

**WASPA appeals panel**  
**Complaint 7419**

**REPORT OF THE APPEALS PANEL**

**Date: 19 November 2010**

**Appellant and Service Provider: Blinck Mobile**

**Complaint Number: 7419**

**Applicable versions: 7.4**

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**1. BACKGROUND TO THE APPEAL**

**1.1** This appeal concerns a complaint lodged on 24 August 2009, by the WASPA Monitor.

**1.2** The SP is a member of WASPA.

**1.3** The complaint relates to an internet advertisement headed "How high is your IQ?". The complaint is lodged on a number of issues.

**1.4** The complaints, the findings of the Adjudicator, the IP's response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

**2. CLAUSES OF THE CODE CONSIDERED**

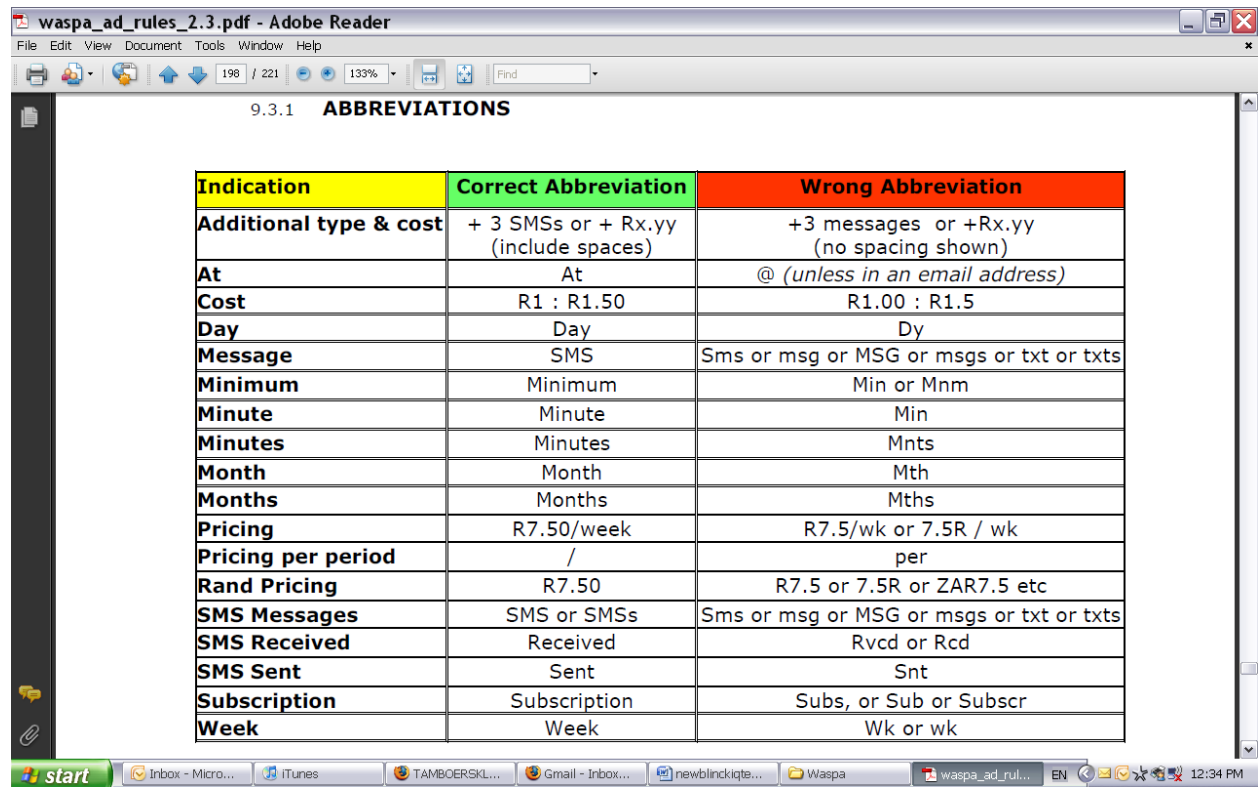
**2.1** The complaint relates to the following clauses of the Code:

- 3.3.1. Members will not offer or promise services that they are unable to provide.
- 4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.
- 4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
- 6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.
- 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.
- 11.1.2. Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.
- 11.1.8. 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:
  - 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.
- 11.1.10. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from  
 [name of service provider] @ [cost of service and frequency of billing].

