



**Wireless Application Service Providers' Association**

## Report of the Adjudicator

Complaint number	<b>#26846</b>
Cited WASPA members	<ul style="list-style-type: none"> <li>• <b>R&amp;D Media Europe B.V (1356)</b></li> <li>• <b>Opera Telecom t/a Opera Interactive/Oxygen8 Communications (0068)</b></li> </ul>
Notifiable WASPA members	
Source of the complaint	<b>WASPA Media Monitor</b>
Complaint short description	<b>Misleading marketing and terms and conditions not available</b>
Date complaint lodged	<i>9 July 2015</i>
Date of alleged breach	<i>July 2015</i>
Applicable version of the Code	<i>13.9 and 14.0</i>
Clauses of the Code cited	<i>3.4, 3.5, 3.7, 4.2, 4.5, 5.1, 5.5, 12.4, 12.5</i>
Related complaints considered	26919
Fines imposed	<ul style="list-style-type: none"> <li>• <b>R&amp;D Media Europe B.V (1356): A fine of R100,000 for contravention of sections 4.2, 4.5, 5.1, and a suspended sentence of R25,000 for contravention of section 12.5.</b></li> <li>• <b>Opera Telecom t/a Opera Interactive/Oxygen8 Communications (0068). No sanctions, complaint dismissed.</b></li> </ul>

Other sanctions	
Is this report notable?	<b>Notable</b>
Summary of notability	The case deals with an important issue, namely misleading and dishonest conduct by luring consumers into subscription services through non-existent promotional competitions. Blame is shifted to so-called affiliated companies doing the marketing but who are not WASPA members.

## Initial complaint

The initial complaint was raised by the WASPA monitor on 9 July 2015 after becoming aware of the marketing campaign in question. The media monitoring team investigated and tested a service that was being promoted by Whats App ("WA") end users. This service, in order to "qualify", meant WA users had to share a link with 10 "WA friends".

The link stated: *"Take a 1 minute survey to get a chance to win a R6,500 Woolworths Giftcard. Woolworths is expanding in Roodepoort. Therefore we need your feedback. Answer 4 simple questions to qualify for 1 of the (150 available) R6,500 Woolworths Vouchers"* The get up of the page is such that it creates the impression that the promotion is done by Woolworths or on their behalf, including a logo that is similar to the normal Woolworths logo.

The link, when opened, seemed to be a Woolworths gift card promotion. The monitoring team followed all the steps required to qualify for entry into the promotional competition, but after answering the 4 questions was directed to a page requiring the participant to share the promotion with 10 friends (this obviously in an attempt to obtain more reference numbers) for the promotion. The participant is then required to enter his or her mobile number. The participant is then redirected to a play.mobi.com website which is suddenly a confirmation for a subscription service at R7 per day. The very brief terms and conditions at the bottom of the page provide information about the cost of the service and contact numbers. There is no indication of what this subscription service is or what services will be rendered to the participant. There is also no further mention of the Woolworths promotional marketing offer. Once the participant has confirmed his or her number and subscription a confirmation message is sent stating: *"Confirm your request for Glomobi @R7.00 per day. Reply "Yes" to confirm/"no" to cancel. Free SMS". Upon confirmation a welcome message was received stating "Welcome 2 Glomobi!content: <http://m.za.glomobi.com>. T&C's: [http://glomobi.com/subscription\\_R7/day/stop?sms\\_stop\\_to\\_39326/Help?0112185618.info.za@glomobi.com](http://glomobi.com/subscription_R7/day/stop?sms_stop_to_39326/Help?0112185618.info.za@glomobi.com)."*

When the media monitor team accessed the Glomobi website there were links to utility apps, realtones, wallpapers and astrology, but no mention of the promotional Woolworths competition.

The media monitor lodged a complaint, namely that it investigated and tested a service that was being promoted by WhatsApp end users stating that this type of marketing is considered highly misleading. Users are placed under the impression that to get the Woolworths gift card, they had to sign up to a subscription service. She stated "*This marketing put our industry into disrepute.*"

The media monitor requested that the campaign be de-activated with immediate effect.

