



REPORT OF THE ADJUDICATOR

Complaint reference number: #9817

WASPA member(s): Viamedia ("SP")

Membership number(s): 0043

Complainant: Competitor

Type of complaint: Subscription service

Date complaint was lodged: 2010-06-24

Date of the alleged offence: 2010-06-22

Relevant version of the Code: 9.0

Clauses considered: 4.1.1, 4.1.2, 5.1.3, 11.1.1, 11.2.2.

Relevant version of the Ad. Rules: 2.3

Clauses considered: 1.4.1

Related cases considered: #0052, #0077, #9233, #9624 and #10245.

Complaint

An anonymous competitor of the SP submitted the following complaint on 24 June 2010 via the WASPA website:

"Code_Breached: 11.2.2. A request from a subscriber to join a subscription service may not be an entry into a competition or quiz.

Detailed_Description_Complaint: SMS Received

From: +2783920227801807

Sent: Jun 22, 2010 4:24 PM

U can win R33mil 2night! Reply P 2 get Powerball results and chance to win R100,000 in prizes plus 500 tickets per draw!Subs service.R3/day.Reply out 2 stop

This is a subscription service competition and not allowed in the WASPA code of conduct. Further the sms claims that you can win R33 million. Where are the T&C for

this competition? Can a person actually win R33 mil? No where is it mentioned which company offers this service. The only mention is of the National Lottery branded game called Powerball. Users that receive this message will believe its from the National Lottery, but it is not.

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"

Service provider's response

On 27 July 2010, the SP responded by email and stated that there were many similar examples of promotional competitions being used in conjunction with subscription services. However, the SP also mentioned that it would communicate with its partners and stop this particular type of promotional competition until it could clarify what was acceptable in terms of the Code.

The SP also included in its email an attachment setting out a detailed response to the specific complaint as follows:

Dear complaints team,

The complainant appears to have misunderstood the message. We don't believe this is a difficult message to understand for the general user but as the complainant is clearly a competitor and there may be malice in his miscomprehension.

We will explain by breaking the message up into separate components.

The message below is promoting an info club for Lottery and Powerball results.

Members are sent the results after each draw. Furthermore, the message refers to the current Powerball jackpot value and also informs the user of the current promotional competition running, which is open to all club members.

The message read: [U can win R33mil 2night! Reply P 2 get Powerball results and chance to win R100,000 in prizes plus 500 tickets per draw!Subs service.R3/day.Reply out 2 stop](#)

[U can win R33mil 2night!](#)

This statement is correct and valid. It refers to the National Powerball Jackpot which was at R33 million at the time the message was sent. This was widely publicised in newspapers, radio and TV. Any South African could have won the Powerball Jackpot that night, had they bought a Powerball ticket from an official supplier. Similar messages were available publically in many adverts by the National Lottery and by news providers. In the context of this message it's appropriate to inform the user and get them exciting about that nights draw. Archival verification can be obtained at: http://www.nationallottery.co.za/powerball_home/results.asp?type=1&month=6&year=2010&day=22

[Reply P 2 get Powerball results](#)

This is the meat of the message. It's the call to action and the service that is promoted. This is the reason for people to reply. The service advertised is a Lotto and Powerball results service, where a user is sent the results of the draws after every draw.

[and chance to win R100,000 in prizes plus 500 tickets per draw!](#)

There is additionally a promotional competition running in conjunction with the service for R100 000 worth of prizes and furthermore the chance to win 500 lotto tickets. Many competitions are offered to club members at various times. However, the competition element is secondary. It is therefore placed after the call to action and the service description. If there was no competition the info club would STILL exist exactly as it is. However, if there was no info club, the competition would NOT exist.

The competition element is therefore a transient promotional element. We believe this is acceptable and generally and widely utilised with a subscription offers. We believe this is consistent with the spirit and intention of the WASPA Code. The intention of the clause 11.2.2. is to preclude subscribers joining a subscription service where they only get a single item or gain access exclusively into a competition and quiz. The competition and quiz components of the clause were added as people were being lured into a subscription service to qualify for their prize or to get their quiz results. Those services had only the competition or the quiz element. Not like this case where the reason to join is to receive the information and the various competitions are ongoing benefits to any club member. The primary objective is to get access to the information service. The intention was certainly not to prevent promotional competitions that benefit subscribers or services.

