



**Wireless Application Service Providers' Association**

## Adjudicator's Report

Complaint number	29743
Cited WASPA members	Interband Enterprises LLC (1315)
Notifiable WASPA members	Smartcall technology Solutions (0090)
Source of the complaint	WASPA Monitor
Complaint short description	Subscription service - WhatsApp form advertising
Date complaint lodged	8 March 2016
Date of alleged breach	
Applicable version of the Code	14.3
Clauses of the Code cited	4.2, 4.5, 4.9(c), 5.1, 5.4, 5.5, 8.8, 15.4
Related complaints considered	26211, 26420, 24103, 28130

Fines imposed	Interband Enterprises LLC – R150 000.00 - Clause 5.4 – R50 000 - Clause 4.2 – R50 000 - Clause 4.9(c) – R10 000 - Clause 5.1 – R10 000 - Clause 5.5 – R30 000
Is this report notable?	<b><i>Not notable</i></b>
Summary of notability	<i>na</i>

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### Initial complaint

In summary, the media monitoring team followed a banner advertisement saying:

WHATSAPP UPDATE (next to the WhatsApp icon)

WARNING! It is possible that you are using an old version of WhatsApp. To avoid service interruption you need to update your version. Download latest version of

WhatsApp within:

00:49:81

This was followed by a space to enter a number, then a DOWNLOAD button, and finally the phrase “Subscription service R7/day”.

In essence, the Monitor submitted that this was a misleading hook to make the consumer subscribe. It also objected to the fact that the wrong response still triggered a subscription. Finally, it objected to the confirmation message sent in response to the unsubscribe request, which implies that it is unsubscribing the user from WhatsApp.

The Monitor attached a full report which I will refer to more fully below.

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### Member’s response

The matter was initially referred to an Emergency Panel, but following certain undertakings by the Respondent, that procedure was terminated and the matter was referred for adjudication.

The Respondent essentially submitted that none of the identified breaches were its own actions.

In the first place, the material was produced by an affiliate marketer. It referred to its contractual terms and noted that it is withholding revenues from that campaign.

The reaction to the wrong key word was the fault of MTN.

### **Monitor's reply**

The Monitor replied that she had only included material from the Respondent's landing page onwards. In addition, the unsubscribe message cannot be the work of a third party marketer.

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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.

4.9. Members must not provide any services or promotional material that:

(c) induces an unacceptable sense of fear or anxiety;

5.1. Members must not offer or promise services that they are unable to provide.

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.

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised 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"...)

### **Decision**

The adjudicators of WASPA have, over the last few months, been repeatedly presented with exactly this style of advertising – messages that imply that a failure to act will result in the consumer’s WhatsApp being cancelled/ not updated. In every case, this is simply a hook to lead the consumer to subscribe and in every case, the action has been blamed on an affiliate marketer.

The decisions coming out of WASPA show that, following a variety of reasoning, the WASPA adjudicators are unsympathetic to this pattern of “blame”.

In matter 26211, the Appeal Panel was charged with a similar situation – that where an affiliate marketer has committed an act that the WASP immediately acknowledges as wrong, but seeks to mitigate because of the fact that it was an affiliate marketer. In that matter, the Panel said:

*At the core of this complaint is the very pertinent question of how much supervision and control a WASP is expected to exercise where it chooses to advertise and promote its websites and services using third parties and affiliate advertising networks in light of the overarching requirements of clauses 4.2, 5.4 and 5.5 of the Code.*

*In outsourcing advertising and promotion for its services to an affiliate who, it would appear, was either expressly or tacitly permitted by the member to use further third parties without needing to run either the identity of those parties by the member or the content of the material being used to promote the member’s websites and services, the Appellant took a risk of the advertising for its services being misleading, deceptive and unfair. The Appellant itself states that, “Often, in these cases, the promotions are delivered on blind networks, and Advertisers are unaware of who the publishers are to maintain business interests”. In other words, because the affiliate “delivers” the advertising, the WASP does not concern itself with the details of the actual advertising itself.*

*Clause 1.2 of the Code makes it clear that an objective of the Code is to ensure that members operate in accordance with ethical and reasonable business practices. This objective is codified into express obligations in clauses 4.2 and 5.4 of the Code which stipulate that:*

*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.*

*Misleading and deceptive advertising is not fair. It appears that in this matter it is not contested that the actions of Payripo.com were not acceptable, were grossly misleading and prejudicial to members of the public.*

*This Panel does not consider that it is professional to simply allow unchecked use of advertising by unidentified affiliates who the member appears to know often publishes advertising using “blind” networks consisting of other persons who do not comply with the Code and who do not need to seek the Principal’s approval on campaigns and strategies.*

*This Panel therefore upholds the finding that the Appellant has breached clauses 4.2 and 5.4 of the Code.*

In matter 26420, the Appeal panel reached the same conclusion via a slightly different route:

*The Panel notes that it is common cause that the material in question, alerting consumers to a virus, was unacceptably misleading.*

*On the question of liability, the Panel notes that one need look no further than the Code, which states:*

*3.6. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides those 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.*

*We can therefore accept that the Appellant is liable for the conduct of its affiliates, whether directly or indirectly employed.*

*The only remaining question is whether the Appellant took reasonable steps to ensure that the affiliates complied with the Code. The Appellant set out a number of processes that it has in place, all of which indicate a concern around this type of behaviour and a monitoring thereof.*

