



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	ViaMedia
Information Provider (IP)	Opportune Trading 117 CC t/a Xcite Mobile
Service Type	Subscription Service
Source of Complaints	Competitor
Complaint Number	#0598
Code of Conduct Version	4.6

Complaint

A complaint was received from a competitor of the SP regarding an advertisement placed by the IP in the City Press newspaper during October 2006. The complainant states:

In many places within the ad, there is no pricing next to the short code. Eg In the Top right hand corner, With the Lotto Service, with the Text fun and Love stuff.

As this ad is a combination of subscription and non subscription content, the user does not know whether they are paying R1.00 or R5.00

The complainant referred to Clause 6.2.5 of the WASPA Code of Conduct, which provides:

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.

SP Response

The SP provided the following response from the IP:

The complaint is technically correct. The advert submitted to the City Press was by a new designer, who while having studied the WASPA Code of Conduct and the Advertising Rules, made the incorrect assumption that the price a few centimeters above would be sufficient. There are three cases where the short code appeared in the text, without the pricing alongside. These are ringed in yellow in the attached advert for your convenience. We have immediately corrected the issue and have impressed upon the designers the importance of following the rules to the letter. We've furthermore, implemented a peer review process to avoid any oversight or omissions in future.

While we accept that the advert was technically incorrect, please understand that this was a mistake and was absolutely not an attempt to mislead the consumer in any way. The price is within centimeters and we sincerely believe that no hypothetical consumer, would have downloaded without having has the opportunity to easily and clearly see the price.

We refer the Adjudicator to a similar complaint made against the complainant (#0306/#0307). In this case the Adjudicator ruled that although the complainants brochure omitted pricing details from entire pages (where two short codes appeared), that a consumer would easily be able to determine the price by paging through the brochure. In our case the price is on the same page, at the top of the advert and within centimeters of the 'violating' short code references.

The complainant implies that there may be further confusion between the R1 and R5 price points. He has made similar complaints to both WASPA and the ASA previously, both of which have been dismissed and the adverts ruled clear and not misleading.

We apologize for the error. We do make every attempt to comply with the Code and the Advertising guidelines, both to ensure the consumer can make an informed purchasing decision and because we know that this particular competitor will identify technicalities where he can and use those against us.

The IP further provided a copy of an advertisement in support of its contention.

Decision

The Adjudicator noted that the advertisement provided by the IP through the SP bears little relation to the advertisement submitted by the complainant in support of his complaint. The adjudicator noted that there are at least seven discrete instances in the advertisement submitted by the complainant where pricing does not appear with the premium number display. This does not include instances where the premium number is mention twice in the context of a particular content type (for example where the premium number is given and then an example is given using the code, such as with regard to the category of pictures, the advertisement states "sms code to 31314 e.g: sms 9014675 to 31314") this has been regarded as a single instance of the premium number display and accordingly a single instance of the pricing not appearing with the premium number display.

The Adjudicator had regard to the Adjudicator's report in complaints #0306 and #0307 and agreed with the Adjudicator's finding therein. The Adjudicator however disagreed with the IP in respect of its interpretation of such decision. The key to such decision, in the view of this Adjudicator, is that there was no intention to mislead and the Service provider in those complaints had quality control processes which were reasonable and adequate. The Adjudicator in those complaints nevertheless found a breach of the WASPA Code of Conduct and considered those factors in determining an appropriate sanction.

The Adjudicator accordingly found a breach of the WASPA Code of Conduct in the instant complaint and in respect of the advertisement submitted by the complainant.

The Adjudicator noted that the second element of the complaint, namely confusion between the pricing of a subscription service and non-subscription related content, has potential merit. However, the complainant (which is a WASPA member and is well versed in the WASPA Code of Conduct and Advertising Rules and the WASPA complaints process) had not indicated clearly that this was a grounds of complaint (by giving a detailed indication of why it regarded the advertisement as confusing and/or specifying the sections of the WASPA Code of Conduct and/or Advertising Rules it considered to have been breached). Similarly, the IP only responded to such allegation in an appropriately cursory manner. Accordingly, this aspect of the complaint was not considered further. Numerous decisions of WASPA Adjudicators and the WASPA Appeals Panel have indicated that if a breach of the Code is to be considered it must be clearly alleged and the SP (or IP, as the case may be) must have an opportunity to respond to an allegation made, especially when the allegation is made by a competitor, rather than a member of the public who lacks the same detailed understanding of the Code of Conduct and Advertising Rules. The complainant continues to ignore these decisions, in making unsubstantiated and unclear complaints.

In considering whether a sanction should be imposed for the breach found, the Adjudicator considered the decision of the Adjudicator in respect of complaints #0306 and #0307. The Adjudicator distinguished this complaint from the aforementioned complaints in the following respects:

- In complaints #0306 and #0307 pricing is missing from two pages of a multi-page booklet and the pricing for the same code appears with the premium number display on at least eight other occasions, on the front of the booklet and in the terms and conditions and service explanation. In the instant complaint, pricing for the premium number 31314 appears in three discrete places (in respect of non-subscription content, in the terms and conditions and in the service explanation which is titled "join a club") and is omitted at least seven times. The reference to "only R1 as a club member" in the header of the advertisement was not regarded as a pricing description as the full pricing is only given in the service explanation titled "join a club";
- Unlike the Service Provider in complaints #0306 and #0307, the IP did not give any indication of reasonable quality control measures that it has in place; and
- The instant complaint occurred some five months after complaints #0306 and #0307, during which intervening period WASPA Adjudicators have imposed increasingly strict sanctions against members infringing the WASPA Code of Conduct.

Nevertheless, as in the complaints referred to above, the Adjudicator could not find any evidence of an intention to mislead consumers through the omission of pricing.

As such, the Adjudicator was of the view that a sanction should be imposed, not only as a punitive measure against the SP but more importantly as an educative sanction to indicate to other service providers (and information providers using their facilities) that they need to employ greater care in reviewing advertisements before publication and that an administrative or third party error cannot excuse lack of compliance by the SP. However a third party error, such as in the instant matter, will certainly mitigate the sanction imposed.

The Adjudicator accordingly imposed a fine of R2 500 on the SP for its breach of Clause 6.2.5 of the WASPA Code of Conduct. Should the SP appeal such sanction, it will be suspended pending the outcome of such appeal.