In addition, it relates to the following Advertising Rule:

### 9.3.1 ABBREVIATIONS



| Indication                        | Correct Abbreviation                    | Wrong Abbreviation                          |
|-----------------------------------|-----------------------------------------|---------------------------------------------|
| <b>Additional type &amp; cost</b> | + 3 SMSs or + Rx.yy<br>(include spaces) | +3 messages or +Rx.yy<br>(no spacing shown) |
| <b>At</b>                         | At                                      | @ ( <i>unless in an email address</i> )     |
| <b>Cost</b>                       | R1 : R1.50                              | R1.00 : R1.5                                |
| <b>Day</b>                        | Day                                     | Dy                                          |
| <b>Message</b>                    | SMS                                     | Sms or msg or MSG or msgs or txt or txts    |
| <b>Minimum</b>                    | Minimum                                 | Min or Mnm                                  |
| <b>Minute</b>                     | Minute                                  | Min                                         |
| <b>Minutes</b>                    | Minutes                                 | Mnts                                        |
| <b>Month</b>                      | Month                                   | Mth                                         |
| <b>Months</b>                     | Months                                  | Mths                                        |
| <b>Pricing</b>                    | R7.50/week                              | R7.5/wk or 7.5R / wk                        |
| <b>Pricing per period</b>         | /                                       | per                                         |
| <b>Rand Pricing</b>               | R7.50                                   | R7.5 or 7.5R or ZAR7.5 etc                  |
| <b>SMS Messages</b>               | SMS or SMSs                             | Sms or msg or MSG or msgs or txt or txts    |
| <b>SMS Received</b>               | Received                                | Rvcd or Rcd                                 |
| <b>SMS Sent</b>                   | Sent                                    | Snt                                         |
| <b>Subscription</b>               | Subscription                            | Subs, or Sub or Subscr                      |
| <b>Week</b>                       | Week                                    | Wk or wk                                    |

## 3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

### 3.1 Finding of the Adjudicator (Copied verbatim from the report)

I have considered the comprehensive allegations made by the complainant as well as the SP's response and must conclude that the IQ Test promotion is a blatant contravention of sections 3.3.1, 4.1.1, 4.1.2, 6.2.4, 11.1.1, 11.1.2; 11.1.8, and 11.1.10 of the WASPA Code of Conduct.

My reasons are as follows:

1. The IQ Test promoted was not accessible by the complainant despite them following all listed instructions. The conclusion must be made that the SP has offered a service that it is unable to provide.
2. The manner in which the promotion is conducted, the subscription of the user to other services, the nature of the additional products offered and the pricing

of the services, are all very misleading. The SP is clearly not committed to having honest and fair dealings with customers and potential customers.

3. The SP has knowingly promoted the IQ Test product/service when it is likely to mislead customers due to the ambiguity and/or omission of correct information from the promotion and subsequent notifications.

4. The pricing information contained on the web pages and in subsequent notification messages is misleading. Multiple communications are required to obtain content, and there is no clear indication given that more premium messages are required before content can be accessed.

5. The promotional web pages do not prominently and explicitly identify the services offered as “subscription services”.

### **Sanction**

I have taken into account the fact that this SP has been the subject of numerous previous complaints which deal with the same or similar contraventions of the Code.

I have also taken into account the SP’s advice that it has, by its own accord, stopped all marketing of its services in SA.

Be that as it may, the SP has not terminated its membership of WASPA and remains bound by the provisions of the Code of Conduct.

