and Rules and request them to refund all monies deducted (if not done so already).

A fine of R5000 must be paid immediately on receipt of this ruling.

A further R5000 is held in abeyance until such time as the reminder message is corrected and a corrected version provide to the WASPA Secretariat. This needs to be done within 7 (seven) days of this ruling.

5. **GROUND OF THE APPEAL AND FINDINGS OF THE APPEAL PANEL**

5.1 **IP's First Ground of Appeal:**

In relation to the adjudicator's decision that:

11.2.1 and 11.2.2 require that any subscription must be separate to any other transaction. In my view, clicking on an advert for an anti-virus scan is not a separate transaction.

the IP appealed that:

We would like to bring to your attention the fact that.... as per our logs the complainant never subscribed to any antivirus service that we operate, but did subscribe voluntarily to our KVIM Chat Service.

We are not sure as to why the adjudicator is making reference to a service that was not subscribed to by the complainant. It appears from the complainant's submissions to WASPA that they have in fact confused and mixed up different services available This could be due to the references make by the complainant to comments circulated within a forum on a popular website in South Africa in which the complainant appears to have used as a reference tool to this complaint.

Having reviewed the content of the forum, the information contained within the forum, when making reference to a "Anti-Virus" campaign have been doctored to suit the authors objective....

It is in our right to point out that it is highly unfair to be judged with regard to a compliance breach related with a service that has no connection at all with the service that actually complainant subscribed to....

The WASPA Code of Conduct recognise a right to complaint to the users (Clause 14.1.1) but also a right of defence for the WASP (14.3.5): in this

case our right to defence was annihilated being that we were not able to identify the source of the breach and to prepare a suitable defence.

Such situation, as far as we know, is in direct breach of the statements of clause 14.1.3, (d) of the WASPA Code of Conduct being that the description provided was not a "detailed" one and in this case the WASPA Secretariat should have followed the procedure ex clause 14.1.4.

After reviewing the information provided to the Adjudicator in relation to this complaint this Panel is of the opinion that the Adjudicator did not have sufficient information at hand to determine that the subscription screens and subscription mechanisms for the "Virus Scan" service amounted to a breach by the IP of the provisions of the Code and Advertising Rules. The IP alleged in its response to the original complaint that the complainant had, in fact, never been subscribed by the IP to any such service. The IP alleged that the complainant subscribed to its KVIM Chat Service, but no advertising or subscription mechanisms relating to this Chat Service formed the subject of the complaint. The Adjudicator should have referred this aspect of the complaint back to the parties for further information before proceeding to find that the subscription screens and subscription mechanisms produced by the complainant amounted to a breach of the Code and Advertising Rules by the IP. This finding is made without making any comment on whether the advertisements produced by the complainant comply with the Code and Advertising Rules.

5.2 **IP's Second and Third Grounds of Appeal:**

The Adjudicator held that the IP's welcome message did not comply with the Code. In this regard, section 11.5.2 of the Code provides as follows:

11.5.2. The welcome message must start with the text "Welcome: " and must also be a clear notification of the following information, in the following order:

The name of the subscription service;

The cost of the subscription service and the frequency of the charges;

Clear and concise instructions for unsubscribing from the service;

The service provider's telephone number.

The welcome message used by the IP was as follows:

*Welcome:Bempix Click to start <http://bzm.tv/s/2DBFEB612B>
Pass17391361 help@bempix.com subscription service R7/Day unsub
sms stop to 43035 help0105002341.*

With regarding to the Adjudicator's finding, the IP argued as follows:

Excepting the Help contact e-mail, the structure of the welcome message complies perfectly with the statements of clause 11.5.2.

Actually our Welcome message is providing further important information to the user in order to allow the same to follow an alternative way to contact with and be duly attended by our customer service.

It is a fact that we are not hiding information, but we are providing a better service to the users in terms of information sources with regard to the subscribed services.

The Adjudicator also held that the IP's reminder messages breached sections 11.6.2 and 11.6.3 of the Code. The reminder message format used by the IP was as follows:

Reminder u r subscribed to Bempix. 1 New updates waiting. Click <http://bzm.tv/s/2DBFEB612B> to read cost R7/day help?0105002341. To unsub sms stop to 43035

With regard to the breach of section 11.6.2 and 11.6.3, the IP argued as follows:

We recognize that the Reminder message layout does not exactly comply with the provision of clauses 11.6.2 and 11.6.3, meaning that it is not exactly the same as required in terms of spaces and wording, however it provides to the user all the relevant information as stated by the WASPA code of conduct, without hiding fundamental concepts.

