



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Sybase 365
Information Provider (IP) (if any)	Mobile Generation (TMG)
Service Type	Competition / Subscription services
Source of Complaints	Anonymous
Complaint Number	1319
Date received	9 May 2007
Code of Conduct version	4.92

Complaint

An anonymous complainant lodged a complaint via the WASPA website on 9 May 2007. The complaint is against a television advert for a text and win competition run by the IP using the shortcode 31939. The complaint sets out the particular sections of the Code and Advertising Rules that are alleged to have been contravened and the basis for the complaint as follows:

Code of Conduct:

9. Competitions

9.1. Provision of information

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.

Complaint:

They do not provide the full cost in Rands. It appears there are a number of SMSs that must be received at some cost. It is not clear that if you will need to answer more questions to win the prize, and it is not clear whether providing an incorrect answer still makes you liable for continued subscription billing. They also do not show the TOTAL maximum nor minimum cost in getting the prize. (see contravention of Ad Rules below)

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.

Complaint:

They do not do this. They just bill you weekly and into the next months without requesting whether or not you want to continue in the competition.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

-- the closing date;

Complaint:

They do not disclose the date, only a vague period. The word 'the' and 'date' indicate a peremptory requirement for a defined calendar date.

11. Subscription services

11.1. Manner of subscription

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.

Complaint:

This is bundling. There is only ONE item you can obtain from this service, that it entry into their competition with the potential of ONE prize.

*Ad Rules:**1.2.1**Display of Access Cost:*

*Must be displayed statically for 100% of entire ad time in 18 point 'Zurich' font
T&C font must be displayed horizontally in 15 points (MINIMUM) 'Zurich' font.*

Complaint:

This is so small as not be 18 nor 15 points Zurich font.

Ad Rules

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

Complaint:

They DO NOT show the TOTAL cost necessary to win the prize. The TOTAL cost involved in accessing the full service based on the cumulative number of SMSs required is not disclosed.

Nor is it disclosed that if you get an answer 'wrong', that you are STILL billed for the remainder of that 'session' and are still billed for the following months.

The complainant also alleges that there had already been an ASASA ruling against this advert for misleading the public.

Emergency procedure

On 10 May 2007, the WASPA Secretariat invoked the emergency procedure as set out in section 13.7 of the WASPA Code of Conduct. Consequently, an emergency panel consisting of three panellists was convened to review the aforementioned complaint.

The panel considered the evidence presented, as well as the web site associated with the service, and found that a breach of the WASPA Code had occurred that required an urgent remedy. On 11 May 2007, the Emergency Panel made the following order:

1. The SP and IP were instructed to immediately halt advertising for all services operated via the 31939 shortcode pending the outcome of the formal complaint process.
2. The SP and IP were instructed to terminate all billing for services operated via the 31939 shortcode with immediate effect. The WASPA Secretariat was to also request that the mobile networks suspend this number pending the outcome of the formal complaint process.
3. The current competitions were to be immediately suspended, and the adjudicator considering the formal complaint should determine how the current round of the competition should be resolved, and whether or not refunds should be issued to those customers who have participated so far in the current round of the competition.
4. Participants in current competitions must be notified of the suspension, at no charge to the customer.
5. The SP and IP were prohibited from operating this or a similar service on any other number pending the outcome of the formal complaint process.
6. The WASPA Secretariat was to notify the mobile network operators and WASPA's members that this suspension has been ordered.

A letter was received from the SP regarding the complaint. It was not considered during the initial deliberations but was reviewed afterwards. The letter stated that the SP had also been reviewing the service in question with the IP to ensure compliance. The SP confirmed that it was their understanding from the IP that the ASASA ruling has been complied with but that the IP had taken the decision to temporarily suspend the service while further changes were being considered and made to their advertising. The SP proposed that it would only re-enable the service once the relevant changes had been made.

The SP also enclosed correspondence from the IP's attorneys, Messrs Bowman Gilfillan, which is stated to have been provided not as a response to the emergency procedure being invoked but rather to open up dialogue with WASPA for guidance on the content of the IP's advertising in SA so as to comply with the Code.