The following sanctions are given:

1. The SP is prohibited from offering any subscription services under the short code 31631.
2. The SP is fined an amount of R250 000.00.
3. The SP is ordered to refund all monies deducted from subscribers to all of its services offered under short code 31631.
4. The SP is ordered to provide the WASPA Secretariat with a list of all subscribers who subscribed to any services offered under short code 31631, together with proof that the necessary refunds have been given, within 10 (ten) days of the SP receiving notice of this report.
5. The SP’s membership of WASPA is suspended for 6 (six) months.

The aforesaid sanctions may not be suspended pending any appeal to be lodged by the SP.

### **4. GROUNDS OF APPEAL**

The Appellant submitted a lengthy appeal, but summarised its grounds of Appeal as follows:

- 4.1 That the Adjudicator erred in finding that the Appellant, by virtue of the fact that the IQ Booster Game was not compatible with the Complainant's mobile phone, was offering a service which it is unable to provide.
- 4.2 That the Adjudicator erred in failing to give due regard to the impact of Winpaso's unauthorised actions.
- 4.3 That the Adjudicator erred in finding that the manner in which the Appellant promoted the services, the subscription of customers to the Appellant's additional services (ie the Scanner applications), the nature of the additional services, and the pricing of the Services were all misleading.
- 4.4 That the Adjudicator erred in finding that the IQ Booster game is likely to mislead consumers "due to the ambiguity and/or omission of correct information from the promotion and the subsequent notifications" and is likely to mislead consumers intending to enter the IQ Test as an independent transaction to subscribing for services
- 4.5 That the Adjudicator erred in finding that the advertisement does not 'prominently and explicitly identify the services offered as 'subscription services'.
- 4.6 That the Adjudicator erred in finding that the notifications sent by the Appellant to consumers do not provide sufficiently clear notification of the information required.
- 4.7 That the sanction is disproportionate even in the Appellant did breach the Code.

We will take this enumeration of the Grounds of Appeal as a starting point, although we note that the subsequent expansions in the Appeal document do not seem to strictly follow this structure, causing some confusion. Nonetheless, relevant expansions of these points will be discussed below. A failure to address any particular point expressly should not be regarded as a failure of the Appeals Panel to read and consider same.

## **5. FINDINGS OF APPEAL PANEL**

### **The role of Winpaso**

- 5.1 The Appeals Panel wishes to start by addressing the role of Winpaso. Winpaso is an affiliate of the Appellant's, with which the Appellant has a contractual relationship. As part of this contract, the Appellant submits that Winpaso is not supposed to alter an advertisement in any way or use advertisements of its own creation.
- 5.2 The Appellant submits that Winpaso made unauthorised amendments to the advertisement, as a result of which the Subscription Terms were removed.
- 5.3 The Appeals Panel understands that it is challenging for the Appellant to monitor its affiliates. Nonetheless, it notes as follows:
- 5.3.1 In choosing to market through affiliates, the Appellant takes a risk. It is for the Appellant to put relevant checks and balances in place in this regard;
  - 5.3.2 If the Appellant believes that the breach is the fault of Winpaso, then it is for the Appellant to take relevant steps against Winpaso;
  - 5.3.3 The explanation provided in this regard in any event only addresses the issue of the subscription terms.
- 5.4 **The Appeals Panel is therefore satisfied that the Adjudicator was correct not to give undue weight to the role of Winpaso in the finding on the merits. This addresses point 4.2 of the Appeal Grounds.**