With regard to the adjudicator assertion, citing literally: "In my view, and due to the exacting requirements of 11.6.3 the reminder message does not comply with the Code in that it has this text between the name of the service and the cost: 1 New updates waiting." We would like to specify that the WASPA Code of Conduct clearly states that between the name of the service and the cost has to be specified the "[content/service description]". The sentence pointed out as not compliant by the adjudicator is actually the content and service description, being that the service subscribed by the complainant was the KVIM Chat one (not the Antivirus) and such service provides the user with updates with regard to the message status on the chat.

That being said, we do not understand the actual reason of such breach, being that, excluding minor differences between the required layout and the provided one, the message comply with the WASPA Code of Conduct requirements.

The content and format of mandatory subscription confirmation messages provide very important protections against consumers

inadvertently becoming subscribed to services. These mandatory messages are designed to give consumers an opportunity to opt-out once they realise that they are subscribed to a service they do not want to continue to be subscribed to.

Although the IP argues that it is providing a better service to users by including further “important information” into their welcome message, such as “Click to start <http://bzm.tv/s/2DBFEB612B> Pass17391361 help@bempix.com”, this additional information can just as easily be argued to be information that distracts attention away from other important information in the messages. In the opinion of this Panel, the welcome message is not a particularly clear notification to the user of the information required by section 11.5.2.

Section 11.6.2 clearly provides as follows:

11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

or

Reminder: You are subscribed to [name of service provider] [content/service description]. Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

In addition to considering the sections of the Code referenced by the Adjudicator, the Panel considered sections 12.1, 12.2 and 12.3 of the Rules which provide further guidance with regards to reminder messages.

Section 12.1 provides that “[a]s is specified in the WASPA Code Of Conduct (www.waspa.org.za), a monthly reminder SMS must be sent to all subscription service customers. The **reminder must contain the following information only**: [own emphasis added]

- (a) The name of the subscription service.*
- (b) The name of the service provider supplying the content or service to the subscriber*
- (c) The inclusive cost of the subscription service and the frequency of the charges;*
- (d) Explicit instructions on how the subscriber may stop their subscription to a service using an SMS MO.*
- (e) The service provider's telephone number. If VAS rates are applicable, this must be indicated next to that telephone number.*
- (f) The information in (a) - (e) above must be presented in the reminder message in the order of first (g), then (b), then (c), then (d), then last (e), inclusively.*
- (g) No other characters other than those prescribed in this section may be inserted before the information contained in (a) and after (e)”.*

Section 12.2 of the Rules provides that “[t]he information specified in s12.1 **must, without exception, take the following design and have the following content, capitalisation, and spacing** and must be provided exclusively in ENGLISH only: [own emphasis added]

You'r<space>subscribed<space>to<space><SERVICENAME><space><inclusive cost of service & the frequency of billing><space>from<name of content provider><period>To<space>stop<space>service,sms<space>STOP<space><insert service name><space>to<space><insert number><space><open bracket><cost of MO><close bracket><period>Help?Call <space>0xy1234567<open bracket>VAS<close bracket>”.

Furthermore section 12.3. of the Rules provides that “[t]he reminder message may not take the form, or be designed in such a way that a reasonable reader may construe the message to be an advertisement for the service or any other service”.

In response to the SP’s statement above that they “do not understand the actual reason of such breach”, the use of the word ‘must’ in section 11.6.2 of the Code and sections 12.1 and 12.2 of the Rules endorses the obligatory requirements of the content of reminder messages in subscription services.

Membership to WASPA is voluntary however all members of WASPA are required to accept the Code of Conduct and related procedures (including the Rules), as binding.

As such all messages must comply with the specific requirements laid down in the Code and Rules, as the Code sets the best practice standards for advertising mobile application services to ensure that the members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services.

As provided for in section 11.6.4 of the Code, the text contained in reminder messages “*must not be worded in a way that attempts to deceive or mislead the customer from the purpose of the reminder which is to inform the user that they are subscribed to a service*”.

It is this Panel’s opinion that the welcome and reminder messages of the IP are unclear and may deceive consumers. The IP should refrain from adding in what it considers to be “additional information” as by doing so they fall foul of the sections of the Code and Rules and such messages will result in a breach and will give rise to valid complaints as they have done.

In summary it is the opinion of the Panel that the Adjudicator’s finding that the SP’s welcome and reminder messages have breached sections 11.5.2, 11.6.2, 11.6.3 of the Code is correct and that such breaches would be prejudicial to consumers.