In the attorneys' letter, it was confirmed that the IP denied any breach of the WASPA Code of Conduct or the WASPA Advertising Rules but suggested certain revisions to the IP's advertising and the mechanics of the competition on a "without prejudice" basis.

The proposed revisions were not accepted by the panel as, if accepted, it would require WASPA to endorse the changes the IP offered to make, thereby creating the impression that this would absolve the IP or SP from any consequences in respect of the alleged breach of the WASPA Advertising Rules and Code of Conduct to date.

The IP was advised, however, that it was free to proceed to make the proposed changes, without making such changes conditional on any endorsement by WASPA.

Subsequent to the Emergency Panel's order being handed down, the WASPA Secretariat received reports that:

- The advert using the same shortcode 31939 was flighted again on SABC 3 at approximately 22:20 on Saturday, 12 May 2007;
- An advert resembling the subject of this complaint aired on eTV at some time over the same weekend; and

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- An advert resembling the subject of the complaint aired on SABC 3 between 21:30 and 22:00 on Monday, 14 May 2007.

The SP was formally notified that failure to comply with an urgent order pursuant to the emergency procedure constituted a further breach of the Code and was therefore requested to provide:

- Confirmation that advertising for services operated via the 31939 shortcode has been suspended, as per the panel's ruling; and
- A list of any adverts for this service that had aired or been published since the emergency procedure notice was issued on 11 May 2007, as well as any explanation the SP or IP might wish to offer for this.

A response was received from the SP on 17 May 2007 regarding compliance with the emergency procedure notice. It confirmed that the IP had contacted its South African media agency on 11 May 2007 to request that advertisements be cancelled in accordance with the emergency procedure notice. It received confirmation that this had been done on Monday, 14 May 2007. The SP confirmed the IP's advice that it will take approximately two (2) weeks to obtain information from the television companies to detail whether any advertisements were aired following the emergency procedure notice.

In an e-mail from an internal sales manager from eTV dated 18 May 2007, it was confirmed that eTV had received notification on 14 May 2007 to stop airing all the relevant adverts which it duly did from that date.

The SP has also confirmed in an e-mail to the Secretariat that it and the IP had each taken every step necessary to comply with the requirements of emergency procedure notice.

SP Response

In its formal response to the complaint dated 18 May 2007, the SP reiterated that it was committed to the values and objectives of WASPA. It confirmed that it does not directly contract with customers for content services, in this case, the “quiz club”. These services are provided by the IP.

The SP referred in its response to its compliance programme, the preventative, detective and remedial measures it takes to ensure compliance and detect and remedy non-compliance with the Code by its customers.

The SP states that it responded in a timely manner to the Emergency Procedure Notice (which was the first notification of the complaint) by suspending the services in question and taking the steps required of it by the Emergency Procedure Notice, thus eradicating the risk of any further consumer harm.

The SP wishes to have it noted, as a preliminary point, that it, MIRA Networks (billing agent) and the IP were already reviewing the services prior to the Emergency Procedure and taking steps to alter the services. Since 11 May 2007, the SP has been liaising closely with the IP in order to obtain all the necessary information, as the SP is dependent on the Information Provider for the relevant information about the services.

The SP concludes that although it is responsible as a wireless application service provider under the Code of Conduct, it bears no substantial responsibility for any breaches of the Code of Conduct that might occur and is taking all reasonable steps to ensure that the risk of any breaches is minimised.

IP response

The IP is a Dutch company which delivers mobile content services worldwide and which is also a registered member of WASPA. For the purposes of adjudicating this complaint, I have taken the response from the IP into careful consideration in addition to the response delivered by the SP.

The IP has provided the following description of its services:

“At this moment, TMG offers a CASH commercial. The grand prize of the CASH service is R15,000. In a TV advertisement (hereinafter referred to as “TVC”) a user is invited to participate by answering the following question:

“Another word for money machine is?

A: ATM

or

B: Blackbox”

The user is requested to send in the keyword of the service followed by an answer to the short code 31939.

