



REPORT OF THE ADJUDICATOR

WASPA Member (SP): Viamedia

Information Provider (IP): Not applicable

Service Type: Subscription service advertising

Complainant: Competitor

Complaint Number: 8664

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:

Complaint #8664 (lodged via the WASPA website):

Affiliations: Complainant wish to remain anonymous

WASPName: Via Media

OtherID: 2782004824002287

Code_Breached: 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 into a competition or quiz.

Detailed_Description_Complaint: At 7pm last night I received another spam message from the number 2782004824002287. The sms was received on the number 0712590050.

The sms reads:

DREAM BIG with R 60 million Powerball Jackpot 2Nite! Reply BALL to play 500 tickets & get a share of the WINNINGS!Subscription service.R3/day.reply out 2 stop

The msg received does not state which company the service offered is from. The only reason I know which company to lodge the complaint against is because WASPA identified the service provider for me, based on the number the sms was sent from, 2782004824002287. The sms was received from the same number as the one from Complaint #8579.

Hence the service provider continues to spam me with this offer regardless of the complaint I lodged.

On 26 January 2010 03:06 PM I lodged Complaint #8579 via the WASPA website.

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 of the WINNINGS! Subscription service. R3/day. reply out 2 stop

Tick_as_appropriate: I have not contacted the service provider and believe this matter requires WASPA's attention

Declaration_Good_Faith: Information provided is true and correct and provided in good faith

This complaint is similar to complaint 8579 and I have taken my report in that complaint into account in this matter.

The complainant pointed out that the SP has been sending unsolicited messages regarding similar promotions in addition to the messages that form the subject matter of this complaint in a follow up email to WASPA:

Please bring to the adjudicators attention that we are still receiving spam sms messages with the same offer that I have lodged the 2 complaints about on different MSISDNs.

MSISDN: 082XXXYYYY (This number does not have to be kept anonymous)

05 Feb 2010

From: 2782004824002287

DREAM BIG with R70mil POWERBALL JACKPOT! Reply BALL to play 500 PWBALL tickets & share the WINNINGS! Subscriptions service R3/day Rely out to stop

21 Jan 2010

From: 2782004824002287

Never forget to buy LOTTO tickets again...! Reply WIN to play 500 tickets EVERY WEEK & get a share of the WINNINGS! Subscription service. R3/day. reply out 2 stop.

This shows clearly that they are still actively promoting the service after both complaints have been lodged.

I'm not going to lodge another complaint, because I dont want to waste the adjudicators time, but thought it important to bring this to their attention.

This pattern is worth bearing in mind although given that this complaint was lodged shortly after complaint 8579, I am inclined to address this complaint on its own merits and not as an escalation of complaint 8579.

Service provider's response

Recognising the similarities between this complaint and complaint 8579, SP responded to the complaint by enclosing a document, which it submitted to WASPA in answer to complaint 8579. A copy of this document is annexed to this report, marked Annexure "A".

The complainant responded to the SP's submissions as follows:

This does NOT resolve the complaint. The response from the service provider has indeed shown the complaint to more serious than initially thought.

The service provider claims that this is not a competition. The service provider is billing the customer for entries that gives them the chance to win. How is that not a competition?

The service provider claims that the service is content service where members are sent daily Lotto information, trivia and facts. In both complaints #8579 and #8664 the marketing messages received were:

/IDREAM BIG with R 60 million Powerball Jackpot 2Nite! Reply BALL to play 500 tickets & get a share of the WINNINGS!Subscription service.R3/day.reply out 2 stopi/

And

/IONCE 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 stopi/

Where in any of these two messages is the content service where members are sent daily Lotto information, trivia and facts advertised? What is advertised is the chance for the user to win by entering a competition. The call to action for the customer is clearly "reply BALL to play" and not "reply BALL to" get content.

How can the service provider claim to be selling a content service when such content is not even mentioned in the marketing message?

This is in contravention of 11.1.2. of the code which deals with subscriptions. As the SMS promotes an independent transaction to join a subscription service which in this instance is an entry by the user to win a share of the WINNINGS. Clause 11.1.2. clearly states this may not be an entry in a competition or a quiz. The service provider claims that this is a club membership, but such a club is never mentioned in the marketing messages.

It is impossible for the customer to have a specific intention of subscribing to a service, if that service is not even mentioned in the marketing message. The service provider claims that the chance to win is an additional benefit yet this is all that the service provider is advertising which then makes it the product being advertised.

The service provider is in fact running their own competition on top of the National Lottery. The service provider is charging users a fee to enter, be it individually or jointly in a group. The service provider is also offering to pay users prizes based on the outcome of the National Lottery. This should be brought to the attention of the National Lottery immediately. It is one thing to have a group of people join together to buy tickets, but quite another thing to market, sell and profit from such a service to the public.

And

Based on the response from the service provider I now have serious concerns that the service they are offering to public is not only in breach of the WASPA code, but also illegal in terms of the Lotteries Act of 1997.

Is the service provider an authorized reseller for the National Lottery?

There are strict rules for resellers to operate under for a reason. If WASPs and service providers can run around and on-sell the national lottery in SA, the mobile industry is opening it self up to serious abuse that could do a lot of damage to the industry.

Please bring this to the adjudicators attention.

I also would like to know if WASPA will contact the National Lottery about this or if I should?

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.

Code version 8.0

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 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)).

Code version 8.0

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 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

Code version 8.0

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", "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

Code version 8.0
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

As with complaint 8579, 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 initially received informing the complainant that he/she was subscribed to the service read as follows:

DREAM BIG with R 60 million Powerball Jackpot 2Nite! Reply BALL to play 500 tickets & get a share of 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 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.

The complainant subsequently received a further, amended message about a week after the message quoted above which read:

DREAM BIG with R90mil PWRBALL JACKPOT!Reply Ball 4 Lotto Facts & PLAY 500 PWRBALL Tickets EVERY DRAW &shr winnings.Subscription service.R3/day.Reply out 2 stop

The amended message introduces the “Lotto Facts” component of the service but otherwise seems to preserve the offering as it was previously stated.

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.

As a further issue, the complainant cited legislative provisions relating to the Lotteries Act and related gaming provisions. My understanding of WASPA's mandate is that addressing compliance with this lottery and gaming legislation falls outside its scope and mandate. Section 3.1.2 requires members to conduct themselves lawfully and if a member is found to have acted unlawfully, generally, then that section of the Code may be invoked. I don't, however, believe that is appropriate for WASPA to decide the question whether the complainant has acted unlawfully in the context of lottery and gaming legislation in the first instance.

The complainant should address the service's compliance (or not) with this legislation with the relevant authorities. If these authorities find that the service is illegal on that basis, it may then fall to WASPA to take further action against the SP on this basis.

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