



REPORT OF THE ADJUDICATOR

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| WASPA Member | AMV Holdings |
| Service Type | Subscription |
| Source of Complaints | Competitor (anonymous) |
| Complaint Number | 4994 |
| Date received | 14 October 2008 |
| Code of Conduct version | 6.2 |

Complaint

The complaint was lodged by someone employed at a competitor company who wished to remain anonymous. Alleged breaches of sections 1.5, 5.1.2 & 6.5.1 are raised.

"I received a commercial sms on 11/10/2008. It came from 31434 (indicating that it was sent from offshore) as Vodacom doesn't allow sending from the short code or originating number rewriting.

It read:

FREE CELL DOWNLOADS! Tones, Games, Vids and Pics! Reply GIFT to this sms to download your bonus items! 16+ sms STOP to quite subscription, R30/3 days 011-461-0317

I replied Gift and was sent:

Thanks 4 using BLING!Contnet link on it's way!Help:011 461-0317.Subscription service R30/3days.sms STOP to 31434 to unsubscribe.16+

This is in contravention of 1.5. as Vodacom has prohibited the sending of SMS from offshore binds.

It appears to be in contravention to 5.1.2. as it only offers a STOP instruction for stopping a subscription and not the commercial communications. This service previously sent out WAP push messages with not way to stop them.

The message uses the word GIFT as a keyword and suggests the user will get bonus items and free content by replying. Gift is similar in meaning to FREE and as soon as one

replies one is joined to a subscription at R30 every 3 days which is hardly free. This is therefore in contravention of 6.5.1. “

SP Response

The WASPA member filed a response in the following terms:

1. On 11 October 2008 the Complainant sent GIFT to 31434 intending to join the Bling subscription “club”.
2. The Complainant was then sent the following message:
ur content!Help:011-461-0317.Subscription service R30/3day.sms STOP to 31434 to unsubscribe.16+
3. No stops were received from the Complainant.
4. The Complainant’s MSISDN has been blacklisted.
5. The WASPA member acknowledged that it had breached the Code and advised that this was as a result of human error. The relevant human had been disciplined.

“We have implemented a checking system to try and ensure that a repeat is prevented. The good news is that the impact seems to be low – of the 438 members of our Hot Babes club who would have received the message above, only 19 have responded by sending in GIFT, including the user who complained. We have suspended those 19 subscriptions and are contacting customers to offer a full refund.

We agree that the message was non-compliant, and it was not authorized for use internally. Its continued inclusion in our Hot Babes club was an oversight. We would seek leniency on the basis that this was a human error, and that the impact has been limited to just a handful of users. “

Sections of the Code considered

The following sections of version 6.2 of the WASPA Code of Conduct were considered:

1.5. Existing agreements with operators

As well as complying with this Code, WASPA members must also comply with any existing contracts and agreements they have with network operators.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator.

6.5. Use of the word “free”

6.5.1. The keyword “free” or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- a. The name of the subscription service;
 - b. The cost of the subscription service and the frequency of the charges;
 - c. Clear and concise instructions for unsubscribing from the service;
 - d. The service provider's telephone number.
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Decision

1. The Adjudicator has no knowledge of the agreements entered into between the WASPA member and any Network and no evidence of any provisions therein has been placed before me. No decision can be made as to whether there has been a breach or not and this aspect of the Complaint is dismissed.
2. It is not, as a matter of passing interest, alleged that the first message received was unsolicited and the WASPA member provided logs indicating a recent commercial relationship with the Complainant and that no STOPS had been received.
3. The alleged breach of section 5.2.1 is also dismissed. The message received by the Complainant is that required by section 11.1.7 of the Code, viz. the welcome message to new subscribers to a subscription service.
4. The WASPA member has acknowledged breaching section 6.5.1 through the use of the keyword GIFT and the Adjudicator confirms this breach. The Adjudicator further notes the points raised in mitigation by the WASPA member, in particular steps taken to rescind the subscriptions and refund members in full. It is accepted that these measures go some distance to ameliorating the damage to the industry and consumer confidence that the WASPA member's actions have caused.
5. In Adjudication 5014 the following order was made for a breach of section 6.5.1 under Version 6.2 of the Code in respect of another WASPA member (although this Adjudicator notes that this fine appears to also cover other breaches and have been preceded by a warning to amend):

"I find that the service provider has breached the Code of Conduct and the Advertising Rules, in particular sub-rules 6.5 of the Code of Conduct and 1.2 and 1.4.11 of the Advertising Rules. I note that the service provider has previously been cautioned to amend its advertising in order to comply with the Code of Conduct and Advertising Rules. The service provider has failed to ensure that its advertising is compliant and I accordingly find that the service provider has breached the Code of Conduct and the Advertising Rules on the basis set out above and impose a fine of R15 000 which is payable to the Secretariat within 5 days of notification of these findings."

In the circumstances the following Order is made:

1. The complaint is partially upheld in that the WASPA member is found to have breached section 6.5.1 of version 8.2 of the Code of Conduct through the use of a keyword with the same or similar meaning to FREE where the associated service was not, in fact, free.
 2. The WASPA Member is fined an amount of R5 000, payable within five days of date of notification of this Adjudication.
 3. The WASPA Member is further required:
 - 3.1. to review its services and ensure that all are compliant with section 6.5.1 of the Code and the associated provisions of the Advertising Rules.
 - 3.2. to confirm in writing within five days of date of notification of this Adjudication that it has contacted and refunded all consumers affected by the breach.
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