The user then receives a zero-rated subscription confirmation message containing all relevant information, such as the price per message, when and how often messages will be sent, how to unsubscribe and customer care details.

Besides the welcome message, the user also receives a billed message containing the second question of the quiz. In case the user sends in the wrong answer, he will receive a message informing him that the answer is wrong and what he should do in order to still have a chance of winning the prize. If the user sends in a message that the system cannot recognize, a (free of charge) message is sent to the user telling him that the message could not be recognized, what he should do to make it recognizable and where he can request more information.

Consequently the user enters a multiple question quiz. The quiz consists of two rounds – a qualifying round and a knock-out final round.

- Qualifying round: The qualifying round consists of 4 questions that are related to the subject in the TV commercial. The user only receives the next question if he answers the previous question. By answering the trivia questions correctly the user qualifies for the final round. After answering the final question of the qualifying round, the user receives a message informing him that he is qualified for the knock-out round and that he, for further information, can visit the website of TMG.*

- Knock-out round: The final round is a knock-out, containing 4 questions with an increasing level of difficulty. To announce the start of the knock-out round, the user receives a free of charge message containing the request to send KO in order to*

participate. After doing this, he receives the first question. After each correct answer, the user receives a message that evaluates the answer and that tells him when he can expect the next question. The user will only receive the next question if he answers the previous question (correctly). In case the user responds incorrectly, he will be knocked out and can no longer participate in the knock-out round. If there are still multiple contestants left after the third question, the fourth question will be an open question. The winner is the individual who has the closest answer to the correct answer. There is no chance involved in this.

To announce the start of the knock-out round, the user receives a message containing the request to send KO in order to participate. After doing this, he receives the first question. After each correct answer, the user receives a message that evaluates the answer and that tells him when he can expect the next question.

Besides answering correctly, the user is also limited to a timeframe in the knock-out round. Each question contains information about the deadline of the question which has to be answered.

1.1 Selection and contact of the winner

Because the service is a skill-based game, the winner is selected on the basis of knowledge. Immediately the winner is contacted for name and address details. One week after the knock-out round, the name of the winner is announced on the website. Furthermore, all users receive a message containing the name of the winner and announcing the start of a new quiz round.

After a winner is announced a new round starts in which new prizes can be won. Every new round the user receives an information message about this new round and the first question. Subsequently every week the user will receive two questions. The winner will be announced at the end of the month. Each month a new round starts in which new prizes can be won.

The subscription equals 4x2 SMSes per month (billed messages pushed to the user). In the first month users will be playing the qualifying round and knock-out round (total=8) in the second month users will be playing the new round of (total=8).

Further in its response, the IP's attorney states the following:

The user experience after registration is as follows:

- (i) *Our client's competition-based services take the form of two rounds. During the first (or qualifying) round a user will receive approximately 4 questions. The user will only receive the next question if he/she answers the previous question correctly. If the user answers all 4 questions correctly he/she then qualifies for the second (or knock-out) round. The knock-out round of TMG's services involves a series of 4 questions. Unlike the first round of client's services a user will not receive the next question in the knock-out round if the user fails to answer the question correctly. Rather, the user will be eliminated from the knock-out.*

If there are still multiple contestants in the competition at the end of the third question then the winner is determined by the ability of a user to get the closest answer to the question.

Thus after subscribing in the first month a user will receive a maximum of 8 questions per month which questions cover both the qualifying and knock-out rounds.

- (ii) *Our client's services operate by way of a monthly subscription service which means that a user is entitled to take part in all competitions offered by our client on a monthly basis; the user subscribes for monthly competitions. After the first month of subscription a new round starts in which the user receives 8 messages, i.e. questions (2 per week). By answering the questions the user has the chance to win a prize on offer for that particular month.*

The response also states that the IP is continually reviewing the content of its advertisements published in the South African media to ensure compliance with the WASPA and ASASA advertising codes as well as any other regulatory requirements. The IP requests that it be noted that immediately prior to the institution of the

Emergency Procedure and the lodging of a formal complaint, the IP was engaged in a process of reviewing all its advertisements released and about to be released in the South African media and has sought to engage WASPA in this review procedure.