### **Availability of the services**

- 5.5 The Adjudicator found that the Appellant was offering services that were not actually available. The Appellant submitted that the fact that the services were not compatible with the complainant's mobile phone does not mean that the services were not available. It submits that mobile phone technology changes the whole time, and that its services are constantly evolving with this change. In essence, the Appellant submits that it cannot be blamed that the consumer's phone is not compatible, and that the consumer is in any event then offered a choice of alternatives.
- 5.6 It is accepted that not every service will be compatible with every phone. **However, the Appellant appears to be misunderstanding the nature of the complaint.** It is not the fact that the IQ Booster Game was not available on the Complainant's mobile that was in issue. It was the fact that despite following every step online, the advertised question of "How high is your IQ?" and "Compare your intelligence. How high do you rate?" was never followed through **online**.
- 5.7 The Appellant correctly points out that the words "IQ Test – Download the IQ booster and see how high you rate!" appear on the screen. We are not, however, satisfied that the communication about the IQ booster is sufficiently linked to the offer of an IQ test. It appears in a separate box, in a separate colour, in a comparatively small part of the screen.
- 5.8 A reasonable consumer could well understand that the online offering of an IQ test is supplemented by this "IQ Booster" which might then help you improve your IQ and do better on the IQ test. This is also seen in the fact that the SMS service is an "IQ **booster**", whereas the online offering is for an "IQ **test**".
- 5.9 The implication of the initial screen is that if you follow all the instructions, you will take part in some sort of online IQ test, and will be given an IQ

score. This never happens. **It is this advertised service that appears to be unavailable.**

### **Misleading claim**

**5.10** The next ground of Appeal is closely linked to this reasoning, being that the advertisement is not misleading. The Appellant states that this advertisement does *not* promise an IQ score, but rather a IQ booster game. The Appellant states, “At no point in the advertisement is the customer promised a score”.

**5.11** As noted above, the Appeals Panel disagrees. The wording and layout of the advertisement makes it likely and reasonable that the hypothetical reasonable consumer will reach the conclusion that you will do an IQ test online, and that you can, if you wish, subscribe to the IQ Booster game to improve that score. This is apparent from the constant references to scores on the screen, which we copy below for ease of explanation. It is also clear from the separation on the right hand of the screen of the promise “Get your IQ test now” from the promise “Get the IQ booster and many more games!”



- 5.13.3 There is no “terms and conditions” link on the webpage presented;
- 5.13.4 Even if there were a “terms and conditions” link or section, it is unlikely that it would directly address the issue at hand.

### **Subscription services**

- 5.14 The Adjudicator found that, “The promotional web pages do not prominently and explicitly identify the services offered as “subscription services”.
- 5.15 The Appellant appealed this finding, and in its argument on sanctions submitted that each SMS that the complainant received made reference to the fact that the services were subscription services.
- 5.16 It also submitted that, “At the very least, a reasonable consumer who attempted to download the IQ Game would have seen (from the first SMS sent) that the service being offered was a subscription service.”
- 5.17 In essence, this relates back to the issues above. The issue is that the advertised IQ test does not exist and is in fact a subscription service for the “IQ Booster” game. This is not communicated.
- 5.18 The Appeals Panel also wants to specifically point out that “from the very first SMS” is not sufficient. This promotion was an online promotion and it should be clear upfront that the advertised service (the IQ test) is only available as a subscription to the IQ Booster game.

### **Use of a quiz**

- 5.19 In relation to the issue of Clause 11.1.2, relating to the use of a quiz to “hook” a consumer into a subscription service, when the Clause requires that “any request from a customer to join a subscription service must be an independent transaction”. The Appellant tries to differentiate the service

offered on a similar basis to that in matter 6843. It states, correctly, that there is no harm in offering a quiz as a **product**.

5.20 For the reasons set out above, the Appeals Panel does not believe that it is clear that the IQ test is separate from the IQ Booster game product. The advertised IQ test in fact never materialises, and is simply a lead in to the subscription to the IQ Booster game.

5.21 **For the reasons set out above, the Appeals Panel therefore finds that this claim is in breach of Clauses 3.3.1 and 4.1.2 in that it offers a service that never materialises, and is misleading. In addition, Clause 11.1.2 is breached, in that the subscription service is not independent of the IQ test. The Appeal in this regard is dismissed. We believe that this addresses points 4.1, 4.4, and 4.5 above, and parts of point 4.3 of the Appeal Grounds.**

### **Additional Services**

5.22 It is recognised that the rather blanket finding of the Adjudicator has made this aspect of the adjudication difficult to appeal. It is therefore also difficult to determine whether the defences put forward on appeal indeed relate to the problems that the Adjudicator experienced.

