



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Mira Networks
Information Provider (IP)	2waytraffic under the "mobilefun4you" brand
Service Type	Subscription Service
Source of Complaints	Competitor
Complaint Number	#0568

Complaint

A complaint was received from a competitor of the SP. The complainant states:

TV Adverts -

The adverts violate 6.1.1. as they don't at all adhere to the advertising guidelines at all e.g.

- 1) They don't have any pricing visible except in the small T&Cs as required.*
- 2) They don't have any indication of the word "subscription" other than in the T&Cs*
- 3) They do not indicate a billing frequency (they only say R7.50 per sms) – they do say "get a daily reading" but this relation to billing frequency is not clear.*

The adverts violates 6.2.5 as they don't clearly advertise the price (as defined by the ad rules and reasonableness).

The adverts violate 11.1.1. as the advertised material doesn't prominently display that it's a subscription service (as defined by the ad rules and reasonableness).

The advert violates 11.1.2. as the advert utilises bundling to promote their product. The user is sent their content simultaneously with subscription action, and the product is sold as content and a subscription. It is not an independent transaction.

The service violates 11.1.7. as there is no contact number in the notification message as required, neither is there a frequency of the subscription i.e. daily. They say only per SMS. e.g. they sent the SMS: "Find personal fulfilment daily! Reply with the 1st 3 letters of your sign (e.g. SAG) R 7,5/sms. Jokes? Reply JOKE, Latest hits? RING, Unsub: stop astro" as a notification sms. Followed by: Congratulations VIRGO! You will receive your first daily horoscope shortly. Like Jokes? Reply JOKE. Like ringtones? Reply TONE. unsub: astro stop.

ALSO From this notification SMS, it NOT clear to users that sending JOKE or RING will generate another daily subscription of R7.50 each i.e. there is no pricing for these services or an indication that they are subscription services.

Web adverts

The Web pages violates 6.2.5 as they don't clearly advertise the price (as defined by the ad rules and reasonableness) with the access number.

The WASPA Code of Conduct provides the following definition:

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

The clauses of the WASPA Code of Conduct referred to by the complainant provide (with the irrelevant portions thereof omitted):

6. Advertising and pricing

6.1. WASPA advertising rules

6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.

6.2. Pricing of services

6.2.2. All advertisements for services must include the full retail price of that service.

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.

6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.

6.2.7. For menu-driven services such as USSD, the price for the service must be clearly stated at the top of the first page. Any additional costs associated with specific menu selections must be clearly indicated.

11. Subscription services

11.1. Manner of subscription

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

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 bundled with a request for a specific content item.

11.1.4. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

11.1.5. Subscription services with different billing frequencies should not have a subscription mechanism likely to cause a customer to accidentally subscribe to a more frequent service.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

(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 contact information.

11.1.8. A monthly reminder SMS must be sent to all content subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's contact information.

11.1.9. Once a customer has subscribed to a subscription service, neither the amount and frequency of the charges nor the frequency of the service may be increased without the customer's explicit permission.

11.2. Customer support

11.2.1. Assistance, such as 'help' information, for subscription services must be easily available to customers, and must not be limited to a medium that the customer is unlikely to have access to.

11.3. Termination of a service

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

11.3.2. All subscription services must have a readily available unsubscribe facility which costs no more than one rand.

11.3.3. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

11.3.4. Members must ensure that the termination mechanism is functional and accessible at all times.

The WASPA Advertising Rules contain eleven sections, each dealing with a particular advertising medium. While each section can be used as standalone criteria for that medium, there are however common criteria to all the media outlined in the Rules, specifically the information that must be displayed to the consumer, and where the medium requires it, a voice-over explaining critical information.

The complainant has raised concerns with three media channels used by the IP, namely television, Internet and SMS messages. As such, the relevant requirements for television advertisements are set out below, however only the requirements unique to Internet web sites and SMS messages is quoted below.

2.2.2 COST OF ACCESS TEXT DISPLAY RULES

Trigger:

At any display of, or mention by a voice-over, of a unique access number

Display Length:

100% of the length of the advertisement

Display Text Font:

'Zurich' font

Display Text Font Size:

18 points MINIMUM

Display Text Font Position:

In a visible block or triangle in a top corner of the screen in the Title Safe Area (see diagrams)

Display Text Font Colour:
Contrasted colour superimposed on the block/triangle

Block/Triangle Colour
Contrasted colour, behind the display text

Display Text Type:

- Text must be static
- No Caps (except for the first letter of the first word) or italics may be used as the display font for the word subscription.
- No italics may be used as the display font for the price text.
- No text must be placed around the access cost text that may obscure clear reading
- The access cost text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- The access cost must not be part of a colour scheme that may obscure easy reading of complete details of the access cost
- The access cost text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the cost

Example:
R10/SMS or
R10/week
Subscription

2.2.3 T&C TEXT DISPLAY RULES

Trigger:

At any display of, or mention by a voice-over, of a unique access number

Display Length:

- Minimum 10 seconds
- If applicable, of the 10 seconds display time for T&Cs, a minimum of 5 seconds must be allocated to informing the user that they will be subscribing to a subscription service.

