



REPORT OF THE ADJUDICATOR

WASPA Member:	MTN Internal WASP Service (IWS) (Member number - IWS 0035)
Service Type:	Competition
Complainant:	Consumer
Complaint Number:	26203
Code Version:	13.6

Complaint

The complainant, a former WASPA adjudicator, lodged a complaint against unsolicited sms's received from the WASP.

The messages in question are:

"Win a Polo VIVO or smartphones or a Notebook. Simply sms Car to 32484 sms cost R1, closing date 30 April, keep smsing to stand a better chance".

And

17:20 on 25 March 2015, which states: "Win up to R100 000 business funding. Tell us ur business idea or how u intend to grow ur business if you win the money. To enter sms ur answer to 36586. To opt out reply with the words stop."

The details of the complaint will be discussed in detail below.

WASP response

Despite requests, and despite an emergency panel decision, the WASP did not initially respond.

After the emergency panel decision, it stated that it has gone through changes and has not been able to respond to WASPA complaints as it should.

In relation to this matter (and matter 26103, which has already been decided) they have refunded affected customers, and have suspended the relevant accounts.

Sections of the Code considered

The complainant identified the following clauses:

4.3. Members must conduct themselves lawfully at all times and must co-operate with law enforcement authorities where there is a legal obligation to do so.

8.4. For a promotional competition, the **"pricing information"** consists of the total cost to the customer for an entry into that competition plus the words "per entry". Examples of pricing information: "R1.50 per entry", "R1 per entry".

8.7. Pricing information must not be misleading. The price must be the full retail price of the service, including VAT. There must not be any hidden costs over and above the price included in the pricing information.

16.9. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who has given his or her consent.

16.10. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:

(a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed, and

(b) has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.

16.11. A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

16.12. Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

18.2. The cost for a single entry into a promotional competition must not exceed R1.50.

18.4. An offer to participate in a promotional competition must clearly state:

- a. the competition to which the offer relates;
- b. the steps required by a person to participate in the competition;
- c. the full cost to enter the competition;
- d. the basis on which the results of the competition will be determined;
- e. the closing date for the competition;
- f. how the results of the competition will be made known;
- g. how a person can obtain a copy of the competition rules; and
- h. how the successful participant can obtain the prize.

18.6. Competition services must have a specific closing date, except where there are instant prize-winners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, if there are any valid entries.

Decision

The complainant has named the clauses which he is complaining in terms of, and has also set out a detailed motivation for each complaint. The WASP initially failed to respond, and subsequently failed to address the merits of the matter – appearing to concede same. The material that is before me for decision on the merits is therefore essentially the complaint and the thoughts of the emergency panel.

In addition to the cited clauses, the Emergency Panel considered clauses 18.2 and 18.5. I have carefully considered the procedural provisions relating to Emergency Panels. Clause 24.68 to 24.78 which regulate this procedure are silent as to whether the Panel can “add” clauses. Given that Clause 24.30 specifically prohibits the *adjudicator* from adding clauses, I am of the opinion that the Emergency Panel is similarly prohibited. However, Clause 8.2 is a definition, and Clause 18.5 actually provides a possible defence to Clause 18.4. While I see no reason to consider them *per se* below, I am satisfied that these are clauses that could be considered without being cited and without prejudice to the WASP.

In relation to clause 4.3, the complaint related to the Lotteries Act. The Emergency Panel found that WASPA is only mandated to administer the WASPA Code and can not make decisions on the Lotteries Act. As no finding *ex facie* exists against the WASP in terms of this Act, it can not be found to be in breach of Clause 4.3 for the reasons set out in the complaint at this time.

I agree with the finding of the Emergency Panel, and find no breach of Clause 4.3.

In relation to clauses 8.7 read with 8.4, relating to pricing information, the Emergency Panel found that, in relation to the second message, the failure to include the cost of the SMS was a breach of Clause 8.4 of the Code. Clause 8.4 is a definition and as such can not be breached. However, the complainant cited Clause 8.7 as read with Clause 8.4, which can give rise to a breach.

Clause 8.7 reads, "Pricing information must not be misleading. The price must be the full retail price of the service, including VAT. There must not be any hidden costs over and above the price included in the pricing information".

As the complete failure to include pricing information is misleading, I agree that there is a breach of Clause 8.7 in relation to the second message.

The Emergency Panel found that clauses 16.9 and 16.10 set out the conditions under which Direct Marketing can be sent to a consumer, and found breaches of Clauses 16.11 and 16.12. I am in agreement with the Panel's interpretation that while clause 16.9 and 16.10 create the test, it is Clause 16.11 ("A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above") that stands to be breached.

In the case of both messages, on the material before me, there appears to be:

- no consent to receive marketing messages;
- no consent has been given in relation to similar products;
- no opportunity to object has been provided at the time of collection;
- In the case of the second message, no opt out provision exists.

Given this, I am satisfied that both messages are *ex facie* in breach of Clause 16.11.

Neither message contains any detail of the sender, and the second message contains no opt-out instructions.

I therefore agree with the Emergency Panel's finding that there is a breach of Clause 16.12.

The Emergency Panel investigated the short codes and confirmed that the first message is charged at R1 a message, and the second at R5 a message. I have no reason to doubt this information.

Clause 18.2 sets the limit for a competition entry at R1,50.

I therefore agree with the Panel's finding that *ex facie*, and presuming there is only one message necessary to enter the competitions:

- **Message 1 is not in breach of 18.2;**
- **Message 2 is in breach of 18.2.**

Clause 18.4 relates to the inclusion of the terms of the competition. The messages contain none of that information, nor access to same.

I therefore find both messages in breach of Clause 18.4.

The Panel does not consider Clause 18.6, understandably. Clause 18.6 requires that a competition has a closing date, and the failure to comply with Clause 18.4 means that it is impossible to determine whether or not there is a closing date.

However, in the absence of such terms and in the absence of argument to the contrary, the evidence suggests that there is no declared closing date. **I therefore consider both messages in breach of Clause 18.6.**

Sanctions

The Emergency Panel suspended the WASP's membership, and the particular short codes.

While it appears that the WASP is now attempting to correct its failure to engage with WASPA appropriately, it still failed to address the merits of this matter.

I am overturning the suspension on the member, but the suspension of the short codes in question remains binding, until such time as the WASP submits appropriate, compliant material to the Media Monitor and the Monitor approves same.

The breaches themselves are serious in that they are flagrant breaches of clear provisions of the Code.

The sanctions are therefore as follows:

- The campaigns in their current format must remain suspended;
- The WASP is fined R50 000 payable within 7 days of receipt hereof.

The suspended fine of R100 000 imposed in matter 26103 is not imposed as these matters appear to have occurred concurrently, and this can therefore not be regarded as a further breach. However, the WASP is advised that this ruling will be taken into consideration if there are future breaches.