The response raises 3 points in limine regarding the anonymity of the complainant, the incorrect use of the formal complaint procedure for dealing with this complaint and the unconstitutionality of the emergency procedure in section 13.7 of the Code.

Regarding the substantive issues raised in the complaint, the IP has denied that the advert and/or its services have contravened the provisions of the Code and Advertising Rules. In particular, the IP argues that:

1. Its adverts do comply with the provisions of Clause 9.1.1 of the WASPA Code of Conduct in that users are advised in the advertisements (by way of a message that appears in the top right-hand corner of the screen for the entire length of the advert) that the service offered by the IP is a subscription service and that the cost of the subscription is R20 per week.
2. Users are advised that the service consists of a minimum of 8 messages per month which are billed at R10 per SMS, thus totaling R20 per week for the subscription to the IP's services, or R80 per month.

This is communicated by way of the following disclaimers which appear at various intervals in the advert:

This is a subscription service. Quiz 2 rounds. Subscription: additional (my emphasis) 8 msg/month.

You will be charged R20/week until you unsubscribe. Free SMSs Do Not Apply.

This is a subscription service. Additional (my emphasis) 8 msg/month. R10/sms. T&C: www.txtcash.co.za. Stop? Text Stop cash to 31939. Adults only. Helpline: 0214043808. Monthly prize awarded.

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3. All of the above information is also repeated in the first (free of charge) information message sent to the user after they have subscribed. The confirmation message reads as follows:

You have subscribed for your chance to win R15,000 in this quiz for R10/msg received! Min.8msg/month. Stop? Send Stop cash. Info: 0214043808 or txtcash.co.za.

4. All the information above is also provided on the IP's website at the URL: www.txt-box.co.za.
5. It has acknowledged that notification that errors are billed did not appear in all of its initial adverts released in the South African media. However, it states that such notification has been inserted into subsequent adverts.
6. It therefore believes that it does inform users wishing to make use of its services what the minimum cost of subscribing to its services is in order to win a prize as well as the fact that errors are billed for.
7. It also argues that although some of the provisions of Clause 9 relating to competition services are applicable, the services provided by the IP are actually subscription based. The IP believes that its services should and do comply with sections 11.1.1, 11.1.7, and 11.1.8 of the WASPA Code.
8. It is of the opinion that Clause 9.1.3 does not apply for the following reasons:
- 8.1 The qualification of 'incremental cost' in Clause 9.1.3 does not apply to the IP's services. The costs involved are ongoing, which is inherent to a subscription service, but the costs are not incremental. The costs are fixed at R20 per week (excluding errors) which is clearly indicated in the advert, in the free of charge notification message sent to users before subscribing to the IP's services, and on the IP's website.
- 8.2 It offers a subscription service by means of which the consumer can enter a competition. All conditions set forth for competitions and subscription services are met by the IP, including:

- i. 9.1.1 (the display full costs);
 - ii. 9.1.2 (details on how competition operates);
 - iii. 9.1.4 (information that is likely to affect a decision to participate);
 - iv. 11.1.1 (mentioning of the word subscription);
 - v. 11.1.7 (providing the name of the service, cost and frequency, how to unsubscribe, details provider); and
 - vi. 11.1.8 (cost reminder once per month) ("*CASH free msg: Stay in the race for ur chance 2 win! R10/msg received, 8msg/month. Info: 0214043808*").

9. Regarding the absence of a closing date, due to the nature of the IP's competition services, especially the existence of a knockout round during which round the winner is ultimately decided, it is not necessary for the IP to give an exact date when the competition will ultimately be won, especially when taking the rationale of the competition into account.

10. The IP states further that paragraph 9.1.4 prescribes that the closing date must be mentioned in the event it is likely to affect the decision to participate. Since the IP offers every month the possibility to win the same prize, by not mentioning the closing date this will not affect the decision of users to participate in the IP's services.

11. The IP believes that the rationale for this section of the Code is that, by mentioning the closing date, the scenario can be avoided whereby a consumer enters a competition after the closing date and spends money without the possibility of winning the prize. This is not the case with the IP's services.