Display Text Font:

'Zurich' font

Display Text Font Size:

15 points MINIMUM

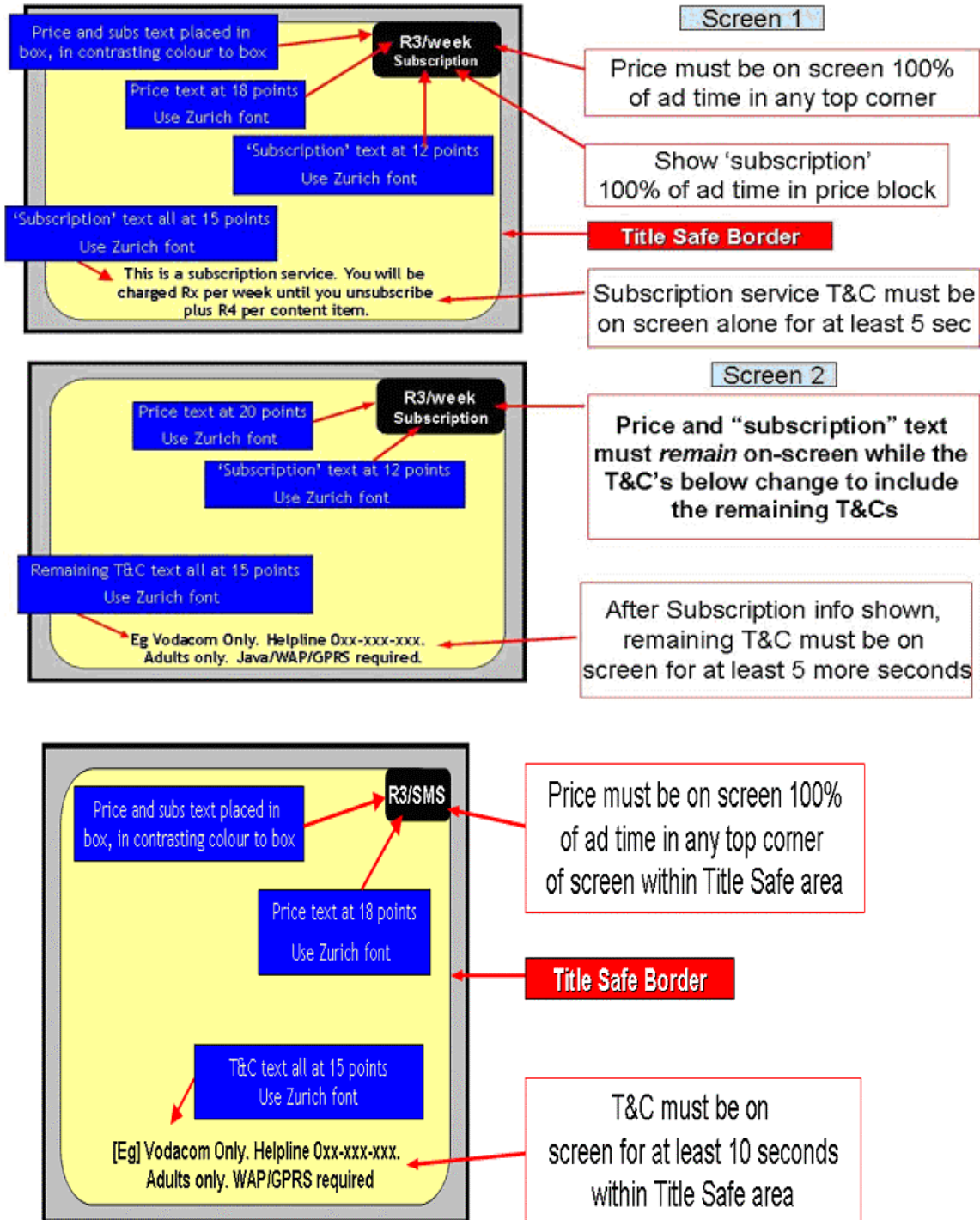
Display Text Position:

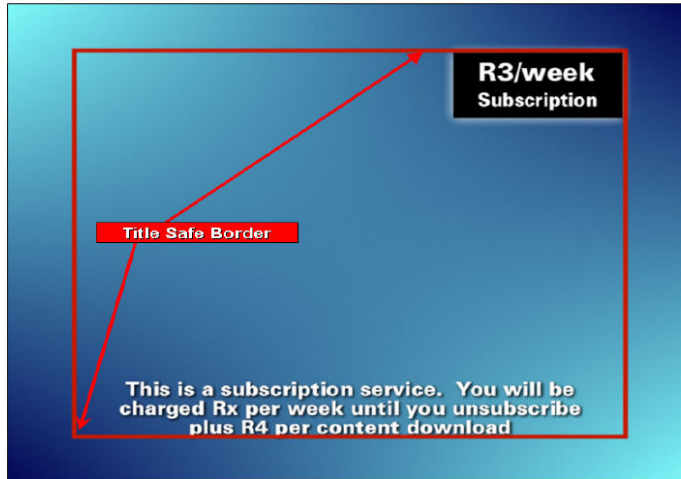
On bottom edge of title face of the screen

Display Text Type:

- No CAPS-only or Italics-only text is permitted for the T&C font.
- The T&C text must be static and horizontal for the requisite minimum display time, changing as is necessary to show all the T&Cs in equal time proportion
- The T&C text may not scroll on the screen, either right to left, left to right nor any other direction.
- The T&C text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- The T&C must be formatted so that each sentence is distinct. Each sentence must end with a period.
- The T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the T&C

- The T&C text must not be obscured by any background flashing or other visual animations that practically and objectively obscures easy reading of complete details of the T&C text.





