



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	#26919
Cited WASPA members	<ul style="list-style-type: none"> • R&D Media Europe B.V (1356) • Opera Telecom t/a Opera Interactive/Oxygen8 Communications (0068)
Notifiable WASPA members	
Source of the complaint	WASPA Media Monitor
Complaint short description	Misleading marketing campaign surrounding a gift card survey on WhatsApp
Date complaint lodged	22 July 2015
Date of alleged breach	22 July 2015
Applicable version of the Code	13.9 and 14.0
Clauses of the Code cited	3.4, 3.5, 3.7, 4.2, 5.4, 5.5, 15.5, 18.2, 18.6
Related complaints considered	# 26846
Fines imposed	<ul style="list-style-type: none"> • R&D Media Europe B.V (1356): A fine of R150,000 for contravention of sections 4.2, 4.5, 5.1, and a suspended sentence of R25,000 for contravention of section 18.6. • Opera Telecom t/a Opera Interactive/Oxygen8 Communications (0068). No sanctions, complaint dismissed.
Other sanctions	

Is this report notable?	Notable.
Summary of notability	The case deals with an important issue, namely misleading and dishonest conduct by luring consumers into subscription services through non-existent promotional competitions.

Initial complaint

The initial complaint was raised by the WASPA monitor on 22 July 2015 after becoming aware of the marketing campaign in question. This was a second campaign similar to the campaign in Complaint # 26846 of which R&D Media was informed on 9 July 2015. In that instance it indicated that the campaign was suspended with immediate effect. The media monitoring team again investigated and tested a service that was being promoted by Whats App ("WA") end users. This service, in order to "qualify", meant WA users had to share a link with 10 "WA friends".

The link stated: *"Take a 1 minute survey to get a chance to win a R6,500 Shoprite Giftcard. Shoprite is expanding in Roodepoort. Therefore we need your feedback. Answer 4 simple questions to qualify for 1 of the (150 available) R6,500 Shoprite Vouchers"* The get up of the page is such that it creates the impression that the promotion is done by Shoprite or on their behalf, including a logo the is similar to the normal Shoprite logo.

The link, when opened, seemed to be a Shoprite gift card promotion. The monitoring team followed all the steps required to qualify for entry into the promotional competition, but after answering the 4 questions was directed to a page requiring the participant to share the promotion with 10 friends (this obviously in an attempt to obtain more reference numbers) for the promotion. The participant is then required to enter his or her mobile number. The participant is then redirected to a play.mobi.com website which is suddenly a confirmation for a subscription service at R7 per day. The very brief terms and conditions at the bottom of the page provide information about the cost of the service and contact numbers. There is no indication of what this subscription service is or what services will be rendered to the participant. There is also no further mention of the Shoprite promotional marketing offer. Upon confirmation a welcome message was received stating *"Welcome 2 Glomobi!content:*

http://m.za.glomobi.com.

T&C's: http://glomobi.com/subscription_R7/day/stop?sms_stop_to_39326/Help?0112185618.info.za@glomobi.com."

When the media monitor team accessed the Glomobi website there were links to utility apps, realtones, wallpapers and astrology. Since the complaint in #26846 R&D Media had changed their terms and conditions on this page to include the following terms: *"The costs of the service are 7R per day or 10R per day. If you join this subscription service, you will be entered into a draw for the promoted incentive / prize."* There was no indication of a closing date or how often the prize would be awarded.

The media monitor lodged a complaint, namely that it investigated and tested a service that was being promoted by Whats App end users stating that this type of marketing is considered highly misleading. She goes on to state that *"the Shoprite giftcard promotion was emphasized very strongly. In fact, no average consumer would have any idea that they are actually purchasing mobile content. The word "Glomobi" or "Glomobi content" does not describe that one is purchasing mobile content. Users are placed under the impression that to get the Shoprite gift card, they had to sign up to a subscription service. This marketing puts our industry into disrepute."*

The media monitor requested that the campaign be de-activated with immediate effect. She also noted that she regarded this as a repeat offence.

Member's response

R&D Media

The member's response of 22 July 2015 is simply an almost verbatim copy of the response sent on 7 July 2015 in regard to a similar complaint except that the dates have been changed from 7 July to 22 July for the 'immediate' suspension of the service. They state: The survey page referred to in the complaint report has been withdrawn on the 22nd of July. The survey page was withdrawn by notifying the affiliate which promoted our download content service. As a matter of precaution and to prevent these same type of pages in the future we have asked Empello to robustly monitor our service and the way our service is promoted. Then we are better aware which pages are used in practice to promote our service. Before engaging in affiliate marketing communications we have clear arrangements in place on what is allowed and not allowed on the basis of compliance with our own offer.

We also acknowledge that the offered incentive (here: giftcard) cannot be interpreted anymore as part of the download service due to the adjustment we have inserted into the promotional page. That adjustment is that we invite a participant to join the download service."