12. The IP awards a prize on a monthly basis and entries received at any time during any given month will have the chance to win a monthly prize. An illustration is given for the scenario of an entry being received after the 20th of a month, with the entrant qualifying for the knock-out or final round in the next month. The IP argues that because the entries may overlap over 2 months, a specific closing date is not mentioned in the advert.

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13. It is fully compliant with the sections of the WASPA Code regarding subscription services. In particular:
- 13.1 the fact that its service is a subscription service is prominently displayed in top right-hand corner of all of its adverts;
 - 13.2 the fact that its service is a subscription services is also displayed in the disclaimers that appear on all of the adverts; and
 - 13.3 its website and terms and conditions that appear therein reinforce that it operates a subscription service.
14. As a result of the subscription-based nature of its services, coupled with the fact that users are constantly reminded of this fact, reinforces the fact that it does not engage in bundling services.
15. When subscribing to its services, the keyword which the user has to send in order to activate the service triggers a zero-rated SMS. This zero-rated SMS outlines the terms and conditions of the competition including:
- 15.1 the fact that the competition is a subscription service;
 - 15.2 the monthly period of the subscription service;
 - 15.3 the frequency at which a user will be sent premium-rated SMSes, being 8 SMSes per month;
 - 15.4 information on how subscribers can unsubscribe or opt-out from the service; and
 - 15.5 customer care information.
16. The allegation made by the complainant that its services amount to bundling and that there is only one service and one prize which can be won is incorrect. The services operate by way of a monthly subscription service which means that a user is entitled to take part in all competitions offered by it

on a monthly basis. In other words, the user subscribes for the right to enter monthly competitions offered by it.

17. After the first month of subscription, a new round starts in which the user receives 8 messages, i.e. questions (2 per week). By answering the questions the user has the chance to win a prize on offer for that particular month.
18. Its adverts and services fall within the ambit of the guidance provided by WASPA in the Code.
19. Regarding the use of the font for the display of access costs and terms and conditions, it chose to use the Universe LT font because this font is more readable than the Zurich font. Examples are provided in an annexure ("A") to its response.
20. With regards to the display of the terms and conditions of its services, the font size used is 2 points bigger than prescribed by WASPA. The reason to use a 17 point in stead of an 18 point font for the Access Cost was because it would not have been possible to mention all relevant and prescribed information within the screenshot.

In order to compensate for the fact that the IP used a 17 point font for the Access Cost and not an 18 point font, the Access Cost is displayed on screen during the entire length of the commercial. Furthermore, the disclaimer text is displayed on screen for 20 seconds, which is four times longer than prescribed in the WASPA Advertising Rules (which is only 5 seconds).

21. Regarding section 1.3.12 of the Advertising Rules, the information in the disclaimer clearly shows the total costs of the service:

This is a subscription service. Quiz: 2 rounds. Subscription: additional 8 mgs/month. You will be charged R20 per week until you unsubscribe.

22. In the right upper corner of the screen the costs are also mentioned:

R20/week: Subscription

23. The costs are mentioned on its website on the welcome page, the “cost” page and in the terms and conditions on the website.

The IP has suggested the following possible changes to its services

- a) in order to make it more clear that the service concerns a monthly subscription service instead of a one-off service, the IP will change its commercials in such a way that users entering a Trivia Club will be made aware that they can win monthly prizes with the prize promoted in the commercial being the first monthly prize that the mobile phone user can win;
- b) the duration of the disclaimer text will be extended from 15 to 25 seconds; and
- c) the titles of the IP's commercials will be amended to mention the total costs per month i.e. R80/month. This will be highlighted in the right upper corner throughout the whole commercial. For the user it then will be clear that this service costs R80 per month no matter what.

In addition to the above proposed changes, the IP is willing to make the following additional changes:

- e) to stress that the service concerns a ongoing Trivia Club;
- f) to further mention that total costs to have a chance to win the prize is R80;
- g) to indicate in the disclaimer on screen that the cost per message is R10 per message received; and
- h) to indicate in the disclaimer that the shown prize is the prize that can be won in the first month.