2.3.4 BEARER REQUIREMENTS & CHARGES: Indicate need for and possibility of additional bearer charges eg WAP

If any additional bearers (eg WAP and/or GPRS) are required for full access to the advertised service/Content, and where charges will be incurred by a user over and above the cost of the Content or service offered by the advertiser, then the display text in both the body of the advertisement as well as in the T&C must indicate that additional bearer charges may apply.

eg "R10/Game + WAP charges"

o [See also 'PRICING' below]

o [See also 'TOTAL ACCESS REQUIREMENTS' below]

2.3.6 CONTACT DETAILS: Provide web site address AND helpline number/shortcode // Contact details must be displayed as part of the T&C details.

- Advertisers must include a helpline number or a working web site address that has direct applicability and linkage to the advertiser
- If an IVR or SMS system using any premium rated or VAS rates channel provided by or through a licensed mobile operator is used for contacting the advertiser or as a helpline access, then the fact that this access number is Premium Rated or uses VAS rates must be indicated next to the access number.
 - o Eg "Helpline 08x-xxx-xxxx. VAS Rates. Free Minutes Do Not Apply."
- Note the general rule in v3.2 of the WASPA Code Of Conduct that a Premium Rated SMS number used as a contact number for the advertiser, or as a helpline, or for unsubscribing from a service may not exceed R1 in total.
 - o Eg : "SMS 'Help' to 31xxx. R1/SMS. Premium Rates. Free SMSs Do Not Apply."

2.3.9 FAILED REQUESTS: Indicate If Failed Requests Billed

- If for any reason the service bills for incorrect, failed, or unsuccessful requests, then the T&C text must display this (if applicable)

Best Practice Suggestion:

Display text: "Errors billed"

2.3.11 NETWORK COMPATIBILITY: Indicate If Services Are Network-dependent // Indicate if subscription-type dependent

- There must be an clear indication in the advertisement detailing which mobile networks the user must have access to for fully access any Content and/or participate in the service offered

- If only contract-only or prepaid-only users have access to the service, this must be indicated

Best Practice Suggestion: Display text: "XYZNetwork contract users only"

2.3.12 PRICING: Show component, bearer and total cost // Cannot use term Standard Rate when no free/discounted SMS/Minutes cannot be utilised

Overview:

The display text must show the full or potential cost of access for fully obtaining the advertised Content and/or service.

2.3.13 SUBSCRIPTION SERVICES: Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words "Subscription Service"

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg "S"), number, abbreviation (eg "Subs"), icon, or any other mark may be used as an alternative to the words "Subscription Service" anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate in the font size, position and type as indicated:

(a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.

(b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.

(c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below]

This indication must include the potential and cost of any (additional) bearer charges.

(iii) Must Indicate Cost Of Any (Additional) Per-Content Access

If in addition to a periodic subscription charge the consumer could additionally be charged on a per-access basis for access to any particular service, Content or class of Content on the advertisement within the subscription period and terms, then the advertiser must make it clear to the consumer that access this Content or service will, over and above the periodic subscription cost, incur additional charges per Content or service access.

The periodic subscription cost, the frequency of the periodic charge, and where applicable, the additional access cost must all be displayed clearly and TOGETHER, in a position immediately above, below, or to the side of the Content, service, or class of Content. There must in particular be an indication whether bearer charges are included or not in the access cost.

o [See also 'BEARER CHARGES' above]

(iv) Must Differentiate Clearly Between Multiple Subscription Types

If in any advertisement there may exist the possibility to subscribe to a number of individual subscription services which would ordinarily each carry a separate but additional subscription charge and associated charging frequency or additional per-Content access charge, then this possibility of the consumer being charged at multiple prices and charging frequency must be clearly indicated.

(v) Must clearly Differentiate Between Non-subscription and subscription Types if both available in the same advertisement:

Taking into account the provisions in section 11.1.2 in v3.2 of the WASPA Code Of Conduct on relating to an "independent transaction," if an advertisement has components to it that promote

(a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service, AND

(b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service,

then this distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or Content in the advertisement.

The words "Subscription Service" as well as the total charges and any additional access charges and charge frequency for that subscription service must be clearly indicated in the form specified.

ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES:

Any request to be subscribed to a subscription service must be an INDEPENDENT TRANSACTION (see s11.1.2 of v3.2 of the WASPA Code of Conduct). Hence subscribers cannot be subscribed to a subscription service through having requested specific Content, or having being made to believe by a (practically) confusing ad design that they are requesting Content on a once-off (non-subscription) basis.

Confusion by consumers may arise in cases where a single advert may indicate the availability of Content to users (usually on a network that has not enabled subscription services) on a once-off basis, as well as on a subscription basis (to users on a network that has enabled subscription services), even though the subscription and non-subscription services may be on a different number range.

If confusing, this may create the scenario where the consumer lacks a specific intention of subscribing to a service (s11.1.2).