The service is a Lotto and Powerball information service. Additionally promoted was the current promotional competition running for club members.

The request for the subscription services is therefore for the information service. Not an entry into the competition. There is indeed a promotional competition running for club members but this is a secondary benefit to members. Not the reason for joining the club.

Attached is an example of a generally accepted, promotional competition similar to this one. There are many more and we will send them through when we are able to record them. Demonstrating that promotional competitions associated with subscription services are considered acceptable and are certainly not a contravention of the spirit or intention of the clause.

We thank you in advance for your time and effort.

Further communications were entered into between the complainant, the SP and WASPA. These further communications, which included some debate and legal opinion on the legality of the service advertised, do not actually take the subject matter of the complaint much further and they do not bear repeating in this report.

Sections of the Code considered

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.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word '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. The reply ‘STOP’ procedure should be made clear to the recipient at the start of any messaging service, for example by including “reply STOP to opt out” in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

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.

11.2.2. 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.

Sections of the Advertising Rules considered

1.4.1 (as set out below):

Indication	Correct Abbreviation	Wrong Abbreviation
Additional type & cost	+ 3 SMSs or + Rx.yy (include spaces between + and next character)	+3 messages or +Rx.yy (no spacing shown)
At	At	@ (<i>unless in an email address</i>)
Cost	R1 or R1.50	R1.00 or R1.5
Day	Day	Dy
MMS	MMS	mms, or Mms, or mmS
Message	SMS	Sms or msg or MSG or msgS or txt or txts
Minimum	Minimum	Min or Mnm
Minute	Minute	Min
Minutes	Minutes	Mnts
Month	Month	Mth
Months	Months	Mths
Pricing	R7.50/week	R7.5/wk or 7.5R / wk
Pricing per period	/	per
Rand Pricing (cents)	70c	R0.70 or R0.7 or ZAR75c
Rand Pricing (Rands+cents)	R7 or R7.50	R7.00; R7.5 or 7.5R or ZAR7.5 etc
SMS Messages	SMS or SMSs	Sms or msg or MSG or msgS or txt or txts
SMS Received	Received	Rvcd or Rcd
SMS Sent	Sent	Snt
Subscription	Subscription	Subs, or Sub or Subscr
Week	Week	Wk or wk

Decision

This adjudication reports deals with several issues. The first issue is whether Version 9.0 of the WASPA Code of Conduct (“the Code”) permitted a request to become

subscribed to a service to also operate as an entry to a promotional competition. In this regard, section 11.2.2 of the Code provides as follows:

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.

In the present matter, the complainant received a message stating, inter alia, as follows:

U can win R33mil 2night! Reply P 2 get Powerball results and chance to win R100,000 in prizes plus 500 tickets per draw! Subs service.R3/day.Reply out 2 stop

It appears evident that if any person receiving such a message sent a reply containing the requisite keyword, he or she would become subscribed to the service and he or she would also be automatically entered into a promotional competition. This would, on the face of it, be a breach of section 11.2.2. because the request to join the subscription service would simultaneously be an entry into a promotional competition.

However, in the reply submitted by the SP, the SP's partner states that the intention of clause 11.2.2 is "to preclude subscribers joining a subscription service where they only get a single item or gain access exclusively into a competition and quiz."

In other words, the SP's partner submits that section 11.2.2 was (in respect of competitions) only intended to prohibit subscription to a service and simultaneous entry to a competition where the subscription service itself was a competition service. In my opinion, the narrow wording of section 11.2.2 itself does not actually support such an interpretation.

Section 14.3.8. of the Code enables an adjudicator to make reference to the "annotated" version of the Code, which contains explanatory notes and a summarised history of changes to the Code.

The annotations to clause 11.2.2 of version 9.0 of the Code state as follows:

*"In version 7.4, the last eleven words **"and may not be an entry into a competition or quiz"** were added. WASPA had received a large number of complaints from consumers who claimed to have been tricked into subscribing to services while entering competitions or quizzes. The modification was intended to prohibit the practice of "bundling" competitions/quizzes and subscription services. Requiring a specific, separate request from a customer to be subscribed to a service prevents the automatic subscription to a service, when a customer intended only to participate in a quiz or competition."*

The explanatory note therefore provides further guidance of the intention of the drafters of clause 11.2.2. The note specifically states that the eleven words *"and may not be an entry into a competition or quiz"* were added to *"prohibit the practice of "bundling" competitions/quizzes and subscription services"*.