## **Members' response**

### *R&D Media*

R&D Media provided a prompt response to the complaint indicating that the campaign had been suspended with immediate effect as they had been unaware of the nature of the campaign conducted by their affiliate who promoted their download service. There was also an undertaking to more robustly monitor their services to prevent any similar occurrence in future. It also indicated that before engaging in affiliate marketing communications we have clear arrangements in place on what is allowed and not allowed on the basis of compliance with our own offer. In regard to the infringement of sections 4.2, 4.5, and 5.5 of the WASPA Code there is an implicit acknowledgement that infringements had taken place by stating "By taking the above mentioned measures we can assure that there will not be similar breaches which were all caused by the used affiliate technique and insufficient monitoring performance."

In regard to section 12.4 R&D Media indicated that they have updated their terms and conditions to ensure compliance to include a reference to be entered into the promotional competition, by adding a closing date of the promotion. This is implicit acknowledgement of infringement of section 12.4.

In regard to section 12.5 it is acknowledged that the link to their terms and conditions may not have worked, but was subsequently reactivated.

### *Opera Telecom t/a Opera Interactive/Oxygen8 Communications*

Oxygen8 indicated that it had discussions with R&D Media on 23 July 2015 and were advised that the service had been suspended as per WASPA's request. Their own investigations revealed that R&D Media used the Woolworths link to market their product. Their role in the transaction was to set up an account for R&D Media and to facilitate billing. The complaint was the first time that it became aware of the campaign. It was only supplied with details of the Glomobi content subscription service and was found to be compliant with the WASPA Code after testing. Its compliance officer advised R&D Media of possible infringements of the WASPA Code and how to rectify its conduct. On 23 July 2015 Oxygen8 sent an email summarising their relationship with R&D Media and noting that they were not provided with the marketing material initialising the redirection to the Glomobi subsection page for checking compliance. It also gave notice of the suspension of the service in terms of their agreement.

## **Sections of the Code considered**

I considered both the provisions of Version 13.9 of the Code in force until 29 June 2015 during which time the relevant marketing campaign was devised and possibly first launched and Version 14.0 which was in operation on the actual date the alleged infringements were noticed during the investigation of the media monitor. The relevant provisions of the two versions of the Code are identical and therefore nothing turns on it.

**3.1.** If a customer of a member provides services covered by this Code of Conduct, those services are subject to the relevant provisions of this Code, as if that customer was a member.

**3.2.** If a customer of a member is found to have breached this Code of Conduct, that member must abide by any order to suspend or terminate the services offered by that customer.

**3.4.** A member is not liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.

**3.7.** A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

**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.

**4.5.** Members must respect the intellectual property rights of their clients and other parties and must not knowingly infringe such rights.

**5.1.** Members must not offer or promise services that they are unable to provide.

**5.5.** Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

**12.4.** For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed at the bottom of the web page.

**12.5.** The minimum terms and conditions displayed on any web page must include at least the following information:

(a) a customer support number, and

(b) a link to a web page where the full terms and conditions for the service are available.

## Decision

### *Oxygen8*

On the evidence it is accepted that Oxygen 8 only became aware of the possible infringing conduct after the promotional campaign had been launched by R&D Media and its affiliate. Oxygen8 took immediate investigative steps to determine whether there had been infringing conduct and on 23 July 2015 advised R&D Media of its findings. It also suspended the services with immediate effect although it seems that R&D Media had already taken such steps as early as 9 July 2015 itself. Section 3.4 of the Code provides that a member is not liable for any breaches of the Code resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.

On the evidence it is accepted that Oxygen8 have demonstrated that they took reasonable steps as required by testing the services of R&D Media for compliance before activating the service and taking prompt action after becoming aware of the possible infringements.

It is therefore held that Oxygen8 is not liable for any infringement of the Code.

### *R&D Media*

On the evidence provided it is accepted that R&D Media was unaware of the nature and full extent of the marketing campaign conducted by its affiliate although it provides no details on the identity of the affiliate, any correspondence it may have had with the affiliate after it became aware of the complaint and any response of the affiliate.

The affiliate that provided the services on behalf of R&D Media can be regarded as a customer of R&D Media as it provided services to R&D Media for which it was being remunerated. In terms of section 3.5 a member must ensure that any customer who is not a member of WASPA but is providing services covered by the Code of Conduct, in this instance conducting a promotional competition to promote the services of the member, is aware of the requirements of the Code. Section 3.7 determines that a member is liable for any breaches of the Code resulting from services offered by a customer, if that customer is not also a member of WASPA.