To avoid this scenario, advertisers must avoid advertising material designs where subscription service access can be confused with non-subscription services for the same or same type of Content in the same ad. Unless this distinction is made clear, the non-subscription portion of an ad which has as its center the requesting of specific Content (on a once-off basis to users on a network that does not have subscription services) may have the effect of (possibly inadvertently) breaching the 'independent transaction' criteria of the subscription portion of the code of conduct (See also s11.1.4 of v3.2 of the Code of Conduct)

2.4 INFORMATION REQUIRED FOR DISCLOSURE

2.4.1 Where Applicable, The Following Is Mandatory Information That Must Be Displayed In Any Advertisement In Any Media Where An Access Channel Is Advertised:

1. PROVIDE CLEAR INDICATION OF TOTAL COST

- R5/SMS. Premium rates. Free SMSs Do Not Apply.
- R20/game. Premium rates. Free SMSs Do Not Apply. WAP required.
- Two SMSs Required at R--- each. Premium rates. Free SMSs Do Not Apply.
- Call 08x-xxx-xxx. VAS Rates Apply. Free minutes Do Not Apply.

2. PROVIDE CLEAR INDICATION OF MINIMUM REQUIREMENTS TO FULLY ACCESS SERVICE/CONTENT

- Call 08x-xxx-xxx. VAS Rates Apply. Free minutes Do Not Apply. Minimum 3 minutes.
- Seven SMSs at R--- each for registration. Premium rates. Free SMSs Do Not Apply.

3. INDICATE IF SUBSCRIPTION SERVICE, AND NATURE THEREOF - INCLUDING PRICE AND (MINIMUM) FREQUENCY

- This is a subscription service. You will be automatically charged R--- every week until you unsubscribe.
- This is a subscription service. You will be charged R-- per week until you unsubscribe, plus R—per wallpaper. WAP required.”

4. INDICATE WEB SITE ADDRESS IF REFERRING TO ADDITIONAL T&CS VIA WEB

- Eg xyz.co.za/tc

5. INDICATE CUSTOMER CARE ACCESS NUMBER

- Helpline 0xx-xxx-xxxx for
- For Help, SMS to 3xxxx (R1/SMS)

6. IDENTIFICATION OF WHO IS PROVIDING THE ADVERTISED SERVICE

- NiceCompany (Pty) Ltd

7. INDICATE IF ANY ACCESS REQUIREMENTS

- WAP Required
- GPRS Required
- WAP/GPRS required

8. INDICATE IF SERVICE IS HANDSET-RESTRICTED [Note: Best efforts at handset compatibility if restricted to more than 30 handset models]

- Nokia Series60 handset required or
- Java Handset Required or
- Only available for Compatible Handsets. For list, SMS Your Model Number to 3xxxx (R1/SMS) or
- Only available for Compatible Handsets. For List, see xyz.co.za/handsets or
- Only available for Compatible Handsets. For list, Call Our Customer Care on 08x-xxx-xxxx (07h00 – 21h00).

9. INDICATE IF FAILED REQUESTS OR ERRORS CHARGED

- Errors charged
- Failed Requests Billed

10. INDICATE NETWORK / ACCESS RESTRICTIONS (IF ANY)

- XYZ Network contract subscribers only

11. INDICATE IF ACCESS TO SERVICE AUTOMATICALLY PLACES USER ON A DISTRIBUTION LIST. INDICATE METHOD & COST OF UNSUBSCRIBING.

- We reserve right to contact you. Updates sent until cancelled. Send 'unsubscribe' to 3xxxx (R1)
- Updates sent until cancelled. Send 'stop' to 3xxxx (R1)

12. INDICATE CLOSING DATE AND T&Cs OF COMPETITIONS

- Competition closes 1 January 2006. Winners will be notified by SMS. You must be over 18 to enter

13. INDICATE IF ANY AVAILABILITY RESTRICTIONS

- Live chat unavailable 01h00-07h00

14. INDICATE THAT ALL PRICES INCLUDE VAT

- All Prices include VAT.

15. INDICATE IF ANY AGE RESTRICTIONS

- Adults only. You may be asked to verify your age.

16. INDICATE THAT CONSENT TO USE SERVICE MUST FIRST BE REQUIRED BY BILL PAYER

- Obtain bill payers consent before using this service

The following specific requirements apply to Internet web sites:

9 INTERNET WEB SITES**9.1 SCOPE**

This section applies to all advertising placed on internet-based web sites visible to the general public where Access Channels are displayed. This also includes advertisements placed on third-party web sites.

9.2.2 COST OF ACCESS DISPLAY**9.2.2.1 Formatting Of Access Cost Text:**

- Access cost text must be of a size that is at least 80% of the largest access number on the page, or 15 point font size, whichever is the greater. The access cost text must be in a non-serif font
- The pricing text must be clearly shown being independent of any other text or image, and not be placed or formatted in a manner where it may be obscured by other text information, graphics or marks that may be displayed around it.
- The cost text must not be part of a colour scheme or design that could obscure (objective) easy reading of complete details of the price.
- All access cost information must be placed horizontally

9.2.2.2 Position of Access Cost Text

- For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number or Content access code in a non-serif font.
- If the ad and/or offer is on a third party web site as a graphic or display text, then the display text with pricing and contact info must be displayed on immediately below, above or to the side of the access number to show the FULL cost to consumer. This includes for example, text-based ads placed on Google-based (or similar) advertisements.
- The T&C text must be placed close as possible to the unique access number.
- T&C information must be placed horizontally.
- If multiple offers are made on the same advertisement and the cost and T&C differ with each offering, each offering must show the cost & T&C separately and clearly.
- While cost information associated with an access number may be displayed elsewhere on a web site (for example cost information also placed in the T&C page of a web site), this must be done as part of a duplication of the pricing. Hence, cost information cannot solely be placed on, for example only the T&C page where accessing the T&C page requires that the user click away from the initial page that displayed the access number.
- The consumer should thus not have to scroll down significantly on that same page or follow any links to other pages to be made aware of the full pricing and T&C associated with a unique access number.
- No cost and/or T&C information may be placed on in-view type pages.
- No cost and T&C information may be placed on any Internet web page requiring a particular add-on component or facility that is not generally available to all users on the Internet. This prohibition extends to placement on pop-up and in-view pages.