The explanatory note draws a distinction between "competitions/quizzes", on the one hand, and "subscription services" on the other and explains that the amendment to 11.2.2 was intended to prohibit "bundling" competitions/quizzes and subscription services. In light of this explanatory note, some merit to the SP's response can be

discerned. The term “bundling” has, however, not been defined. It can be taken to refer to a subscription service that is a competition services in the sense of a bundled “competition & subscription” service. Alternatively the term can also be taken to describe a “bundled” process or mechanism that subscribes a consumer to a service and enters the consumer into a competition at the same time.

In my view, in the context of the WASPA Code, “bundling” refers to a subscription activation mechanism that “bundles” a request for something with the provision of some other additional or “bundled” thing. There is a long line of WASPA adjudication reports interpreting the term in this manner and the SP has itself made submissions consistent with this interpretation (see for example complaints #0052 and #0077).

In my opinion, the argument advanced by the SP can therefore neither be sustained on the plain wording of section 11.2.2 itself nor with respect to the explanatory notes thereto.

In addition, section 4.1.2. of the Code requires that members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission. Having studied the message in question, I am of the opinion that even if some consumers might have appreciated that they were signing up for a subscription service that would be charged for at the rate of R3 per day to receive notification of Lotto Powerball results, I find it highly probable that even reasonable consumers may have been misled into thinking that they could enter the Lotto Powerball itself by replying to the SMS. The message refers to the actual Lotto Powerball prize and the price for receiving notification of the draw results is roughly equal to the price of one entry into the Lotto draw. The wording of the actual message is not sufficiently clear in explaining that all a consumer gets for R3 per day is an SMS containing the winning numbers and not an actual entry into the Lotto draw. I therefore regard the message as being reasonably likely to mislead by inaccuracy and ambiguity. The SP is therefore in breach of section 4.1.2 of the Code.

Section 11.1.1 of the Code also requires that:

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.

Furthermore, section 1.4.1 of the Advertising Rules makes it clear that the word “subscription” may not be abbreviated to “subs” in the manner that it has been in the message that is the subject matter of the present complaint. Section 11.1.1 of the Code and section 1.4.1 of the Advertising Rules have therefore been breached.

Finally, it is noted that the message that is the subject of this complaint also contained the following instruction:

“Reply out 2 stop”

Section 5.1 of the Code deals with Commercial Communications and section 5.1.3. provides that for SMS and MMS communications:

“... a recipient should be able to stop receiving messages from any service by replying with the word ‘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. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message."

The envisaged process to stop receiving commercial messages from the service provider does not comply with section 5.1.3 of the Code.

Sanctions

Complaints very similar to the present matter have previously been lodged and upheld against the SP in complaints numbers #9233, #9624 and #10245.

I do not consider it necessary to impose further sanction on the SP for the breach of 11.2.2 of the Code in this matter. The facts of this matter arose some time ago, prior to the publication of the above mentioned adjudication reports, and the Code of Conduct has itself been subsequently amended to provide that it is now permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer *provided* that it is clear to the customer that the promotional draw or competition is ancillary to the subscription service and *provided further that the process of joining the subscription service may not be disguised as an entry into a competition.*

The amendment to the Code underscores the importance of clear, unambiguous and non-confusing communications to consumers.

For the breaches of sections 5.1.3 and 11.1.1 of the Code as well as section 4.1.2 of the Advertising Rules, a fine of R40 000 is imposed against the SP, R10 000 of which is to be suspended for a period of 12 months provided that no breach of 11.2.3 of version 11.0 of the Code (or a substantially equivalent provision of any later version) is upheld against the SP during the suspension period following the publication of this report.

The amount of R30 000 shall therefore be paid to WASPA within 5 working days of the publication of this report failing which the SP's membership shall be suspended until such time as the fine has been paid in full, together with interest thereon at the rate of 15,5% per annum.