



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Exactmobile
Information Provider (IP) (if any)	N/A
Service Type	Subscription / Content bundling
Source of Complaints	"Public" or "Competitor"
Complaint Number	#0309
WASPA Code Version	4.3

Complaint

The following Complaint was received on 17 May 2006. The Complaint is closely related to those made under Complaints #306 & 307 in that all three matters involve the same Complainant and SP and flow from the publication and distribution of Exactmobile Directory #30.

The Complaint itself does not, however, relate directly to the Directory, but rather to a follow up message received by the Complainant after requesting content in response to a call to action featured in the Directory.

'[S]ms received from exactmobile from +27822003902051138 after ordering wallpaper:

"Reply to this sms with 'CLUB' to join the eXactmobile NOW! club. Members save up to 25% on all content, get access to great specials & more. Cost R10/month"

This sms was received after ordering a single piece of content by sms of the keyword 571443 to 33333. This is a subscription service but nowhere is this stated. If you reply to this sms you are subscribed without knowing you are joining a subscription service. There is no optout instruction for this service in the message that entices the customer to join subscription service. No terms and

conditions or reference of where to view the terms and conditions for this service is provided. There is also no helpline number for customers to phone about this subscription service.

Only after you reply "CLUB" to this sms do you receive a sms that states that this is a subscription service:

"Welcome to the Club! Go to eXactmobile NOW! to enjoy the benefits. The cost is R10 per month. To unsubscribe send STOP to 32227 (R1/SMS). Helpline: 0822 302 222"

The customer should also be made aware that there is a further R1 cost to unsubscribe before get subscribed and not after.

There is also further concern about bundling in this case as this sms was received after a specific non subscription product was ordered.'

The Complainant specifically alleged a breach of sections 11.1.1 and 11.1.3 of Version 4.3 of the WASPA Code of Conduct.

SP Response

The SP's response is quoted in full below:

"The SMS this user received was a follow up SMS as a result of content being requested from the Exactmobile 30th Directory. The follow up SMS is only sent to the user the first time the user requests a content item from Exactmobile. Furthermore in the 30th Directory, there is ¾ of a page (page 4) explaining the Club.

The user is not automatically subscribed to the Club just by purchasing an individual piece of content and hence there is no bundling occurring. The SMS the user receives is a separate opt in, which the user must reply to separately if he wishes to purchase the service. If the user does not reply, the user does not get billed.

The text of the SMS states clearly that this is a Club and the cost is R10/month. This is not a subscription service whereby the user is sent content which he/she does not have any say over. The SMS clearly implies that the user will be joining a Club for a specific price per month.

The WASPA code does not require the advertising of a subscription service to state the cost of unsubscribing. The code states that the cost to unsubscribe may not be more than R1.00. This information was provided to the user upon joining the Club. The price to unsubscribe from the Club also appears on page 4 of the Directory, as well as on our website.”

The Adjudicator called for a full copy of Exactmobile Directory #30 which was received from the SP. The entire booklet, including page 4 as referred to above, has been reviewed.

Sections of the Code and Advertising Rules considered

Code:

“2.21 - A **subscription service** is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.”

11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

11.1.4 Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service.

Advertising Rules:

11.1 SCOPE

Applies to all SMS and MMS's to the general public where Access Channels are displayed.

11.2.1 Text clearly Showing Access Cost and T&C for each service or Content type offered.

11.2.4 Contact details of the sender are obligatory. The contact details must not use any premium-rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method.

11.2 OBLIGATORY COMPONENTS:

11.2.1 Text clearly Showing Access Cost and T&C for each service or Content type offered.

11.2.2 The opt-out facility may not utilize any PSMS Access Codes beyond R1 in total or may not use any premium rated phone or fax numbers whatsoever. Any voice-based opt-out facility must not be more than 120-seconds in total length.

11.2.4 Contact details of the sender are obligatory. The contact details must not use any premium- rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method.