The IP will amend the mechanics of its services in the following manner:

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- a) in terms of the current setup of the IP's services, a user receives 8 questions per month. The user has to answer these 8 questions in order to have a chance to win the prize. The IP is prepared to change the flow of their services in that they will send 2 questions per week (or 8 questions per month). However, each time the user receives 2 questions the user has a chance to win a prize. Each 2 question will then be considered a new round with four prizes to be won in a month.
- b) The IP has already changed the text of the first information message which a user receives from 'R10/msg' to 'R10/msg received' thus making it clearer for users that they are charged per message received.

In a further e-mail, the IP's attorneys delivered sample screenshots indicating their client's proposed changes to its adverts as outlined in its response above.

Sections of the Code considered

Sections 2.10; 2.23; 3.9; 4; 6; 9; 11 and 13 of the Code.

Section 1 and 2 of the Advertising Rules.

(see Annexure A for the text of these sections)

Decision

Points in limine

As much as the "formal complaint" procedure set out in the Code is described as formal, I do not believe that it is in the spirit and purport of the Code that complaints be resolved with the same level of formality as would be expected in a court of law. Technical defences have been frowned upon in past adjudications and the raising of

points-in-limine can only lead to unnecessary delays in the resolution of complaints. In the present case, the person most prejudiced by such delays is the IP.

However, as they have been raised and form part of the response submitted by the IP, I will deal with them each individually as follows:

1. Anonymity of the complainant

While it is correct that the use of the word “*must*” in section 13.1.3 of the Code might lead to the conclusion being drawn that the section is peremptory, I do not believe that this was the intention of the drafters of the Code.

Section 13.1.4 provides that any complaint lodged that does not contain the necessary information *may* be referred back to the complainant by the secretariat, together with a request to provide the missing information.

Furthermore, section 13.1.5 provides that the secretariat may initiate a complaint against a member on behalf of WASPA, should it become aware of an apparent breach of the Code.

I do not believe that it was the intention of the drafters that a complainant, who wishes to remain anonymous, be precluded from submitting a complaint or bringing potential consumer harm to the attention of the Secretariat. Even if I were to accept such a strict interpretation of section 13.1.3, in practical terms, the Secretariat could launch the same complaint itself under section 13.1.5. It is for the benefit of all members, their clients and consumers in the industry that complaints and potential consumer harm be dealt with in terms of the WASPA Code.

This point *in limine* is dismissed.

2. Incorrect use of the formal complaint procedure

Section 13.2.1 of the Code provides that in the case of a complaint for which it is feasible for the member to provide a prompt remedy and where no material breach of the Code seems to have occurred, the informal complaint procedure will be followed.

In the current matter, it appears *ex facie* the complaint that in the event that it is upheld, there is no prompt remedy that can be implemented by the SP or IP.

Secondly, for the reasons more fully set out hereunder, there have been a number of breaches of the Code and Advertising Rules by the IP and therefore the formal complaint procedure must be used.

The second point *in limine* is dismissed.

3. Constitutionality of WASPA's emergency procedure

This is not the correct forum for the hearing of a direct constitutional challenge to the provisions of the Code. While the Constitution will be applicable in the interpretation and application of the Code, the allegation that a section is unconstitutional must be brought in a competent court with jurisdiction to hear such matters.

The third point *in limine* is dismissed.

On the Merits

The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.

After viewing the advert, the IP's website and reading the IP's explanation for the nature and description of the advertised services a number of times, I am still not entirely confident in my understanding of how the IP's "trivia club" actually works. Moreover, the actual cost implications for joining the club or entering the competition are not clearly set out.

In the response submitted on behalf of the IP, its attorneys have admirably tried to explain the mechanisms for the subscription and competition services advertised as well as the pricing structure involved. Unfortunately, after considering their explanation, I am still not given answers to the questions asked by the complainant, namely:

1. How many SMS messages will be sent by the IP and how many are billed?
2. How many questions must be answered to win the advertised prize?
3. Does the IP continue to charge a subscription fee if previous questions are answered incorrectly?
4. What is the total maximum or minimum cost that may be incurred in winning the advertised prize?