In regard to the infringement of sections 4.2, 4.5, and 5.5 of the WASPA Code there is an implicit acknowledgement that infringements had taken place by stating "By taking the above mentioned measures we can assure that there will not be similar breaches which were all caused by the used affiliate technique and insufficient monitoring performance."

In this response R&D Media also replied to the additional allegation of an infringement of section 8.4 and 18.4 of the Code namely that there is no pricing information in regard to the promotional competition by stating that the cost of participating in the promotional competition was included in the R7 per day subscription fee. They also state that the main focus of the promotion is Glomobi content.

In regard to the alleged contravention of section 15.4 of the Code R&D Media points out that what is offered is an opportunity to win a prize. The subscription is not a precondition for the claiming of an existing reward. They also maintain that this scheme cannot be classed as promotional competition.

In regard to the infringement of section 18.6 of the Code, namely that there was no closing date for the competition R&D Media alleges that on the disclaimer of the landing page it is stated that the closing date for the competition is 1 February 2016.

Opera Telecom t/a Opera Interactive/Oxygen8 Communications

Oxygen8 indicated that, in addition to its initial response of 9 July 2015 to R&D Media, on 23 July 2015 it sent an email summarising their relationship with R&D Media noting that they were not provided with the marketing material initialising the redirection to the Glomobi subsection page for checking compliance. It also gave notice of the suspension of the service in terms of their agreement. The earlier response in complaint #26846 was somewhat more complete in addressing the issues.

Sections of the Code considered

I considered both the provisions of Version 13.9 of the Code in force until 29 June 2015 during which time the relevant marketing campaign was devised and possibly first launched and Version 14.0 which was in operation on the actual date the alleged infringements were noticed during the investigation of the media monitor. The relevant provisions of the two versions of the Code are identical and therefore nothing turns on it.

3.1. If a customer of a member provides services covered by this Code of Conduct, those services are subject to the relevant provisions of this Code, as if that customer was a member.

3.2. If a customer of a member is found to have breached this Code of Conduct, that member must abide by any order to suspend or terminate the services offered by that customer.

3.4. A member is not liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed at the bottom of the web page.

15.5. A member may offer an incentive for joining a subscription or notification service, provided that it is clear that the benefit only applies once the customer has joined the service. (Example: "if you join this subscription service, you will be entered into a monthly draw for a prize".)

18.1. A "promotional competition" means any competition, game, scheme, arrangement, system, plan or device for distributing prizes as defined in section 36 of the Consumer Protection Act, 2009.

Consumer Protection Act s 36(d) (d) "promotional competition" means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if—

(i) it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and

(ii) any prize offered exceeds the threshold prescribed in terms of subsection (11),

irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.

18.2. The cost for a single entry into a promotional competition must not exceed R1.50.

18.6. Competition services must have a specific closing date, except where there are instant prizewinners. An insufficient number of entries or entries of inadequate quality are not acceptable reasons for changing the closing date of a competition or withholding prizes. Once the closing date for a competition is reached, the advertised prizes must be awarded, if there are any valid entries.

Decision

Oxygen8

On the evidence it is accepted that Oxygen 8 only became aware of the renewed possible infringing conduct after the promotional campaign had been launched by R&D Media and its affiliate. Oxygen8 took immediate investigative steps to determine whether there had been infringing conduct and on 23 July 2015 advised R&D Media of its findings. It also suspended the services with immediate effect although it seems that R&D Media had allegedly taken such steps on 23 July 2015 itself. Section 3.4 of the Code provides that a member is not liable for any breaches of the Code resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.

On the evidence it is accepted that Oxygen8 have demonstrated that they took reasonable steps as required by testing the services of R&D Media for compliance before activating the service and taking prompt action after becoming aware of the possible infringements.

It is therefore held that Oxygen8 is not liable for any infringement of the Code.

R&D Media

In Complaint #26846 I indicated that on the evidence provided there that it was accepted that R&D Media was unaware of the nature and full extent of the marketing campaign conducted by its affiliate although it provided no details on the identity of the affiliate, any correspondence it may have had with the affiliate after it became aware of the complaint and any response of the affiliate. That no longer holds true. In this instance R&D Media simply reproduced much of its answer to the complaint and infringements in Complaint #26846 despite the fact that at this time they were well aware of the fact that its affiliate was blatantly disregarding the WASPA Code of Conduct. It was aware of such fact at least since 9 July 2015 when the first complaint was lodged. From its response and the subsequent changes it made to its standard terms and conditions one can come to no other conclusion that R&D Media was well aware of this misleading and dishonest marketing campaign where consumers are lured by bait and switch tactics to subscribe to a subscription service while under the belief that they are essentially entering a promotional competition as defined in the Consumer Protection Act and the Code. The only real difference between the initial campaign and this one is that the getup is changed from a Woolworths survey to a Shoprite survey, even to the detail in the reference to Roodepoort on the first page.