*However, it remains that the Appellant allows affiliates to run campaigns that are not signed off and are by unidentified publishers. In contracting to an affiliate who it would appear used further third parties without needing to run either the identity of*

*the party by the Appellant or the content of the material by the Appellant, the Appellant took a risk. It would appear in these cases that because the Advertiser “delivers”, the WASP does not concern itself with the details of the transaction.*

*This Panel is of the opinion that this is not the reasonable level of care envisaged by Clause 3.7. More pertinently, this is not behaviour that is consistent with the following clause:*

*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.*

*The Panel notes for the guidance of the Appellant and other WASP’s that it considers the contractual resolution of these issues – which appear to be the current trend in both complaints and appeals – to be simple. If a WASP requires all campaigns to be signed off, and an Affiliate fails to do so, that affiliate is in breach of contract. In the current environment, it is simply not reasonable for a WASP to allow unapproved campaigns to run. It is simply unacceptable for WASPs to hide behind the unauthorised behaviour of unidentified affiliates.*

*The Panel also notes that, as the Adjudicator pointed out, if the Appellant has indeed put good contractual protections in place, the fine will be recoverable from the Affiliate who appears to be the party most directly responsible for the campaign.*

I will now, bearing the above in mind briefly turn my attention to the specific cited clauses.

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.

Following the reasons set out above, I consider the Respondent’s actions in failing to supervise its third party affiliate marketer appropriately to be in breach of Clause 4.2.

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

In this matter there is an *ex facie* breach of WhatsApps intellectual property. However, as pointed out by the Respondent, this clause has an intentional element in the word

'knowingly". Given that the actions were, *ex facie*, taken by the affiliate marketer with no supervision by the Respondent, I can not find a breach of this clause.

4.9. Members must not provide any services or promotional material that:

(c) induces an unacceptable sense of fear or anxiety;

This clause is often cited in relation to matters where consumers are told that their WhatsApp is expiring. The Respondent has simply denied liability based on it being the fault of the third party. However, as pointed out above, it is the Respondent who is ultimately responsible for material that is disseminated in relation to their service.

I am of the opinion that a consumer, on seeing the message with the countdown, might believe that their WhatsApp is about to expire, and experience anxiety about this. That anxiety could, in turn, result in them failing to read the small print relating to subscription services.

I therefore find a breach of Clause 4.9 (c).

5.1. Members must not offer or promise services that they are unable to provide.

As the Respondent is not actually the party that provides WhatsApp, I think it is correct to say that they promise a service that they are unable to provide.

In addition, it appears that their "Top 10 Apps" are all Apps that are freely available from other providers.

They are therefore in breach of Clause 5.1.

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

The respondent appears to be offering freely available Apps as part of a subscription service. I consider this to be both dishonest and unfair.

The Respondent is therefore in breach of Clause 5.4.

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.

As with Clause 4.5, this clause requires an element of intention. In relation to the WhatsApp" hook, I accept that this is missing.

However, the product is *ex facie* a service that allows you access to 10 freely available Apps. I consider this in itself to be deceptive and misleading, as the consumer thinks that they are getting some sort of upgrade or service that they must pay for.

They are therefore in breach of Clause 5.5.

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service.

The advertised content is WhatsApp, and it seems that the consumer does get this – albeit from a third party provider who supply it for free. While this is hardly an impressive business model, this clause has not been breached.

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”)....

I disagree with the Monitor’s reasoning in applying this clause, which was “Our reason for this clause is under the premise of “to get your update, join our service”. The application of this clause is narrow – applying to rewards, prizes and similar benefits. There is therefore no breach of this clause.

### **Sanctions**

The Respondent has a previous finding against it for misleading WhatsApp advertising – in a cumulative amount of R41 000 in matter 28130 - but it appears that the decision in that matter was only handed down after this matter arose. That being said, the complaint in that matter was lodged in November 2015 and by the Media Monitor. On 23 November 2015, the Respondent submitted, in matter 28130, the Respondent submitted:

The campaign was stopped immediately and we will no longer offer any Whatsapp related services.

The matter at hand arose in March 2016 – some 3 months after this submission.

In addition, in matter 24103, we see that as far back as 2014, the Respondent was being admonished for using similar scare tactics in the form of virus alerts.

It is clear to me that the Respondent is not taking either the rules of WASPA, or its submissions to WASPA, particularly seriously. Even if the affiliate is “to blame” for the marketing material, the service still offers a free WhatsApp service as part of the subscription.

It appears to me that the Respondent now need a sanction that will act as a deterrent in this regard, and bring home to it that compliance with WASPA rulings and rules is not a matter to be taken lightly.

I note that the only reasons that I am not suspending the member for its failure to abide by its own undertaking is that:

- the decision in matter 28130 was handed down after this matter arose.
- The Respondent appears to have had a period of “good” behaviour in 2015 when it received no formal complaints.

I fine the Respondent R 150 000,00 for the reasons set out above.

This amount is broken down as follows:

- Clause 5.4 – R50 000
- Clause 4.2 – R50 000
- Clause 4.9(c) – R10 000
- Clause 5.1 – R10 000
- Clause 5.5 – R30 000

As noted in other matters, if the Respondent has indeed built in contractual protections against breaches by affiliate marketers, there is nothing to prevent them recovering the damages in terms of those contracts.