If I go through the IP's own explanation for its service, there appear to be a number of further contradictions and ambiguities as follows:

The user is requested to send in the keyword of the service followed by an answer to the short code 31939. The user then receives a zero-rated subscription confirmation message containing all relevant information. Besides the welcome message, the user also receives a billed message containing the second question of the quiz.

It appears that two questions need to be answered before the user actually enters the competition.

In case the user sends in the wrong answer, he will receive a message informing him that the answer is wrong and what he should do in order to still have a chance of winning the prize.

Is the subscriber charged for this notification?

If the user sends in a message that the system cannot recognize, a (free of charge) message is sent to the user telling him that the message could not be recognized, what he should do to make it recognizable and where he can request more information.

See above - does this free notification apply to incorrect answers too?

Consequently the user enters a multiple question quiz.

At this point, the consumer has received at least one billable SMS at R10. Only now are they entered into the trivia competition where they receive a maximum of 8 questions over the two rounds.

The qualifying round consists of 4 questions that are related to the subject in the TV commercial. The user only receives the next question if he answers the previous question. By answering the trivia questions correctly the user qualifies for the final round. After answering the final question of the qualifying round, the user receives a message informing him that he is qualified for the knock-out round and that he, for further information, can visit the website of TMG.

In addition to the 4 billable SMS's which carry the questions in the qualifying round, is the consumer charged for the notification that he/she has qualified for the knock-out round?

The final round is a knock-out, containing 4 questions with an increasing level of difficulty. To announce the start of the knock-out round, the user receives a free of charge message containing the request to send KO in order to participate. After doing this, he receives the first question. After each correct answer, the user receives a message that evaluates the answer and that tells him when he can expect the next question.

Are these "evaluation" messages billed?

The user will only receive the next question if he answers the previous question (correctly). In case the user responds incorrectly, he will be knocked out and can no longer participate in the knock-out round.

Is the advertised R20 per week subscription fee still charged to consumers who have been knocked out?

If there are still multiple contestants left after the third question, the fourth question will be an open question. The winner is the individual who has the closest answer to the correct answer. There is no chance involved in this.

What are the criteria used by the IP to determine what the “closest” answer is?

Besides answering correctly, the user is also limited to a timeframe in the knock-out round. Each question contains information about the deadline of the question which has to be answered.

One week after the knock-out round, the name of the winner is announced on the website. Furthermore, all users receive a message containing the name of the winner and announcing the start of a new quiz round.

Is this notification message billed for?

After a winner is announced a new round starts in which new prizes can be won. Every new round the user receives an information message about this new round and the first question.

Does this entail 2 separate messages and are one or both billed to the consumer?

Subsequently every week the user will receive two questions. The winner will be announced at the end of the month. Each month a new round starts in which new prizes can be won.

The subscription equals 4x2 SMSes per month (billed messages pushed to the user). In the first month users will be playing the qualifying round and knock-out round (total=8) in the second month users will be playing the new round of (total=8).

It appears from the IP's own explanation that more than 8 messages are received by a consumer who responds to the advert and who wishes to win a prize. While the IP does clearly state in the disclaimers used in the advert that the service is subscription based and that an “additional” 8 messages may be received and charged for, the total cost of the advertised service is certainly not shown or made clear in the advert or otherwise.

On my calculations, there are at least 9 billable messages being sent to a consumer who enters the competition and proceeds to the very end. The total cost would therefore be R90 and not R80. From the foregoing, it is clear that even the proposed changes suggested by the IP will not remove the cause of complaint.

I therefore find, even before considering the individual sections of the Code referred to in the complaint that the advert and the IP's explanation for the competition mechanism is misleading, ambiguous and confusing and therefore in direct contravention to the overall objective of the Code.

The IP has also directly contravened the provisions of section 4.1.1 and 4.1.2 of the Code in that:

- a) Pricing information for the services are not clearly and accurately conveyed to customers and potential customers; and
- b) The information disseminated by the IP is deceptive, or is likely to mislead by inaccuracy, ambiguity or omission.