9.2.3 T&C DISPLAY RULES**9.2.3.1 Formatting & Font Criteria For T&C Text**

- The T&C text must be in 12 point font size, or 50% of the largest access number on a Web page, whichever is the greater. The T&C must be in a non-serif font
- All T&C information must be placed horizontally

9.2.3.2 Position of T&C display text

- For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number in a non-serif font.
- This T&C text must be placed close as possible to the unique access number. If multiple offers are made on the same advertisement and the cost and T&C differ with each offering, each offering must show the cost & T&C separately and clearly.

The following specific requirements apply to SMS advertising:

11 SMS/MMS ADVERTISING

11.1 SCOPE

Applies to all SMS and MMS's to the general public where Access Channels are displayed. While cognizant of the limited space in an SMS, senders must nonetheless abide by the General Terms.

11.2 OBLIGATORY COMPONENTS:

11.2.1 Text clearly Showing Access Cost and T&C for each service or Content type offered.

11.2.2 The opt-out facility may not utilize any PSMS Access Codes beyond R1 in total or may not use any premium rated phone or fax numbers whatsoever. Any voice-based opt-out facility must not be more than 120-seconds in total length.

11.2.3 The sender must within 10 business days provide the recipient with details or how the sender obtained the recipients cellphone number, when such details are requested by the recipient. The details provided to the consumer must be specific. Thus, a response that indicates the details were obtained eg "from a database" is not specific.

11.2.4 Contact details of the sender are obligatory. The contact details must not use any premium rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method.

11.3 TEXT DISPLAY

11.3.1 Display Text with full pricing information must be displayed on the SMS/MMS

11.3.2 The SMS must contain contact details of the sender, preferably a web site address

11.3.3 If the recipient of the email requests to the sender that the sender provide details of how the sender obtained the recipients email address, it is a legal requirement according to s42(b) of the ECT Act 2002 that this information be provided.

SP Response

The SP provided the following response:

Attached please find a reply message from the company regarding the above mentioned complaint.

The companies name is 2waytraffic, and their web address is www.2waytraffic.com.

The company has corrected the advert to reflect the correct WASPA guidelines.

Regarding this request, why is an end user entitled to remain anonymous and what are the implications?

The SP's response included a response from the IP, which indicated:

In reference of the "e-mail" complaint to the waspa hereby my answer:

1. *Concerning the TV ads: I have read the advertising rules and as discussed we have changed some things, so that they are according all the rules and regulations of the advertisement section of the waspa code of conduct.*

2. *Concerning the internet site: the person who is complaining says that our web page is in violation with 6.2.5. of the waspa code of conduct. This means that we do not advertise the price clearly??? I am not agreeing with this. On our web page stands the following:*

RECURRING

When you subscribe to the joke service, you will be subscribed to a SUBSCRIPTION SERVICE. This means that you will receive a joke daily, until you unsubscribe yourself. The service is applicable for all ages. You must be the legal owner and bill payer of the mobile phone to subscribe to the above service. If you are not, you must ask the legal owner and bill payer of the phone to subscribe. Children below 18 years must seek parental approval before subscribing to the above service.

COST

7,5 rand per received message + standard messaging fees.

UNSUBSCRIBE

If you want to unsubscribe from the service, you can cancel the service as follows:

1. *By sending a text message*

Send a text message with the words STOP JOKE to number 31303. You will be unsubscribed immediately from the service. In confirmation we will send a "unsubscribe" message to you.

2. *By sending an e-mail*

Send an e-mail with your mobile number to info@mobilefun4you.com.. Within 24 hours you will be unsubscribed from the service (exception on weekend days, then you will be unsubscribed on Monday).

3. *By calling our service number*

You can call our service number 0800-980431 here you can listen to a tape with additional information. Here you can find out how and where to unsubscribe.

I do not think this is in breach with the code of conduct, but is in the contrary saying more then we have to. I think we say extensively how the service works, what a subscription is, how many it costs and how to unsubscribe!

3. *Finally concerning our text messages: For example our joke service the notification (welcome) message is*

:

Welcome to our joke service! A new joke each day 7.5 R/sms. The latest hits? Reply RING. Horoscopes? Reply ASTRO, Info: 0800-980431, Unsub: stop joke

We have the Recipient (Mobilefun4you), the contact number (0800-980431), pricing (7.5 R), frequency (daily) and name of the Provider (Emexus) in our notification message. So I think, we say everything according to the code of conduct.