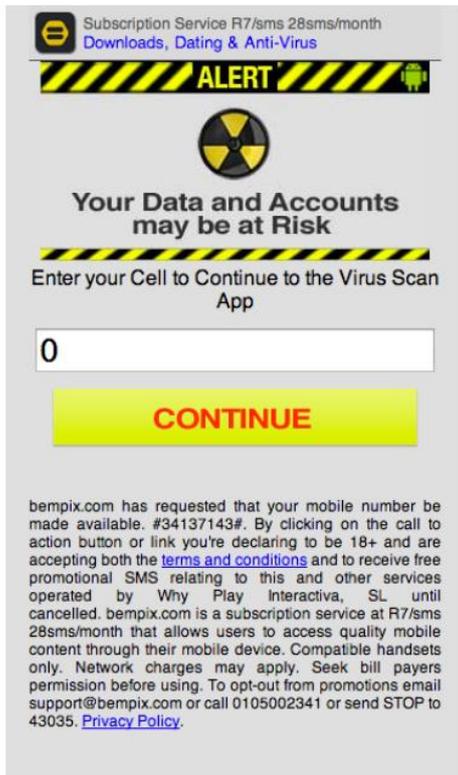
5.3 **IP’s 4th Ground of Appeal:**

With regard to the Adjudicator's finding that the IP had breached the advertising rules in relation to the virus scan service, the IP argued that:

As already stated under point a) above [which refers to point under ground of appeal 1], the complainant subscribed to our KVIM Chat service and not our Anti--Virus Service. The adjudicator in our opinion is making reference to a service that has been portrayed as mentioned previously within a public forum website, and not the service in which the complainant accessed and requested. We feel that the adjudicator's comments in relation to their decision about the service in which they are adjudication is unjust and out of remit based on the actual service in which the complainant joined.

Unfortunately we are not able to duly respond to such accusation due to the lack of information provided by the complainant with regard to the Virus scan campaign to which we are not able to prove if he subscribed or not being that we do not know which campaign is he talking about. We have no chance to defend our stance due to the fact that we cannot identify the subject of the offence.

However, in order to provide you with a wider range of information, had the complainant actually been joining our Bempix service of which Anti--Virus is a product offered, the following screenshot of our Anti Virus campaign that was running around November 2013 (time when the complainant subscribed to our KVIM Chat service).



1) Service nature, price and frequency clearly displayed
 2) Multiple contents clearly stated on the right under the service information

3) Service description and subscription process are clearly stated and perfectly visible.

4) Disclaimer is provided right under the “continue” action button. All the relevant information is duly displayed.
 - SP name clearly stated.
 - Terms and Conditions and Privacy Policy active links provided.
 - Opt-out options and customer service contact data

Referring back to the Adjudicator’s comment, citing literally “The Advertising Rules relating to SMS and MMS services have also been breached in that it is not clear that the advert for a virus scan is actually a subscription service. The terms of the subscription service are not clearly displayed”, unfortunately we cannot agree with these statements. In fact the thing that the service is of a subscription nature is absolutely clear. Such information, as you can see at point 1 above, is provided right of the top of the landing page in order to make that visible without the need of any scroll action. Moreover the same information is reiterated in the disclaimer.

That being said, unless the Adjudicator and the complainant were looking to another Anti Virus campaign, we can confidently assert that our campaign is fully compliant.

The finding of the Panel for grounds of appeal #4 is the same as the Panel’s finding for grounds of appeal #1.

6. Summary

6.1 The appeal is upheld with regards to the grounds of appeal #1 and #4 and dismissed with regards to the grounds of appeal #2 and #3.

7. Sanctions

- 7.1 The Panel has considered the sanctions imposed by the Adjudicator and the IP's arguments in mitigation of sanctions and concludes that the initial sanctions imposed by the Adjudicator were too lenient for a clear and obvious breach of section 11.6.2 of the Code. However, as the IP does not have a history of complaints having been upheld against it, there do not appear to be any aggravating circumstances to warrant the imposition of a very significant sanction against the IP at this juncture.
- 7.2 The IP's decision to appeal against the Adjudicator's finding of a breach of section 11.6.2 was poorly conceived. Had the IP not appealed this finding of breach of section 11.6.2 it is conceivable that it would have been refunded its appeal fee due to the upholding of its appeal against the finding of breach in relation to the Virus Scan advertising and subscription mechanism.
- 7.3 This Panel upholds the Adjudicator's decision to direct the IP to refund the complainant all amounts debited on the complainant's account from 26 November 2013 to 31 December 2013, which amounts must be paid immediately upon receipt of this Appeal Report, (if not done so already).
- 7.4 In addition, the IP is fined R25 000 for its clear breach of section 11.6.2..
- 7.5 The amounts provided for in paragraphs 7.3 and 7.4 above must be paid by the IP in full within 5 days of publication of this report.
- 7.6 As the appeal was partially successfully and partially unsuccessful, 50% of the appeals fee is to be refunded to the IP.
-