5.23 To properly understand this aspect of the matter, the Appeals Panel refers back to the original monitor report. In addition to the IQ test which never materialises, the monitor took issue with:

- The names of the products (“scanner”, “radar” etc) in relation to the reality;
- The pricing information in the SMS - “@R15/sms/3sms/week”
- The failure of the website to identify this as a subscription service (this forms point 4.5 of the Appeal Grounds).
- The use of the abbreviations “txt” and “@”

- 5.24 The question that the Appellant first addresses in this regard is whether the consumer realises that they are being subscribed to additional services (over and above the IQ booster game). We do not believe that this issue was raised by the monitor, nor explicitly ruled on by the Adjudicator. It is therefore irrelevant to the findings.
- 5.25 For clarity, we note that the Appellant persists in its contention that the consumer would have realised that they will never do an online IQ test, and that when the monitor received an SMS saying that the IQ booster game was incompatible with her phone, she should have stopped trying. For the reasons set out above, we disagree. We do not, however, find it particularly material to the remaining points.
- 5.26 In relation to the names of the products, the Appellant essentially submits that the reasonable person would not possibly think that a download called “Smell Scanner” would enable the cell phone to smell, nor that “Radar on your cell phone” would turn your cell phone into a radar device.
- 5.27 We have grappled with this issue. On one hand, we agree with the Appellant that this interpretation does show a certain degree of naivety on the part of any consumer. However, what else is one supposed to think “Smell scanner” and “Radar on your cell phone” mean? There is no indication in the wording of the sms’s that they are joke applications (such as “Fool your friends with Smell Scanner”, for example). While the “Radar” screen shot does indicate that it is a wallpaper, it also includes confusing promises such as “NOBODY WILL BELIEVE HOW YOU KNOW WHO IS NEAR” and “RADAR ON YOUR CELL PHONE”.
- 5.28 In relation to the Radar application, in particular, it is also not beyond the realm of possibility that one cell phone could detect another cell phone in the vicinity.

- 5.29 In this regard it must be noted that South African cell phone users, and WASP users, cover a wide range of education levels including the less educated and more gullible consumer. Any WASP operating in the South African environment needs to take particular care not to take advantage of the less educated cell phone user.
- 5.30 **Given this, we agree that the names in the context of the surrounding communication about the additional services are misleading.**
- 5.31 The complaint took issue with the pricing information in the SMS - “@R15/sms/3sms/week”. It submitted that the correct formatting is “R45/week”.
- 5.32 The Appellant correctly submitted that this is not an explicit requirement of the Code. The Code requires that “Pricing contained in an advertisement must not be misleading.” (Clause 6.2.4)
- 5.33 The Appellant also pointed out that the consumer will not always get 3 sms’s per week – they may unsubscribe after 2, or have low prepaid credit. In that case, the consumer will not pay R45 per week, but rather “R15/sms”.
- 5.34 The Appeals Panel accepts the Appellant’s argument to some degree, and is satisfied that the communication does not necessarily have to be the “R45/week” suggested by the complaint. The Panel does, however, find the wording of the current SMS slightly cumbersome and potentially confusing. This is mostly because the “/” symbol usually means “per”. The “translation” of the sms is therefore “R15 per sms per 3sms per week”.

- 5.35 The Appellant needs to consider the communication and find a better way of communicating that it is R15 per SMS, and that consumers receive 3sms (at R15 each) per week.
- 5.36 **This Panel therefore finds that the current wording is potentially misleading, as a consumer may think it costs only R15 per week. The communication is therefore in breach of Clause 6.2.4 of the Code.**
- 5.37 The complaint took issue with the abbreviations “@” and “txt”.
- 5.38 In relation to the use of “@”, the Appellant correctly points out that there is a contradiction between the contents of Clause 11.1.10 - which prescribes the following wording “[service activation instructions and/or activation code]. U'll b subscribed to [XYZ service] from [name of service provider] @ [cost of service and frequency of billing]” – and the Advertising Rules.
- 5.39 The Appellant has submitted that in the event of a conflict, the Code takes precedence and correctly points to Clause 6.1.3 in support of this.
- 5.40 **In the circumstances, the Appeals Panel agrees that the Appeal must be successful with regard to the use of “@”.**
- 5.41 The Appellant accepts that the use of “txt” was incorrect. No further discussion of this point is therefore required.
- 5.42 **The Appeals Panel has now addressed all the aspects of the Appeal Ground raised in paragraph 4.3 and 4.6.**