11.16 SUBSCRIPTION SERVICES: Show Total Subscription Charge, Frequency of Charge, any bearer charges and any additional charge/s

(i) Must Use The Words “Subscription Service”

If the Content provider is providing a continuous, subscription-like or subscription-based service, then the words “Subscription Service” must be prominently displayed at the top section of the advertisement as well as at each Content or service section in the advertisement where various subscription types are displayed.

No acronym, letter (eg “S”), number, abbreviation (eg “Subs”), icon, or any other mark may be used as an alternative to the words “Subscription Service” anywhere in the advertisement when that Content is only available at all and/or at a particular cost as part of a subscription service.

(ii) Must Indicate Charge/s:

The advertisement must indicate:

(a) The TOTAL charge that the consumer will incur for the subscription component of their access to that subscription service.

(b) The frequency (and the minimum frequency, if applicable) at which they will be charged for the subscription component of access to that subscription service.

(c) Whether, in addition to the periodic subscription charges in (a) & (b) above, there are any additional charges applicable to obtaining any particular service, Content or class of Content on the advertisement. [See (iii) below] This indication must include the potential and cost of any (additional) bearer charges.

Decision

At the outset it is noted that the Complaint reveals a number of separate allegations, almost all of which relate to the nature of the SMS received by a user after ordering content by sending the keyword 571443 to 33333. It seems reasonably clear that this message constitutes promotional material and a call to action distinct from the ordering of the actual content.

Accordingly and as regards the potential breach of section 11.1.4 and the alleged bundling of subscription and content services the Adjudicator can find little merit in the Complaint. On an examination it seems clear that there are two distinct transactions and that customers are not being automatically subscribed to a subscription service as a result of a request for any non-subscription content or download. Furthermore I cannot find that the effect of the SMS marketing message constitutes a (practically) confusing ad design that would have the effect of leading consumers to believe that they are requesting Content on a once-off (non-subscription) basis.

Furthermore, regarding the claim by the Complainant that the SMS message received should have included an unsubscribe or opt-out option, I can find no such requirement in the Code or Advertising Rules and this element of the Complaint is dismissed¹.

The SP in its Response denies that the Exactmobile Club constitutes a “subscription service” for the purposes of the Code. A “subscription service” is defined by the Code as “any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction”. Suffice it to say that the Exactmobile Club falls squarely within this definition².

Chapter 11 of the Advertising Rules deals with the information requirements in respect of SMSs to the general public where Access Channels are displayed. Section 11.16(i) indicates unequivocally that the SP is obliged to use the words “subscription

¹ See in this regard the Adjudicator’s Report in respect of Complaint #0391

² The issue of whether the Exactmobile Club service constitutes a “subscription service” for the purposes of the Code has been more fully canvassed under the WASPA Adjudication delivered in respect of Complaint #0372, to which the reader is referred (see the first issue raised under this Complaint). It should be noted that in its response to Complaint #0372 the same SP acknowledges that the Exactmobile Club is indeed a “subscription service” for the purposes of the Code.

service” to identify a service which it is marketing where such service is “a continuous, subscription-like or subscription-based service”.

Accordingly section 11.1 of the Code and section 11.16(i) of the Advertising Rules has been breached by the SP through its failure to use the words “subscription service”.

Further section 11.2.1 of the Advertising Rules indicates that SMS messages of this nature must clearly show the terms and conditions for the service advertised and section 11.2.4 of the Advertising Rules requires that the contact details of the sender are must be reflected in the SMS carrying the marketing message. The breach in respect of section 11.2.4 is patent while in failing to indicate the applicability of bearer charges as term and condition of the service the SP has breached 11.2.1

It is not a defence to claim that these details appear on a page in the Directory which goes to explain the manner in which the Club operates – there is no guarantee that an end-user ordering content from the Directory will be aware of or interested in the Club service. The SMS marketing message dispatched with the content item ordered must stand alone as an independent marketing message.

