



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Viamedia
Information Provider (IP):	Not applicable
Service Type:	Subscription service advertising
Complainant:	Competitor
Complaint Number:	#8579
Code Version:	8.0
Advertising Rules Version:	2.3

Complaint

The complainant is a competitor who wishes to remain anonymous. The complaint is as follows:

Affiliation_Information: Complainant wish to remain anonymous WASPName: unknown OtherID: +2783920227002287

Code_Breached: 9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- a. the closing date;*
- b. any significant terms and conditions, including any restriction on the number of entries or prizes which may be won; 9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material: a. how and when prize-winners will be informed; b. the manner in which the prizes will be awarded;*
- c. when the prizes will be awarded;*
- d. how prize-winner information may be obtained;*
- e. any criteria for judging entries;*

- f. *any alternative prize that is available;*
- g. *the details of any intended post-event publicity;*
- h. *any supplementary rules which may apply;*
- i. *the identity of the party running the competition and responsible for the prizes.* 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 in to a competition or quiz.*

Detailed_Description_Complaint: sms received Jan 25, 2010 5:38 PM:

"ONCE IN LIFETIME R50,000,000 POWERBALL JACKPOT!!! Reply BALL to play 500 tickets & get a share o f the WINNINGS!Subscription service.R3/day.reply out 2 stop"

1. *Dont know who offers this competition. Didnt even know who to lodge complaint agaist.*
2. *Dont know the terms and conditions of the competition cause no link is provided and not even disclosed which company is running the competition.*
3. *No closing date, if there even is one, for the competition.*
4. *A Subscription service may not be an entry into a competition.*
5. *Opt out instructions not included.*
6. *No helpline or customer service number included.*
7. *Name of company offering service not included.*
8. *I never give out permission to be contacted on this number. Where and how did this company (whoever they are) get hold of this number to send me spam?*

Service provider's response

The SP requested the complainant's MSISDN in order to provide specific feedback on the complaint but the complainant declined to disclose it to the SP in the interests of remaining anonymous.

The SP responded to the complaint in a document emailed to WASPA. A copy of this document is annexed to this report, marked Annexure "A".

Sections of the Code considered

This complaint was formally escalated on 21 January 2010 after first being lodged on 4 January 2010. The applicable version of the Code is therefore version 8.0.

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2.9. A "competition service" is any competition or game with prizes or entry mechanism into a draw. Where an auction or a reverse auction has the characteristics of a competition service, it is considered to be a competition service.

2.23: A "subscription service" is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

2.22. "Spam" means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

3.1.1: Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.

3.1.2: Members are committed to lawful conduct at all times.

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.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

(a) the recipient has requested the message;

(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect

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to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9 (b)).

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.3. Interactive competition services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

- (a) the closing date;
- (b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
- (c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
- (d) any significant age, geographic or other eligibility restrictions;
- (e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item;
- (f) the entry mechanism and workings of the competition.

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

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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.

11.1.4. Where possible, billing for a subscription service must indicate that the service purchased is a subscription service.

11.1.5. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

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:

- (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.

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].

11.2.5. The cost of service and frequency of billing must use the format "RX/day", "RX/week" or "RX/ month" (or RX.XX if the price includes cents). No abbreviations of "day",

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“week” or “month” may be used.

11.5.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.5.2. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be ‘STOP’. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate.

I have highlighted the sections of the Code which are particularly relevant to this specific complaint and which I have relied upon below.

Sections of the Advertising Rules considered

It was not necessary to consider the Advertising Rules for the purposes of this report.

Decision

Given the complainant's reluctance to disclose his/her MSISDN and afford the SP an opportunity to give specific feedback on the complainant's subscription, I am forced to assess the service in more general terms based on the information provided to WASPA. In this regard, I have focused on the message the complainant received as well as the SP's comment that the complainant was likely included in its campaign as the complainant's details were included in a “legitimately obtained database” and was not spammed.

The message the complainant received informing the complainant that he/she was subscribed to the service read as follows:

ONCE IN LIFETIME R50,000,000 POWERBALL JACKPOT!!! Reply BALL to play 500 tickets & get a share o f the WINNINGS!Subscription service.R3/day.reply out 2 stop

The complainant stated that the message was not solicited and intimated that he/she did not opt in to this service. This suggests that the message was, in fact, spam and in the absence of a consent by the complainant to receive these sorts of messages when the complainant's details were included in the SP's database or at some point

subsequent to that date, this is an unavoidable conclusion. If the database the SP is using is substantial then it is logical to assume that a substantial number of people have been subscribed to the service, potentially involuntarily.

