



**Wireless Application Service Providers' Association**

## Adjudicator's Report

Complaint number	26483
Cited WASPA members	Artiq Mobile B.V. (1390) – IP Mira Networks (Pty) Ltd (0011) - SP
Notifiable WASPA members	<i>n/a</i>
Source of the complaint	Monitor
Complaint short description	Competition with guaranteed win links to subscription service
Date complaint lodged	22 May 2015
Date of alleged breach	<i>Unknown</i>
Applicable version of the Code	13.9
Clauses of the Code cited	4.2, 5.4, 8.4, 8.7, 15.4, 15.5, 16.4
Related complaints considered	<i>n/a</i>

Fines imposed	IP is fined: R25 000 for breach of Clause 15.4 R10 000 for breach of Clause 16.4
Is this report notable?	Notable
Summary of notability	This report gives guidance on drawing a line between Clauses 15.4 and 15.5..

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## Initial complaint

The Monitor lodged a complaint about a direct SMS allegedly guaranteeing an iPhone prize. When the link is followed, the user finds themselves subscribing.

The monitor raised a number of issues with the campaign that will be addressed in full below.

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## Clauses

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

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.

15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: "to claim your prize, join this service".)

15.5. A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: "if you join this subscription service, you will be entered into a monthly draw for a prize".)

16.4. Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an "opt-out request").

## Member's response

The IP submitted that it finds the campaign completely unacceptable. The campaign was carried out by a third party marketer and the ultimate site that the user is directed to does not belong to the IP.

The IP set out the steps that it has taken to try to ensure compliance by affiliate marketers, including the terms and conditions, third party monitoring services and take down procedures. The IP has terminated the relevant affiliate marketer, has refunded all affected consumers, and has removed those consumers from its data base.

The IP then went on to address the merits, which I will canvas below.

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## Complainant's response

The monitor re-iterated that the competition is used as a hook to a subscription service.

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## Member's further response

The IP responded saying that, although it does not agree, it has amended the relevant pages to make it clear that it is a content service.

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## Decision

I am, in the first place, left somewhat perplexed. The IP starts by agreeing that the campaign is unacceptable and is alleging that it is the doing of an affiliate marketer. However, it appears to accept responsibility and control of the content in addressing the merits.

I note also that, as a general principle, WASPA members bear the responsibility for their affiliate marketers, which they must manage. The submissions regarding the controls that the IP has for the affiliate marketing arrangement can, at best, act in mitigation of sanction.

I note that I will consider the original material in respect of which the complaint was lodged, and not the amended material which may or may not be sufficiently changed.

I note that I am limited to the clauses cited in this matter, and issues raised that have not had correlating clauses cited cannot be considered.

Turning to the material before me, I will start with the more substantive clauses of the Code that were cited, and thereafter turn to whether the WASP has satisfied its general duty in terms of Clauses 4.2 and 5.4.

Clause 8.4 read with Clause 8.7 require that the pricing information is clearly expressed:

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.

The WASP submitted that the entry was free and therefore the absence of a price is not misleading.

The requirement relating to the pricing information in clauses 8.4 and 8.7 relates to the sms's that are necessary to enter the competition. In this matter, the consumer does not send an sms, but follows a web link. They are never charged for an entry because they never send an sms to enter.

**Clauses 8.4 and 8.7 are therefore not applicable to the situation at hand.**

Clause 15.4 requires, "A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: "to claim your prize, join this service".)"

Clause 15.5 states that, "A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: "if you join this subscription service, you will be entered into a monthly draw for a prize".)"

The IP defends its actions, saying that the page clearly states, "The promotional draw or competition is ancillary to the competition".

Drawing the line between clause 15.4 and 15.5 poses some challenges. However, it is my opinion that the order of the "hooking" the consumer is the pivotal issue here. If the material states, "You have/could win a prize" upfront, and then leads to a content service, the issue is clause 15.4; if the material states "Subscribe to this content service and then you could win a prize", then it falls into what could be labelled a clause 15.5 defence.

In the matter before me, the initial communication is SOLELY around the prize, and it is only on the third step that there is any suggestion of a content service. I am therefore satisfied that this falls within clause 15.4 and not clause 15.5.

The question posed by Clause 15.4 is not whether the consumer is aware that there is a subscription service, or whether the competition is ancillary or not. The question is whether the consumer HAS TO subscribe to claim the advertised prize.

**In the current matter, the consumer cannot claim the iPhone, or enter to have a chance to win the iPhone, without subscribing. The iPhone competition was the initial**

**hook, with no reference to the content service. The campaign is therefore a breach of clause 15.4.**

Clause 16.4 is the “opt out” requirement and states, “Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an “opt-out request”).”

**The initial sms patently has no opt out mechanism and is in breach of clause 16.4.**

I now turn to Clauses 4.2 and 5.4 which state, respectively:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

I consider that any unprofessional and dishonest actions by the IP have been succinctly captured by the breaches above, and that a further finding in respect of these clauses is therefore unnecessary and would arguably amount to a “double jeopardy”.

## **Sanctions**

The IP has already taken certain remedial steps. However, the breaches in this matter are severe, and while the IP initially defends the matter by “blaming” an affiliate marketer, its defence indicates that it believes that the specific issues raised above were acceptable.

I am also in agreement with the monitor that using a competition as a hook is not a new issue – it is one that has been canvassed again and again in WASPA rulings and it is somewhat incredible that it is still being defended by members. Similarly, a failure to include an opt out option is a basic breach of the WASPA Code that should simply not occur anymore.

I fine the IP as follows:

- In respect of the breach of clause 15.4, R25 000.
- In respect of the breach of clause 16.4, R10 000.