- (a) The cost of the subscription service and the frequency of the charges; joke service! A new joke each day 7.5 R/sms*
- (b) Clear and concise instructions for unsubscribing from the service; Unsub: stop joke*
- (c) The member's contact information: 0800-980431*

We communicate everything, but then in a more marketing perspective:

4. Also once a month we send out the "recommended" notification messages already! For example the monthly notification message for our horoscope service is:

Mobilefun4you horoscopes! Daily personal horoscopes on your mobile! 7.5 R/sms, info: 0800-980431, provided by Emexus. Weekly ringtones? Reply RING (15 R/sms)

This is NOT compulsory, but we do this already from the start in South Africa

Investigation

The television advertisement provided by the complainant was reviewed. The voice over provides (as closely as can be discerned):

"Want to know if this will be the day your destiny is revealed? Simply send the text message "astro4" to number 31303 to find guidance in your daily life. Send the text message "astro4" to number 31303 to receive your personal horoscope daily on your cell phone. Send a text message "astro4" to number 31303. Text it now to find out if you're a rising star today."

A screenshot of the advertisement on the IP's Internet web site is set out below"



The IP's service (specifically the horoscope service) was tested and sending a message "Astro 4" to the short code 31303 generated the following reply from the IP on number +2783920018231303:

"Find personal fulfilment daily! Reply with the 1st 3 letters of your sign (e.g. SAG) R 7,5/sms. Latest hits? Reply Ring. Info: 0800-980431, Unsub: stop astro"

A further message was received prior to replying to the welcome message received. This appears to be a generic horoscope message, without a star sign associated therewith.

Having sent the message "SAG" a further response was received:

"Congratulations SAGGITARIUS! You will receive your first daily horoscope shortly. Like Jokes? Rely JOKE. Like ringtones? Reply RING unsub:astro stop."

In addition, a further horoscope message was received.

As such, four (4) messages were received in a single day. Of these, three messages incurred a billing charge. Thereafter a single message per day was received.

Amounts billed for the service were:

2006-11-24 21:01:10 27831236701 R6.58 excluding VAT ie R7,50 including VAT – initial message received

2006-11-24 21:02:35 27839200182 R6.58 for reply with 3 letter star sign code

2006-11-24 21:03:17 27831236701 R6.58

2006-11-25 13:35:14 27831236701 R6.58

2006-11-26 13:17:39 27831236701 R6.58

2006-11-26 22:51:35 31303 R0.75 excluding VAT ie R0,86 including VAT - attempt to unsubscribe – rejected but no additional charge for message received

2006-11-27 09:19:56 31303 R0.75 successful unsubscribe

An attempt to unsubscribe from the service over a weekend was not processed until Monday morning. Even then, it required two attempts; the first returned the following response "You are already receiving horoscope. Like hilarious jokes? Reply JOKE. Latest hits? Reply RING. More info: www.mobilefun4you.com"

In addition, the IP's Internet web site www.mobilefun4you.com was reviewed.

Adjudicator's Decision

At the outset, the Adjudicator considered whether a possible contravention of the WASPA Advertising Rules was to be considered, as well as the WASPA Code of Conduct. The reason for this enquiry was that the complainant had referred to the specific clauses of the WASPA Code of Conduct that the IP, through the SP, was alleged to have contravened, however the complainant only referred to the WASPA Advertising Rules (incorrectly referring thereto as "guidelines") in general terms.

From the complaint, the Adjudicator was of the view that a possible breach of the WASPA Advertising Rules was sufficiently clear as both the Advertising Rules and Clause 6.1 of the WASPA Code of Conduct (which refers to the Advertising Rules) are specifically referenced in the complaint submitted. This is borne out by the fact that the IP states in its response that "*I have read the advertising rules*". As such, the Adjudicator was further of the view that the IP, through the SP, had been given an opportunity to respond to a possible breach of the WASPA Advertising Rules.

1 Independent transaction

One of the primary and most serious charges levelled by the complainant is that the IP is breaching clause 11.1.2 of the WASPA Code of Conduct in that the advertisement utilises bundling to promote the IP's service. In addition, the complainant alleges that the user is sent content simultaneously with subscription action and the product is sold as content and a subscription. It is not an independent transaction.

The complainant acknowledges the use of the phrase "receive your personal horoscope daily on your cell phone" in the advertisement. The IP did not respond to this issue directly.

The Adjudicator is of the view that the advertisement submitted is at the least confusing and at worst a contravention of clause 11.1.2 of the WASPA Code of Conduct, in that the phrases "Want to know if this will be the day your destiny is revealed?" and "find out if you're a rising star today" create the impression of time limited content being sent ie your horoscope for this day. In contrast, the phrases : find guidance in your daily life " and "receive your personal horoscope daily on your cell phone" indicate a daily, repeated service.

The WASPA Advertising Rules indicate (the Section "ADDITIONAL BACKGROUND NOTES TO SUBSCRIPTION SERVICES", at the end of Clause 2.3.13) that "subscribers cannot be subscribed to a subscription service through having requested specific Content, or having being made to believe by a (practically) confusing ad design that they are requesting Content on a once-off (non-subscription) basis." While these notes refer largely to situations where both subscription services and non-subscription content are offered in the same advertisement, they are equally applicable here, where a subscription only service (with no non-subscription content) is confusingly portrayed as a non-subscription content item. In particular, the notes provide further "If confusing, this may create the scenario where the consumer lacks a specific intention of subscribing to a service (s11.1.2)." and "To avoid this scenario, advertisers must avoid advertising material designs where subscription service access can be confused with non-subscription services for the same or same type of Content in the same ad."

