



**Wireless Application Service Providers' Association**

## Adjudicator's Report

Complaint number	29230
Cited WASPA members	Interband Enterprises LLC (1315)
Notifiable WASPA members	Smartcall technology Solutions (0090)
Source of the complaint	Public
Complaint short description	Subscription service
Date complaint lodged	27 January 2016
Date of alleged breach	
Applicable version of the Code	14.3
Clauses of the Code cited	4.2, 4.5, 5.4, 5.5, 5.15, 5.16, 8.2, 8.7, 15.3, 15.4, 15.12, 15.13, 16.4, 16.13, 16.15, 17.1
Related complaints considered	

Fines imposed	Interband Enterprises LLC – R20 000 fine; and R50 000 suspended for 12 months.
Is this report notable?	<b>Not notable</b>
Summary of notability	<i>na</i>

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### Initial complaint

The complainant's received the following SMS:

":\r\n\r\nPlease confirm your purchase: STS, Get R180 Airtime, R7.00,RecurringDaily. Reply \\\"Y\\\" to confirm. Need help from provider? 011 507 4630. Telkom Mobile".

He submitted that it was unsolicited and misleading as his provider is Telkom Mobile and this message has nothing to do with them.

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### Member's response

The Respondent initially submitted that the subscription process was never completed and the number had been removed from their data base.

In its formal response, the Respondent submitted in essence – with supporting logs – that the complainant interacted with a banner advertisement and that the sms he received was as a result thereof, and was the second step of the subscription process. The respondent did not react and the process was not completed.

The Respondent also gave a detailed response on each clause.

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### Clauses

The following clauses were put to the Respondent:

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.

4.5. Members must respect the intellectual property rights of their clients and other parties and must not knowingly infringe such rights.

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.

5.15. Members must respect the constitutional right of consumers to personal privacy and privacy of communications.

5.16. Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

8.2. For a subscription service, the "pricing information" consists of the word "subscription" and the cost to the customer and frequency of the billing for the service. The cost and frequency portion of the pricing information must follow the following format, with no abbreviations allowed: "RX/day", "RX/week", or "RX/month" (or RX.XX if the price includes cents). For services billed at an interval other than daily, weekly or monthly, the required format is "RX every [time period]", with no abbreviations permitted when specifying the time period. Examples of pricing information: "Subscription R5/week", "R1.50/day subscription", "RX every three days", "RX every two weeks".

8.7. Pricing information must not be misleading. The price must be the full retail price of the service, including VAT. There must not be any hidden costs over and above the price included in the pricing information.

15.3. For all subscription and notification services the member must keep a record of the source of the service initiation request, and all subsequent interactions with the customer. Those records must be made available to the customer, on request. Records must be kept for a period of at least three years after the customer terminates the service.

15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: "to claim your prize, join this service".)

15.12. For all subscription services initiated by the sending of an SMS, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of two ways:

(i) The customer's mobile carrier may implement the confirmation step.

(ii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

15.13. A confirmation message must contain only the following information, in this order:

- (a) the name of the service,
- (b) the pricing information,
- (c) a customer support number,
- (d) instructions for confirming the initiation of the subscription service, and
- (e) (optionally) additional information about the service.

16.4. Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been approached for the purposes of direct marketing to desist from initiating any further communication (an “opt-out request”).

16.13. Upon request of the recipient of a direct marketing message, the member must, within a reasonable period of time, identify the source from which the recipient’s contact details were obtained. The member must also provide proof that the recipient has given consent to receive that message, or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.

16.15. If technically feasible, a recipient must be able to opt out of any further direct marketing messages sent by SMS by replying to a message with the word ‘STOP’. If this is not technically feasible then clear instructions for opting out must be included in the body of each marketing message.

17.1. With the exceptions noted below, all subscription services, notification services, contact and/or dating services and other bulk SMS services (such as free newsletters) must have a functional opt-out procedure, including the option to reply ‘STOP’ to SMS messages.

## **Decision**

There are two versions of what occurred before me:

On the Complainant’s version, he received an entirely unsolicited SMS.

On the Respondent’s version, the SMS was the second step in a subscription process that the Complainant started when he interacted with a banner.

In considering this matter, I am going to give the Respondent the benefit of the doubt and accept its version as true. There are three reasons for this stance. The first is that it is supported by extracts from logs; and the second is that the Complainant was given an opportunity to comment on this version and failed to do so. Finally, the wording of the subscription “Please confirm your purchase” is consistent with this version.

While the fact that the SMS was in response to a subscription initiation does mean that it is not unsolicited, it does not mean that it is automatically not misleading.

There are a number of clauses that I agree with the Respondent are irrelevant to the matter, either *ab initio* or based on the version that I am accepting. These are:

Clause 4.5, 5.15, 15.12, 16.4, 16.13, 16.15 and 17.1. The latter 4 fall away as the matter did not involve direct marketing.