In considering an appropriate sanction I have taken into account the fact that, in my opinion, the nature and cost of the Exactmobile Club service is, on the basis of the SMS message forming the subject of this Complaint, reasonably clear to end-users. I cannot find in the facts presented regarding the SP's conduct, any indication of an intention to mislead end-users to their prejudice. On the other hand, the SP is in clear breach of various provisions of the Code and Advertising Rules.

In the Adjudicator's Report in respect of Complaint #0056³ the Adjudicator had cause to consider a similar breach of the Code:

11.1.1. The Adjudicator has previously indicated his concerns regarding the marketing of a “subscription service” as a “club”. While such marketing is not prohibited in terms of the WASPA Code of Conduct, Section 11.1.1. clearly indicates that the term “subscription service” must be used in promotional material and such use must amount to a prominent and explicit identification of the service as a subscription service. The placing of the term “subscription service” in between inverted commas in Section 11.1.1 of the WASPA Code of Conduct is in the view of the Adjudicator a clear indication that this exact term must be used. This was not done. The Adjudicator specifically found that the use of the term “club”

³ see <http://www.waspa.org.za/code/download/0056.pdf>

or the phrase “join the club” or similar phrases is not a substitute for the use of the term “subscription service”.

(my emphasis)

There are a number of other similar matters in which the current SP has been involved. The finding that the SP is explicitly aware that the Club service is a subscription service for the purposes of the Code is unavoidable.

In considering an appropriate sanction I have considered the following:

- The approach adopted by the SP and the fact that the SP has complied with the balance of the requirements of the Code and Advertising Rules in respect of this particular advertisement. In my judgement the particular advert allows consumers a reasonable opportunity to determine what service they will receive and how they will be charged for it;
- The ongoing problems surrounding subscription services in the industry and the apparent reluctance on the part of industry players to implement strict compliance with the Code;
- The finding that the SP was, at the time the advert was conceptualised, designed and submitted, aware of the fact that its Club service was a subscription service which had to be explicitly identified as such. This is coupled with the SP's denial that the service is a subscription service for the purposes of the Code.
- The fact that a comfort message is sent to consumers who subscribe to the service as required by section 11.1.7; and
- The efforts of the industry to address these problems through consumer education largely based on easy recognition by consumers of subscription services.

In the Adjudicator's Report in respect of Complaint #0056, referred to above, a finding was reached that the SP had breached section 11.1.1 of the Code. The Adjudicator found that the fact of the breach was mitigated by the following:

- the promotional SMS message was sent to previous customers of the SP who had utilised the subscription service of the SP in the past;
- the use of the key words “SUB TONE” (where the word “TONE” may be replaced by one of the other category of subscription services offered by the
- SP) gives some indication that this is a subscription service; and

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- a comfort message is sent to subscribers by the SP, in terms of Section 11.1.7. of the WASPA Code of Conduct.⁴

The SP in Complaint #0056 was ordered to pay a fine of R50 000, of which payment of R45 000 was suspended in recognition of the mitigating factors outlined above.

In the instant matter and in respect of the breach of section 11.1 of the Code and section 11.16 of the Advertising Rules the SP is issued with a fine of R75 000, of which R50 000 is suspended for 2 years and triggered by a failure by the SP to properly observe the requirements of Section 11.1 of the Code or Section 11.16 of the Advertising Rules during that time and in addition to any sanction which may be imposed in respect of the triggering breach.

In respect of the breach of section 11.2.1 of the Advertising Rules the SP is fined the sum of R7 500. This amount is payable to the WASPA Secretariat within five (5) days of the date of issue of this Report.

In respect of the breach of section 11.2.4 of the Advertising Rules the SP is fined the sum of R7 500. This amount is payable to the WASPA Secretariat within five (5) days of the date of issue of this Report.

⁴ see <http://www.waspa.org.za/code/download/0056.pdf>