



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	Viamedia
<b>Information Provider (IP)</b> (if any)	
<b>Service Type</b>	n/a
<b>Source of Complaints</b>	Mr P Tomlin
<b>Complaint Number</b>	9951
<b>Date received</b>	16 July 2010
<b>Code of Conduct version</b>	9.0

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### Complaint

The complainant received the following commercial sms:

*"Do U want R19 Million? Then reply BALL 4 a chance 2 WIN 500 tickets per draw and get Powerball results after each draw Subs service.R3/ day.Reply out 2 stop"*

The complainant replied in the manner dictated by section 5.1.3 of the WASPA Code with "STOP". He then received the following response:

*"Oops that didn't work! Please try again or call our call centre on 0861111106."*

The complainant then called the call centre number and was able to have his unsubscribe request actioned. He also requested details of the source of his personal details and number. The call centre operator was unable to give him this information. He was also not able to speak to the SP's WASPA compliance person but was advised that he would be contacted.

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The complainant then contacted a director of the SP to provide the necessary proof in terms of section 5.1.7.

A lengthy period of time then passed before the complainant was furnished with the source of his details. The complainant alleges that this period of time was not reasonable as envisaged by section 5.1.7.

After receiving details of the source, the complainant also requested proof that he had a previous direct commercial relationship with the SP's partner. He has not been provided with such proof.

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### **SP's response**

The SP states that the complainant did not follow the correct channels to deal with his complaint, and although willing to assist, the director of the SP who was contacted is not always available to deal with such requests.

The SP also provided an incomplete contact number which had to be verified by the SP causing further delay.

Once the SP had the correct number, it was able to respond to the complainant within 3 working days with the information required by section 5.1.7.

The SP does not believe it is obliged by the provisions of the Code to provide the complainant with proof in terms of section 5.2.1 (b) of the Code. However the SP undertook to obtain such proof from its partner (voice recordings) and to provide same to the complainant.

The SP's account manager, who was tasked with obtaining such proof, had family bereavements and was unable to attend to this matter.

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### **Sections of the Code considered**

## **5. Commercial communications**

### **5.1. Sending of commercial communications**

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

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.

5.1.7. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

5.1.8. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

### **5.2. Identification of spam**

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.

### **5.3. Prevention of spam**

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

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### **Decision**

I have noted the SP's explanation for the non-functioning of its "STOP" mechanism and, although the provisions of section 5.1.3 are mandatory, it is unreasonable to expect that a technical malfunction of such a mechanism will never be experienced.

I am satisfied that the SP provided alternative means to enable the complainant to unsubscribe, and has therefore complied with its obligations in terms of section 5.1.2.

Despite some delays, which were not due to the fault of the SP, the SP did provide the complainant with the details of the source from where it obtained his contact number. I am satisfied that this was done within a reasonable time.

Section 5.3.1 of the Code does state that the SP must take reasonable measures to ensure that its facilities are not used for the purposes of sending spam. The SP should therefore at least verify the information it received from its partner that the complainant had a direct and recent (within the last six months) prior commercial relationship with it and that he would reasonably expect to receive marketing communications from them. If it does not, it runs the risk that the message that was sent to the complainant was spam.

However, I do not believe that the SP has an obligation under section 5 of the Code to provide the complainant with proof of facts necessary to satisfy section 5.2.1.

The complaint is accordingly dismissed.