One would expect the confusing nature of the IP's advertisement to be clarified in the "comfort message" sent by the IP in terms of Clause 11.1.7 of the WASPA Code of Conduct. The content message is examined in detail below, however the delivery of the comfort message almost simultaneously with the first content item (some ten (10) seconds apart) gives credence to the complainant's allegation.

The Adjudicator found that the IP's advertising and comfort messages are confusing in the extreme, either due to blatant disregard for the WASPA Code

of Conduct and Advertising Rules (which are examined in more detail below) or due to a deliberate attempt to confuse consumers and potential consumers. However the Adjudicator did not regard this is sufficient to find a breach of Clause 11.1.2 of the WASPA Code of Conduct and the complaint in this regard is not upheld.

2 Adherence to the WASPA Advertising Rules

A review of the IP's television advert, its Internet web site and SMS advertising indicates numerous and substantive breaches of the WASPA Advertising Rules, which is in turn a breach of Clause 6.1.1 of the WASPA Code of Conduct. These breaches are:

2.1 *Television Advertising*

The most notable omission in the IP's television advertising is the breach of Clause 2.2.2 of the WASPA Advertising Rules, as no visible block is placed in the top corner of the screen, indicating both access costs and the fact that this is a subscription service.

There is no indication of network compatibility, in contravention of Clause 2.3.11 of the WASPA Advertising Rules.

The terms and conditions display contains the pricing of the service, namely "R7.5 /sms". While the cost of a single or component SMS to access the service is indicated, there is no indication that two SMS messages will be needed to initiate the service, at a cost of R7,50 each and thereafter the first day's horoscope will be received at an additional cost of R7,50. Clause 2.3.12 of the WASPA Advertising Rules indicates:

"If more than one SMS is required to access the service/Content, then the number of SMSs so required and their individual cost for access must be indicated. The total cost involved in accessing the full service based on the cumulative number of SMSs required must also be disclosed. For example, if a number of SMSs are required for registration before full access and use of an advertised service becomes available to a user, then the possibility thereof and then the number of required SMSs must be indicated.

Eg "2x R5 SMS = Total R10 + WAP Charges"

Eg "3 x R5 SMSs required for service registration. Total cost R15"

So, according to the WASPA Advertising Rules, the IP should display "2xR7.50 for registration and R7.50 per message received. Total cost RR22.50 and thereafter R7.50 per daily message received". Moreover, this needs to be displayed in the title block at the top of the screen and not just in the terms and conditions.

2.2 *Internet web site Advertising*

The IP's web site contains the following breaches of the WASPA Advertising Rules:

For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number in a font size and font type that is easily visible and readable.

The display text must indicate the TOTAL cost involved in obtaining the full service, as well as the number of, for example SMSs or access times, and their individual cost, required for full access (if applicable). The IP's Internet web site provides:

COST

7,5 Rand per received message + standard messaging fees.

Again, there is no indication that two SMS messages will be needed to initiate the service, at a cost of R7,50 each and thereafter the first day's horoscope will be received at an additional cost of R7,50.

There is no indication of network compatibility.

In terms of pricing, the WASPA Advertising Rules requires the display text to show the full or potential cost of access for fully obtaining the advertised Content and/or service. In particular Clause 9.2.15 provides:

"If more than one SMS is required to access the service/Content, then the number of SMSs so required and their individual cost for access must be indicated. The total cost involved in accessing the full service based on the cumulative number of SMSs required must also be disclosed.

For example, if a number of SMSs are required for registration before full access and use of an advertised service becomes available to a user, then the possibility thereof and then the number of required SMSs must be indicated.

This is not done!

2.3 *SMS advertising*

The IP advertises its other subscription services in SMS messages sent to subscribers. These messages contravene the WASPA Advertising Rules in the following respects:

Clause 11.2.1 - Text clearly Showing Access Cost and T&C for each service or Content type offered.

Clause 11.3.1 - Display Text with full pricing information must be displayed on the SMS/MMS

Clause 11.14 - There must be an clear indication in the advertisement detailing which mobile networks the user must have access to for fully access any Content and/or participate in the service offered.

Clause 11.15 - The display text must show the full or potential cost of access for fully obtaining the advertised Content and/or service.

Clause 11.16 - If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words "Subscription Service" must be prominently displayed at the top section of the advertisement as well as at

each Content or service section in the advertisement where various subscription types are displayed. Must also Indicate Charge/s, including:

(a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.

(b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.

(c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement

(iv) Must Differentiate Clearly Between Multiple Subscription Types If in any advertisement there may exist the possibility to subscribe to a number of individual subscription services which would ordinarily each carry a separate but additional subscription charge and associated charging frequency or additional per-Content access charge, then this possibility of the consumer being charged at multiple prices and charging frequency must be clearly indicated. In the case of the IP, its "Jokes" subscription costs R7.50 per SMS, while its "Ringtones" subscription service costs R15 per sms received. While there do not appear to be handset compatibility restrictions of the IP's horoscope and joke subscriptions as they are text based, there may be compatibility issues with the ringtones subscription, yet no indication of handset compatibility is given.

3 Pricing of service

As indicated above, the IP has not adhered to the pricing requirements of the WASPA Advertising Rules, a clear contravention of Clause 6.1.1 of the WASPA Code of Conduct. As such, the Adjudicator was unwilling to make a further finding of a breach of Clause 6.2.5, which relies on a subjective test of clarity of visibility.