Clause 15.3 falls away as the Respondent appears to have kept the relevant records.

For me, the crux of the matter comes down to the wording of the message, and for this I first turn to Clause 15.13 which reads:

A confirmation message must contain only the following information, in this order:

- (a) the name of the service,
- (b) the pricing information,
- (c) a customer support number,
- (d) instructions for confirming the initiation of the subscription service, and
- (e) (optionally) additional information about the service.

The reason that the Code is so strict with regards to confirmation messages is so that consumers will not be misled or confused (for example, into not realising that the sms is related to the banner they have just interacted with).

This must be read with Clause 8.2 which says:

For a subscription service, the “pricing information” consists of the word “subscription” and the cost to the customer and frequency of the billing for the service. The cost and frequency portion of the pricing information must follow the following format, with no abbreviations allowed: “RX/day”, “RX/week”, or “RX/month” (or RX.XX if the price includes cents). For services billed at an interval other than daily, weekly or monthly, the required format is “RX every [time period]”, with no abbreviations permitted when specifying the time period. Examples of pricing information: “Subscription R5/week”, “R1.50/day subscription”, “RX every three days”, “RX every two weeks”.

The message in this matter is:

":\r\n\r\nPlease confirm your purchase: STS, Get R180 Airtime, R7.00,RecurringDaily. Reply \\\'Y\\\' to confirm. Need help from provider? 011 507 4630. Telkom Mobile".

The confirmation is non-compliant in that:

- The name of the service is missing;
- “R7.00 RecurringDaily” is not compliant with Clause 8.2 as the word “subscription” is missing.

The Respondent submits that this message was sent by the Mobile carrier and is therefore of no relevance. I accept that this mitigates the wrong to some extent, but am of the opinion that it remains the responsibility of the WASP to ensure that all messaging and communication that goes out in respect of its services is compliant. It has a contractual relationship with the mobile carriers and should build in appropriate protections.

**The message is therefore in breach of Clauses 8.2 and 15.13.**

In addition, I find the words “Please confirm your purchase” and “Get R180 airtime” to create the impression that what is happening is that the recipient is simply buying R180 airtime. This is not the case as they are subscribing to a service – and they still have no idea what that service involves – and on the material before me they MIGHT win R180 airtime.

The message is therefore misleading. While I accept the argument that the carrier created the message may mean that the Respondent cannot be in breach of Clause 5.5, which has an element of intention, **I consider it inherently dishonest and therefore in breach of Clause 5.4.** My comments about the Respondent’s responsibility made above apply here.

Finally, Clause 15.4. A member must not require that a customer join a subscription or notification service in order to claim an existing reward, to be able to redeem existing loyalty points or to claim a similar benefit. (Example of incorrect marketing: “to claim your prize, join this service”.)

The Respondent has said:

*We respectfully submit that we are not in breach of this clause. The landing page clearly states: “Subscribe and stand a chance to get R 180.” The Complainant was not offered a pre-existing reward. Only once a user has subscribed to the service, will the user be entered into a random draw where the user stands a chance to win a R180 voucher. Entry into this draw only occurs after the subscription service is joined and is ancillary to the subscription service.*

I am of the opinion that the material in the landing page is not validly before me as it was not the subject of the complaint. That being said, I have accepted that the complainant *ex facie*

saw this, and I agree that it does state “Subscribe and stand a chance to get R180”, albeit under a much bigger headline that states “Get R180 airtime”. The ambiguity in this communication is then followed by the SMS – the issue before me – which says “Get R180 Airtime”.

In the SMS communication, the R180 is the main and indeed only description of what you will get for the R7 a day. There is no indication in the SMS that this is a prize in a competition. In addition, the Clause itself is quite clear that constructions such as “to claim your prize, join this service” are unacceptable”. Had the material or SMS said, “Subscribe to songs and wallpapers and stand a chance to win R180”, or had the SMS said “Subscribe and be entered in our draw for R180” the situation would be different. However, the overall communication of the SMS is that to claim R180 free airtime, you need to subscribe. **This is in breach of Clause 15.4.**

### **Sanctions**

As noted above, I accept that the mobile carrier may have crafted this SMS. However, I do not accept that the Respondent – who must have provided the necessary information – has no responsibility for it.

In addition, I am perturbed by the very fundamental nature of this breach – the issues covered are matters that have been rehashed in numerous WASPA rulings in the past. It is inconceivable to me that WASPs are not fully aware of how to conduct a compliant subscription campaign.

Given this, I fine the Respondent R20 000,00 in respect of this breach, and impose a suspended fine of R50 000 should they be found guilty of a similarly non-compliant subscription campaign in the next 12 months, starting from date of receipt of this decision.