Considering the nature of the SP's service, it appears to be a subscription service and, at the same time, has elements of a competition service. The entry mechanism for the competition is the subscription itself and the outcome of the competition is participation in PowerBall winnings. The SP contends that because all subscribers will share in the winnings, this is not a competition but given that PowerBall is run by the National Lottery operator, the subscribers to the SP's service are competing with other entrants in the lottery generally. I therefore find that the service is both a competition service and a subscription service.

In the absence of an indication whether the complainant opted to subscribe to the service specifically, the complainant appears to have been involuntarily subscribed to the service. This is problematic as the Code specifically prohibits automatic subscriptions in the absence of an opt-in to the service and also requires that subscriptions must be independent transactions with the specific intention to subscribe to the service, which does not appear to be the case at all.

As a subscription service the service does not comply with the message content requirements set out in 11.1.8 and 11.1.10. The message sent to the complainant merely informs the complainant that he/she was subscribed to a subscription service without the necessary detail the Code requires subscription service operators to disclose.

The complaint is accordingly upheld.

Sanctions

The SP is required to cease any further subscriptions to the service as it was constituted at the time the complaint was lodged as well as any similar service/s which operates in a similar fashion.

The SP is ordered to send reminder messages to all current subscribers in the format prescribed in section 11.5 of the current version of the Code, namely version 9.0.

The SP is fined R50 000, which amount is payable to WASPA within fifteen working days of being advised of this sanction, or at the WASPA Secretariat's discretion should the SP appeal this decision.

Dear WASPA Secretariat,

The complainant has mistaken the service to be a competition, which it is not.

The complainant cites contraventions of clause 9.1.4 of the code which deals with Competitions. The service in question is not a competition in any way. The service is a subscription or club membership. It is a content service where members are sent daily Lotto information, trivia and facts. There are additional benefits to the service. One of these is a pool of 500 Power Ball tickets. Any proceeds from these tickets, if any, are pooled, equally divided and distributed to all members. The Power Ball is run by the National Lottery, not by this service. While the Power Ball itself may be deemed a competition by WASPA's definition, this service is NOT. The service simply buys a set number of tickets each week, as a free additional benefit of the service. There is no competition between members, all share equally. There is no need to enter anything, all members are included. The service is a content service with benefits and features in relation to the Power Ball, like the 500 tickets, which change from time to time. The SMS received was promoting that particular benefit of the club. Certainly 9.1.4 doesn't apply to this service at all, as it is not a competition.

The complainant cites a contravention of 11.1.2. of the code which deals with subscriptions. As the SMS promotes an independent transaction to join a subscription service and does not offer a single item of content, we can only assume he/she is suggesting a contravention of the last part of the clause which prohibits using "entry into a competition or quiz". This is reinforced by the statements of the complainant. As explained above the service is not a competition as the complainant suggests. There is, therefore, no contravention of this clause either.

In response to the complainant's specific complaints:

1. *Dont know who offers this competition. Didnt even know who to lodge complaint against.*
 - o **The service is not a competition.**
 - o **The SMS is identified by the Originating Number which is accepted in the code as a method of identification i.e. "5.1.1. All commercial messages must contain a valid **originating number** and/or the name or identifier of the message originator."**
2. *Dont know the terms and conditions of the competition cause no link is provided and not even disclosed which company is running the competition.*
 - o **The service is not a competition.**
3. *No closing date, if there even is one, for the competition.*
 - o **The service is not a competition.**
4. *A Subscription service may not be an entry into a competition.*
 - o **The service is not a competition.**
5. *Opt out instructions not included.*

- **Opt out instructions are included and quoted by the complainant him/her self i.e. "reply out 2 stop"**
6. *No helpline or customer service number included.*
- **A helpline or customers service number is not required in commercial messaging.**
7. *Name of company offering service not included.*
- **The name of the company is not required for commercial messaging, the originating number is deemed sufficient by the code.**
8. *I never give out permission to be contacted on this number. Where and how did this company (whoever they are) get hold of this number to send me spam?*
- **The complainant refuses to divulge his/her MSISDN.**
 - **Had he/she done so we could easily prove that:**
 - **The message was not Spam.**
 - **The number was from a legitimately obtained database.**

We hope you agree that each and every issue lodged in this Complaint lacks merit and regret that the complainant has wasted time and money for all involved.

Warm regards,

Robin,

ViaMedia