## **Sanctions**

- 5.43 The Appellant submitted that the sanctions are unjustly punitive, disproportionate and irrational.
- 5.44 In relation to the refund, the Appellant argued that it was unjust to order a refund of all subscriptions under short code 31631, as they did not all come through the offending website. It also submitted that they all knew that they were entering a subscription service from the SMSs.
- 5.45 While the Appeals Panel agrees with the Appellant on these points, it points out that one of the issues raised which has been successful on appeal is the name of the services – “radar” and ‘smell scanner”. However, it is true that the reasoning behind the Appeals Panels finding related largely to the communication around these names, not the names in isolation.
- 5.46 **For this reason, the refund sanction is amended to: The SP is ordered to provide the WASPA Secretariat with a list of all subscribers who subscribed to any services offered under short code 31631 through the offending website together with proof that the necessary refunds have been given, within 10 (ten) days of the SP receiving notice of this report.**
- 5.47 Turning to the fine, which the Appeal does not address head-on, although its arguments can be extrapolated.
- 5.48 The Appeals Panel notes that the “major” offence in this matter is the fact that the website communicates that the reader can do an IQ test, whereas this never materialises. Instead, various subscription services are offered.

5.49 The Appeals Panel has found the Appellant's approach to this either disingenuous, or obtuse, as it appears to ignore the essential issue and mostly attempts to argue peripheral and often irrelevant issues instead. This, combined with the numerous peripheral breaches, is not indicative of a provider that has made an error in interpreting the Code, or a once-off error of judgement. It is indicative of a wilful disregard of the Code.

5.50 In addition, in the period from October 2007 to date, Blink has had over 20 complaints upheld or partially upheld against it. This echoes the Appeals Panel's sense that the Appellant is not attempting to comply with the Code.

5.51 The Appellant had also been fined several times prior to the original adjudication in this matter. Those fines were smaller and obviously have not had the desired effect on the Appellant's behaviour. It would seem that a significant fine is required to drive the message home to the Appellant.

5.52 There are only two potential mitigating factors:

- The role of Winpaso, which we have addressed;
- The overturning of the finding regarding "@".

5.53 **We find that neither of these factors warrants a decrease in the fine. The fine of R 250 000,00, is therefore upheld.**

5.54 The Adjudicator suspended the Appellant's WASPA membership. The Appeals Panel is not convinced that the suspension of WASPA membership is desirable in a situation where the member appears to require education, assistance and guidance, as well as the enforcement

procedures of WASPA. This aspect of the sanction is therefore set aside.

**5.55 In summary:**

- The role of Winpaso does not make a material difference to the merits of this matter;
- The fact that an IQ test is offered online, and never materialises, is in breach of Clauses 3.3.1, 4.1.2 and 11.1.2 of the Code.
- The names of the “Radar” and “Smell Scanner” services are misleading in the context of the overall communication around them, and therefore in breach of Clause 4.1.2.
- The sms wording regarding pricing is potentially misleading and in breach of Clause 6.2.4.
- The Appeal is successful on the use of the symbol “@”.
- The sanctions are upheld, with one amendment. The sanctions are therefore as follows:
  - The SP is prohibited from offering any subscription services under the short code 31631.
  - The SP is fined an amount of R250 000.00.
  - The SP is ordered to refund all monies deducted from subscribers to all of its services offered under short code 31631 through the offending website.
  - The SP is ordered to provide the WASPA Secretariat with a list of all subscribers who subscribed to any services offered under short code 31631 through the offending website, together with proof that the necessary refunds have been given, within 10 (ten) days of the SP receiving notice of this report.