I will now turn to the individual sections of the Code which the complainant alleges have been breached by the IP.

Section 9.1.1

I agree with the complainant that the advert for the IP's trivia competition service does not clearly display the full cost of the services. While the full cost of the subscription part of the services on offer may be R20 per week, the total cost to the user responding to the advert and entering the competition is not clearly disclosed.

Section 9.1.2

Although this section is not specifically referred to in the complaint, the import of the complainant's complaint is that the advert does not include clear details of how the competition operates. Even after examining the content of the confirmatory messages sent by the IP after subscription and the information on its website, it is still not clear exactly how the competition works.

Unfortunately, and with all due respect to the IP and its attorneys, the proposed changes to the game mechanism appear even more confusing.

Section 9.1.3

It is clear from the IP's explanation of its competition that with every question answered correctly, the cost to the user increases in "increments" of R10. The IP is under a duty to, at reasonable intervals, inform the user of the additional costs, and must require the user to actively confirm their continued participation.

It appears from the IP's explanation of the competition mechanics that confirmatory and notification messages are sent to users after each question and each round. The user must then take steps, i.e. by sending further answers, to actively confirm their continued participation. As the cost of each question sent is at a fixed rate of R10 per question, as advertised, it appears *prima facie* that the IP is compliant with this section.

Unfortunately, when the subscription element of the service is added to the equation, things become less clear. If a user does not actively confirm their wish to continue to participate in the competition, will they continue to be charged R20 per week for the advertised subscription fee? The advert and related explanatory materials fail to explain this and I therefore find that the provisions of section 9.1.3 have been contravened.

Section 9.1.4

I do not accept the IP's explanation for the absence of a closing date in the advert. Based on the explanation given for the mechanics of the competition, and the illustration provided, it would be very simple for the IP to state for example that "*entries received before 20th of the month, closing date _____; entries received after the 20th, closing date _____*".

Furthermore, as a new competition effectively begins each month, the ascertainment of a closing date is easy and should be advertised.

Section 11.1

While it may appear from the screen display and voice over in the television advert that this is a once-off competition, I am satisfied that the IP has taken sufficient steps to highlight to consumers that they would be entered into a subscription based service if they respond to the advert.

I do not find that the IP is guilty of bundling.

Section 1 and 2 of the Advertising Rules

I am not sure whether section 1 or 2 would be applicable to an advert of this nature. However nothing really turns on this as the provisions are identical in relation to this complaint.

Although the word "Guidelines" are used to describe the Advertising Rules, it has been accepted that the Rules, read together with the provisions of the Code are peremptory and do not merely act as guidelines to members.

Regarding the use of the alternative fonts and display times used by the IP in its advert, this is a direct contravention of the applicable sections of the Advertising Rules.

The complaint is upheld.

Sanction

1. The SP and IP are ordered to suspend all services operated via the 31939 shortcode until such time as the services and related advertising complies with the objective and provisions of the WASPA Code of Conduct and Advertising Rules.
2. In particular, the IP must:

- 2.1 Clearly disclose the total maximum cost that may be charged to an entrant to any of its competitions in rands.
 - 2.2 Clearly disclose how many premium-rated SMS messages may be received by a consumer from the time that they respond to the advert until the time that they unsubscribe.
 - 2.3 Disclose on all its adverts that errors are billed.
 - 2.4 Offer a better explanation on its website and in any other promotional material (where applicable) about the actual mechanics of its subscription and competition service.
 - 2.5 Disclose a closing date for each of the competitions offered to subscribers.
 - 2.6 Make use of the font specifications contained in the WASPA Advertising Rules.
3. This sanction is not to be suspended pending any appeal by the SP.
 4. The SP and IP are instructed to terminate all billing for services operated via the 31939 shortcode with immediate effect.
 5. The current competitions are to be terminated and all entrants / subscribers who have already participated are to be refunded for all amounts already paid.
 6. Participants in current competitions must be notified of the termination of the service, at no charge to the customer.
 7. The WASPA Secretariat must notify the mobile network operators and WASPA's members of the suspension as per 1 above.