In this case there is no indication that the affiliate of R&D Media is a WASPA member. The promotional marketing campaign masquerading as a promotional competition clearly constitute an infringement of a number of provisions of the Code in that it is clearly devised to be false and deceptive and to mislead by ambiguity and omission. Although the marketing presents itself as a promotional competition for which the only requirements are the answering of 4 simple questions in a survey, it then requires the participant to extend the marketing to friends and family (10 additional WA account holders) and finally fails to make reference to any entry into a promotional competition. R&D Media by their own admission was unaware of any such competition and no evidence was provided that any such competition was in actual fact ever held or prizes awarded. This conduct borders on the fraudulent in that it leads the participant unwittingly down the road to a subscription service of which absolutely no information

is provided as to what kind of subscriptions service is being subscribed to until the subscription has actually taken place. The conduct is clearly not the kind of professional conduct that can be expected of members in terms of section 4.2. Although there may be suspicion that the affiliate did not have the permission of Woolworths to use its logo in the campaign, there is insufficient evidence to find a contravention of section 4.5. There is also clearly conduct which is false or deceptive and likely to mislead as prohibited by section 5.5. There is also no clear indication in the marketing campaign that the benefit, ie the promotional competition, will only be available once the subscription service is joined, which would constitute an infringement of section 15.5.

The initial part of the marketing campaign clearly constitutes a promotional competition as defined in the Code and in the Consumer Protection Act. Although the issue of the infringement of the promotional competition requirements of the Code were not specifically raised by the complaint, R&D Media was clearly aware of these concerns at the time the complaint was raised. This is evident from their response and remedial action in this complaint and also in Complaint #26919 which deals with a similar complaint and was raised at the same time.

In their response to the complaint R&D Media acknowledges that there had been infringements of the provisions of the Code, to wit sections 4.2, 4.5 and 5.5 of the Code. It indicates that it has taken steps to ensure that similar breaches will not take place in future. They also admit to negligence in their monitoring of the activities of the affiliate ("insufficient monitoring" performance").

R&D Media also admitted to the infringement of section 12.4 of the Code in that its terms and conditions were not active and therefore not accessible to potential clients at the time of the media monitors investigation. This is also an infringement of section 5.7.

It is held that R&D Media is liable in terms of section 3.7 for the infringements of sections 4.2, and 5.5 of the Code.

It is also held that R&D Media is liable for an infringement of section 12.4 of the Code.

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## **Sanctions**

### *Oxygen8*

No sanctions are imposed in respect of Oxygen8 as it was held that their conduct in respect of this complaint did not constitute an infringement of the Code.

### *R&D Media*

The infringements of sections 4.2, 4.5 and 5.5 of the Code all relate to the same conduct, namely the deceptive marketing campaign conducted by R&D Media's affiliate. This is regarded as a very serious infringement as is evident by the number of different sections of the Code involved as well as the intentionally misleading and dishonest nature of the conduct of the affiliate. It is taken into account as a mitigating circumstance that R&D Media was not aware of the conduct of its affiliate, but the problem was partly caused by insufficient monitoring by it.

This type of conduct is also not unique and has been the object of a number of complaints against other WASPA members and seems to be a common strategy. In some of the cases it is also alleged that it was the conduct of the affiliate and not the member itself that was to blame. WASPA members should therefore be alive to the possibility of this type of unprofessional and dishonest conduct on their behalf. R&D Media had an obligation to ensure that its affiliate abided by the Code of Conduct and probably has legal means to hold the affiliate liable for such conduct.

R&D Media has been in contravention of the Code of Conduct in regard to similar conduct, (case # 6842 of 19 June 2009) namely a marketing campaign masquerading as a competition, but in fact leading to a subscription service, although the exact provisions of the Code then in force were different. It was fined R150,000 on that occasion.

A fine of R100,000 is imposed on R&D Media for the infringement of sections 4.2, 4.5 and 5.5. This fine takes into account the fine imposed in Case #26919 which deals with similar conduct at a stage shortly afterwards. The combined fine of R250,000 is regarded as appropriate taking all facts into consideration.

A fine of R25,000 is imposed on R&D Media for the infringement of section 12.4 suspended for 6 months provided that R&D Media does not infringe section 12.4 during this period.

#### **Matters referred back to WASPA**

There are also possible infringements of sections 15.5, 18.1, 18.4 and 18.5 dealing with promotional competitions which should have been mentioned in regard to the conduct in question. As these possible infringements form part of the greater scheme of dishonest conduct here, nothing turns on that fact, but would give the adjudicator more scope to deal with such complaints. Members should also be afforded an opportunity to deal with possible infringements under these provisions where appropriate.

No further action is required in this case.