The Adjudicator considered a possible breach of Clauses 6.2.2, 6.2.3 and 6.2.4 of the WASPA Code of Conduct. These clauses are not specifically referenced in the complaint, however they are sub-clauses of Clause 6.2 of the WASPA Code of Conduct, which is specifically referenced by the complainant. The Adjudicator is of the view that possible breaches of **ALL** of the sub-clauses of Clause 6.2 of the WASPA Code of Conduct must be brought to the attention of a reasonable Service Provider and Information Provider, when a complainant specifies Clause 6.2 of the WASPA Code of Conduct under the heading "Section of the Code of Conduct Breached".

As such the Adjudicator considered these possible breaches of the Code of Conduct.

In considering these possible breaches, the Adjudicator noted that there are two common billing models in use in South Africa. The first involves a consumer sending a premium rated SMS to a number to obtain content. The consumer is billed for the MO message but not for the MT message sent to him or her containing the content or a bookmark from which the content may be collected. The consumer will have to incur the cost of accessing or downloading the content. The other method usually employed in subscription services is a MO message charged at a low rate, which initiates a subscription service charged on a time based system (daily, weekly or monthly) and not per MT message received.

The IP uses a different billing system, charging the same R7.50 per MO and MT message. This does not contradict the WASPA Code of Conduct, but is potentially confusing. In not providing a clear and definitive indication of pricing, the IP is intentionally or negligently confusing consumers as to the price of the service. For example, there is absolutely no indication that the process of registering for the service, sending the star sign to personalise the service to the consumer's preferred star sign and receive the first horoscope will incur a charge on the first day of R22.50 and not the R7.50 that is implied.

As such, a breach of Clause 6.2.3 was not found, as the Adjudicator found no basis to indicate that these additional costs are "hidden", however the Adjudicator found a breach of Clauses 6.2.2 and 6.2.4 of the WASPA Code of Conduct as the IP's advertisements do not contain the full retail price of the service and the IP's advertised costs are misleading. In particular, multiple communications are required to obtain content, yet the advertised price does not clearly indicate or include the cost for all communications required for that transaction. While a cost per SMS message is given, it is not clear that this charge is for both MT and MO messages and according a clear indication is not given that more premium messages are required.

4 Comfort Message (11.1.7 of the Code of Conduct)

The message sent to the consumer on subscribing to the IP's service does not contain the name of the subscription service or the IP's or SP's contact information.

While the message does contain the cost of the subscription service and the frequency of the charges, these are separated from each other in a manner that does not breach the WASPA Code of Conduct, but is less than ideal. Similarly the instructions for unsubscribing from the service, are cryptic yet not sufficiently so to find a breach of the WASPA Code of Conduct.

Sanctions

The Adjudicator identified breaches of Clauses 6.1.1, 6.2.2, 6.2.4 and 11.1.7 of the WASPA Code of Conduct. The breaches of Clause 6.1.1 are numerous and egregious and occur in each and every advertising media employed by the IP. They go to the heart of the WASPA Advertising Rules and are not mere technical contraventions that can be swept aside with a warning.

The Adjudicator imposed the following sanction:

- 1 the SP is ordered not to provide a service to the IP, until such time as the IP's advertising, pricing and comfort messages accord with the WASPA Code of Conduct and the WASPA Advertising Guidelines. In so doing, the SP may not initiate any new or existing billing transactions for any of the IP's subscription services during such period of suspension, however it may process any unsubscription requests;
- 2 The IP and failing the IP, the SP, shall send a SMS notification to all existing subscribers notifying them of the suspension of the IP's service until such time as it complies with the WASPA Code of Conduct and WASPA Advertising Rules;

- 3 the Secretariat is instructed to notify all other WASPA members of the suspension of the IP's service in terms of 1 above and that providing a service to the IP during such period may constitute a breach of the WASPA Code of Conduct and render a member doing so liable to sanctions themselves; and
- 4 The SP is ordered to pay a fine in the amount of:
- 4.1 R30 000,00 in respect of the IP's failure to include the required title block in its television advertisements;
- 4.2 R5 000 for the remaining breaches of the WASPA Advertising Rules relating to television;
- 4.3 R5 000 for the breaches of the WASPA Advertising Rules relating to Internet web sites;
- 4.4 R10 000 for the breaches of the WASPA Advertising Rules relating to SMS messages. This amount is higher than the fines in 4.2 and 4.3 due to the IP's failure to include both identification of the service as a subscription service, as well as pricing information, in its SMS advertisements, while the television and Internet web site advertising included these elements, albeit in a manner in breach of the WASPA Advertising Rules and according Clause 6.1.1 of the WASPA Code of Conduct;
- 4.5 R10 000 in respect of the IP's breach of Clauses 6.2.2 and 6.2.4 of the WASPA Code of Conduct, which are penalised in a single amount as they are aspects of the same breach, which amount has been set with regard to the potential harm to consumers; and
- 4.6 R5 000 in respect of the IP's contravention of Clause 11.1.7 of the WASPA Code of Conduct.

Being a total of R65 000, which is considered appropriate given the numerous and egregious breaches of the WASPA Code of Conduct perpetrated by the IP through the SP.

Should the SP wish to appeal this decision or any one or more of the sanctions, the sanctions numbered 4 above shall be suspended pending the outcome of such appeal, however the remaining sanctions shall continue to apply notwithstanding any such appeal.