The affiliate that provided the services on behalf of R&D Media can be regarded as a customer of R&D Media as it provided services to R&D Media for which it was being remunerated. In terms of section 3.5 a member must ensure that any customer who is not a member of WASPA but is providing services covered by the Code of Conduct, in this instance conducting a promotional competition to promote the services of the member, is aware of the requirements of the Code. Section 3.7 determines that a member is liable for any breaches of the Code resulting from services offered by a customer, if that customer is not also a member of WASPA.

In this case there is no indication that the affiliate of R&D Media is a WASPA member.

The promotional marketing campaign masquerading as a promotional competition clearly constitute an infringement of a number of provisions of the Code in that it is clearly devised to be false and deceptive and to mislead by ambiguity and omission. Although the marketing presents itself as promotional competition for which the only requirements are the answering of 4 simple questions in a survey, it then requires the participant to extend the marketing to friends and family (10 additional WA account holders) and finally requires subscription to a subscription service. None of the marketing up to this point provides any indication as to the nature of the subscription service except the cost of the service. It would now seem that R&D Media by their own admission was well aware that this deceptive campaign was running since it now made provision for the entry into the competition in its standard terms and conditions. This conduct borders on the fraudulent in that it leads the participant unwittingly down the road to a

subscription service of which absolutely no information is provided as to what kind of subscriptions service is being subscribed to until the subscription has actually taken place. The conduct is clearly not the kind of professional conduct that can be expected of members in terms of section 4.2. There is also clearly conduct which is false or deceptive and likely to mislead as prohibited by section 5.5. There is also no clear indication in the marketing campaign that the benefit, ie the promotional competition, will only be available once the subscription service is joined, which constitutes an infringement of section 15.5.

The initial part of the marketing campaign clearly constitutes a promotional competition as defined in the Code and in the Consumer Protection Act. In this case issue of the infringement of the promotional competition requirements of the Code were specifically raised in the complaint.

There is no indication on the materials provided that the rules of the promotional competition were made available as required or that a closing date for the competition was indicated. This is an infringement of section 18.6. In my view there is no clear infringement of section 18.2, namely that the cost of entering the competition exceeded R1.50 as it seems to be a free benefit of the subscription service. There may be infringements of section 18.4 of the Code and section 36(4) of the Consumer Protection Act, but this was not part of the complaint.

In their response to the complaint R&D Media acknowledges that there had been infringements of the provisions of the Code, to wit sections 4.2, 4.5 and 5.5 of the Code. It indicates that it has taken steps to ensure that similar breaches will not take place in future, but this undertaking flies in the face of a similar undertaking given on 9 July 2015 in regard to complaint 26846.. They also admit to negligence in their monitoring of the activities of the affiliate ("insufficient monitoring" performance").

It is held that R&D Media is liable in terms of section 3.7 and on its own conduct for the infringements of sections 4.2, 5.4, and 5.5 of the Code.

It is also held that R&D Media is liable for an infringement of section 18.6 of the Code.

Sanctions

Oxygen8

No sanctions are imposed in respect of Oxygen8 as it was held that their conduct in respect of this complaint did not constitute an infringement of the Code.

R&D Media

The infringements of sections 4.2, 4.5 and 5.5 of the Code all relate to the same conduct, namely the deceptive marketing campaign conducted by R&D Media and its affiliate. This is regarded as a very serious infringement as is evident by the number of different sections of the Code involved as well as the intentionally misleading and dishonest nature of the conduct involved. There is no doubt that in this case R&D Media was aware of this misleading and

dishonest campaign. This type of conduct is also not unique and has been the object of a number of complaints against other WASPA members and seems to be a common strategy.

R&D Media has been in contravention of the Code of Conduct in regard to similar conduct, (Complaint # 6842 of 19 June 2009) and identical conduct (Complaint #26846 of 13 October 2015), namely a marketing campaign masquerading as a competition, but in fact leading to a subscription service. In Complaint #6842 it was fined R150,000 and in Complaint #26846 I fined R&D Media R100,000 despite some mitigating factors. This is a repeat infringement that took place soon after R&D Media had become aware of similar infringement in Complaint 26846 and despite unconditional undertakings given to WASPA. This time round it infringed these provisions knowingly.

A fine of R150,000 is imposed on R&D Media for the infringement of sections 4.2, 4.5 and 5.5. This fine takes into account the fine imposed in Case #26846 which dealt with similar conduct at an earlier stage. The combined fine of R250,000 is regarded as appropriate taking all facts into consideration.

A fine of R25,000 is imposed on R&D Media for the infringement of section 18.6 suspended for 6 months provided that R&D Media does not infringe section 18.6 during this period.

Matters referred back to WASPA

Reference to section 18.4 and what is required for promotional competitions should also be considered in cases like this. Also consider the requirements of s 36 of the CPA in regard to promotional competitions, read with section 4.3 requiring lawful conduct.