

WASPA appeals panel
Complaint 8664, 8579, 9233

REPORT OF THE APPEALS PANEL

Date: 28 June 2011

Appellant and Service Provider: ViaMedia

Information Provider (IP): /

Complaint Number: 8664, 8579 and 9233

Applicable versions: 8.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns three complaints. One was lodged on 9 April 2010, and the other two in January 2010.

1.2 The complaints were all lodged anonymously by a competitor.

1.3 The Appeal relates to 3 issues:

- Whether the message was spam
- Whether the matter is a subscription or competition service, and related issues
- Whether the subscriber was automatically subscribed to the service

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 appeal relates to 3 issues. The related clauses are:

Clause 5.2.1

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 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.

Clauses 2.9 and 2.23

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.

Clause 9.1.2

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

Clause 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.

Clause 11.1.5 and 11.1.8

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.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

In essence, the Adjudicator found that the message in question was spam, was both a competition and a subscription, and that the complainant was involuntarily subscribed to the service.

The details of the 3 findings are available on the WASPA website and will not be re-visited here.

3.2 Sanctions

In respect of matter 8664, the Appellant was fined R 50 000.

In respect of matter 8579, the Appellant was fined R50 000.

In respect of matter 9233, the Appellant was fined R 50 000.

4. GROUNDS OF APPEAL

The Appellant summarised its appeal as follows, verbatim:

1. The adjudicator has accepted the complainant's version that the messages received were spam without our partner's being afforded the opportunity to lead evidence to refute it.

1.2 The adjudicator has disregarded or overlooked his own statement that the complainant's refusal to provide their cell numbers prevents our partner from responding to the allegation that the messages were unsolicited.

1.3 The adjudicator's finding is irregular in that our partner has been refused the opportunity to provide evidence to refute the complainant's allegations.

1.4 We request that the appeal panel should also take into account new information presented i.e. that a previous allegation of spam was successfully refuted once the MSISDN was given.

1.5 The finding that this message does not comply with the requirements set out in section 11.1.8 and 11.1.10 of the Code is misdirected on the facts in this regard. He/she has misunderstood the nature of the messages received by the complainant.

1.6 The messages are commercial messages, as defined in section 2.8 of the WASPA Code, and not confirmation of subscription.

1.7 The adjudicator's finding is factually incorrect.

1.8 In terms of section 2.9 of the Code, a "competition service" is defined as any competition or game with prizes or entry mechanism into a draw. The dictionary definition of "competition" is "an event in which persons compete". The adjudicator's finding that subscribers are competing with entrants to the national lottery to win may be correct. However, the adjudicator has overlooked the fact that subscribers to this service are not competing against each other.

1.9 Section 9.1.6 of the Code also states that competition services and promotional material must not use words such as 'win' or 'prize' to describe items intended to be offered to all of the participants. In other words, where entrants are not competing with each other and the benefits of entry are available to all participants, no competition service is being offered.

1.10 The proceeds from winning tickets is distributed to all subscribers to this service and, therefore, this service cannot be held to be a competition service.

1.11 The adjudicator is misdirected as to the true nature of this service. He has also misinterpreted the provisions of the Code as they relate to competition services.

1.12 It is not relevant to the current complaint whether your promotion falls foul of the Lotteries Act, 1997. WASPA has no jurisdiction in this regard and the adjudicator can only concern himself with the question of whether your promotion contravenes any provision of the Code of Conduct.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaint was made on from January to April 2010. Version 8.0 and 9.0 of the Code apply during this time. Except for a numbering issue, there are no material differences between these versions on the relevant sections.

5.2 Finding

5.2.1 The complaints in this matter relate to versions of the following message:
**ONCE IN LIFETIME R50,000,000 POWERBALL JACKPOT!!! Reply
BALL to play 500 tickets & get a share of the WINNINGS!
Subscription service.R3/day.reply out 2 stop\''**

5.2.2 The issues of Spam and automatic subscription

5.2.2.1 For reasons that will appear from below, these two issues will be discussed together.

5.2.2.2 The Panel is of the opinion that the Adjudicator erred in that he or she gave the benefit of doubt in this matter to the anonymous complainant. The Panel believes that in this situation, the benefit of doubt must be given to the Appellant.

5.2.2.3 The complainant has chosen to lodge this complaint anonymously. While this is their right, they must accept that certain effects result from this decision.

5.2.2.4 One of those effects is that it becomes very difficult for the Appellant to properly investigate the allegations and respond thereto.

5.2.2.5 Having chosen to complain anonymously, the complainant also made certain broad allegations without offering any proof.

5.2.2.6 In the circumstances, the Panel considers it unfair to expect the Appellant to make a proper case on issues relating to whether a message was spam, and whether an automatic subscription occurred. They are unable to check their records, submit proof or answer a clear case.

5.2.2.7 A finding in this situation is a failure of equity.

- 5.2.2.8 The Panel also concur that the Adjudicator appears to have the requirements of a welcome message confused with that of an offer. The message in this case is an offer, not a welcome message.
- 5.2.2.9 **Given the above, the findings in respect of the spam and automatic subscription are set aside.**
- 5.2.2.10 **The complainant is free to submit fresh complaints that are not anonymous, enabling the Appellant to properly respond.**

5.2.3 The competition and subscription offers

- 5.2.3.1 The Adjudicator found that the offer has aspects of a competition and a subscription service.
- 5.2.3.2 The Panel concurs. The offer relates to the Powerball draw, and as such complies with the definition of a competition. It also appears to result in a subscription and therefore must comply with the subscription service requirements of the Code.
- 5.2.3.3 Clause 9.1.2 requires that “Any promotional material for a competition service must include details of how the competition operates.”
- 5.2.3.4 The offer contains no such details, such as how the numbers are chosen, how many people are entered, how often the competition is entered, how winners are informed, how entrants can monitor the competition and how the winnings are divided.
- 5.2.3.5 To be frank, in the absence of such details, the Panel is forced to wonder about the legitimacy of the enterprise.
- 5.2.3.6 **As such, the offer is in breach of Clause 9.1.2.**
- 5.2.3.7 The Appellant would also be well advised to get advice on this in relation to the Consumer Protection Act, and rules around the National Lottery.
- 5.2.3.8 Clause 11.1.2 says that “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.”
- 5.2.3.9 This clause is a challenge to apply to the current situation. The Panel’s understanding of this service is that you pay R3 a day to be repeatedly

entered into the Powerball Draw, along with other subscribers. If the group win the draw, they share the winnings.

5.2.3.10 While this does seem to link entering a competition with a subscription, it is also unclear how they can be separated as the nature of the subscription is that you are repeatedly entered into the competition.

5.2.3.11 The “mischief” that Clause 11.1.2 seeks to address is the situation where a consumer unsuspectingly responds to a specific content offer, only to find themselves subscribed to a service.

5.2.3.12 The Panel is of the opinion that this is not the case in this matter. It is clear that what is on offer is a subscription, rather than a once off competition entry.

5.2.3.13 **We therefore find that the offer is not on breach of Clause 11.1.2.**

5.2.4 Sanctions

Given the above findings, we reduce the sanction to one fine of R20 000,00 in respect of the breach of Clause 9.1.2.

5.2.5 In summary

5.2.5.1 **The findings in respect of the spam and automatic subscription are set aside;**

5.2.5.2 **The offer is in breach of Clause 9.1.2;**

5.2.5.3 **The offer is not on breach of Clause 11.1.2;**

5.2.5.4 **We reduce the sanction to one fine of R 20 000,00 in respect of the breach of Clause 9.1.2.**

5.2.6 The cost of appeal is non-refundable.