



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Exactmobile
Information Provider (IP) (if any)	N/A
Service Type	Directory advertising
Source of Complaints	Competitor ¹
Complaint Number	#0372
Date received	17 July 2006
Code of Conduct version	4.3

Complaint & SP Response

Multiple complaints are raised against the SP regarding the Exactmobile Directory #31. Many of these mirror complaints raised by the same Complainant with regard to Exactmobile Directory #30 under Complaint numbers #306, #307, #309 and #373.

The seven individual complaints raised are set out below with the SP's Response in respect of each alongside.

<u>Complaint # 1</u>	<u>Response to Complaint # 1</u>
I refer to The Advertising Guidelines # 1.3.13 SUBSCRIPTION SERVICES (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	Technically, according to the WASPA code of conduct/Ad Guidelines, the Exactmobile Club is a subscription service, as in Section 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. Most consumers however associate the word "Subscription" to mean a once off payment which entitles you to receive regular

¹ The Complaint was submitted by e-mail and did not indicate whether the Complainant was a competitor or a consumer. Clarification was sought from the Complainant but was not forthcoming. Information to hand indicates however that the Complainant is a competitor.

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. My complaint #1: Since they DONT use the words "subscription service" anywhere in their advertisement as required in your rules, and instead use the acronym "Club", they have violated this clause as they are blatantly misleading consumers.	information such as newsletters, software updates etc. The average consumer does not associate the word subscription to mean regular billing. According to www.dictionary.com the word subscription is listed as "a payment for consecutive issues of a newspaper or magazine for a given period of time" or "a purchase made by signed order, as for a periodical for a specified period of time or for a series of performances." Therefore a consumer would expect to pay once and receive services for a specified period of time. The Exactmobile club, in terms of a logical consumer expectation, is not a subscription service as billing takes place on a monthly basis. In order not to confuse the consumer, the wording R10.00/month is very clearly and legibly written below the short code. A Club is not specifically defined within the WASPA code of conduct or advertising guidelines. Although the words "Subscription Service" are not mentioned, the user is advised that the cost is R10/month. The user is also not enticed to join the club by offering specific content or services, but rather advised of the benefits of joining the Club as a specific transaction at R10/ month. The requirement to put 'Subscription service' wording into ads was introduced as a direct result of the outbreak of attempted content bundling. If the ad for the Club was produced exactly according to the WASPA code of conduct/Ad Guidelines, then it would be sufficient to have a sentence at the top saying "Subscription Service" and then NOT have the wording "per month" displayed very prominently below the short code. Exactmobile could just say SMS CLUB to 33 333 (R10) and then at the bottom in the terms and conditions say, "The subscriber will be billed monthly". This would be technically correct but it would also be
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	confusing. The word Subscription would be at the top, the price of R10 would be in the middle and the frequency of the billing would be at the bottom, with nothing clearly connecting the three elements. The consumer would then expect to be billed once off for R10 and would not be clear on exactly what they are getting and how often they will be billed. Furthermore if the consumer did not see the wording "subscription service" or did not understand what this meant, the consumer would not understand why they are being billed regularly and would complain that this is misleading. Our advertising on the other hand, whilst not using the actual word Subscription, does make the cost and the frequency of it, very clear. Nobody has ever educated the consumer to advise that in the mobile services arena, "subscription" means regular billing and not regular information for a specified time with a once off upfront payment. Once the user joins the Exactmobile Club, the user is sent a comfort message advising the user of the costs and how to unsubscribe. Our website, call centre, etc. all advise people clearly on how to unsubscribe if required. Every time Club members download content, they are reminded of being Club members and indeed throughout our WAP portals, Club members are continuously reminded that they are Club members. Exactmobile has not received a single complaint from consumers where the consumer was not aware that billing takes place on a regular basis. Given that we receive hundreds of e-mails per day and thousands of calls per day to our CRM centre, this is a significant statement, not an idle one. This is the first complaint that has been received and it has been received from a competitor. Exactmobile has a large number of users that join the Club every day, unsubscribe the same day and then join again later. This shows that the consumers understand how the Club works and are
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	perfectly comfortable with it. The users rejoin in huge numbers again as they realize the benefits of the Club. Unlike the 'subscription services' where users are being pushed ringtones, etc. on a weekly basis, our Club is completely different. Customers can access the Club 24/7 and use the benefits (dozens and dozens of benefits) when they want. The Club is much like a gym membership – pay monthly and then use the facilities as often as you want. A gym membership would not be described in advertising as a subscription service. Furthermore if we use 'subscription service' at the top of our ads, given the proliferation of 'push a ringtone' type of subscriptions services out there putting this label at the top of their ads, there is a significant chance people will actually be confused as to what our service is. Our service is what it says it is, namely a Club and we clearly state the cost and the frequency of the cost. In future Exactmobile will place the words "subscription service" at the top of any Club ads, even though we strongly believe this will serve more to confuse than to clarify. Exactmobile will further continue to state R10/month clearly so that users know and understand that this service requires monthly billing. We do however believe that Clubs like ours need to be urgently separated in WASPA terms from 'push a ringtone' type subscription services.
<u>Complaint # 2</u> 1.3.11 NETWORK COMPATIBILITY: Indicate If Services Are Network-dependent // Indicate if subscription-type dependent. There must be an clear indication in the advertisement detailing which mobile networks the user must have access to for fully access any Content and/or participate in the service offered. My complaint #2: EXACTMOBILE do not show network compatibility	<u>Response to Complaint # 2</u> On the front cover of all Exactmobile directories, is a clear statement: All Networks, All Handsets, All Welcome. Therefore it is clearly stated that all networks are supported. The Club services are also available to all networks including Cell C. Cell C subscribers join by sending a Premium Rate SMS. Cell C users are reminded to join again at the end of the month by sending another Premium Rate SMS. Therefore all users can use the services and join the Club.

<u>Complaint # 3</u> 1.3.12 PRICING: Show component, bearer and total cost // The display text must show the full or potential cost of access for fully obtaining the advertised Content and/or service. My complaint #3: Eaxctmobile do not show even an approximate network cost of downloading the service or even that there WILL be a network cost.	<u>Response to Complaint # 3</u> This complaint has also been lodged by the same complainant in complaint number 373. Therefore this complaint should not be ruled on twice. The Exactmobile Directory must be read in its entirety. On Page 1, where information is provided on How to use this service, there is a section called WAP Access needed, with a clear W symbol. Within the explanation it is detailed what this symbol means and the cost of approx R0.20 to R0.60 is clearly stated. Wherever this symbol is used on individual pages, the user should refer back to Page 1 for an explanation. As the Directory states, the W symbol is used next to each section where WAP is required and a bearer cost will be applicable.
<u>Complaint # 4</u> s11.1.2 of the WASPA Code of conduct Any request to be subscribed to a subscription service must be an INDEPENDENT TRANSACTION In their Club page, they do not tell you that this is a subscription service. Instead they entice the consumer not once but TWICE to download content. Specifically the calls to action to : "****Download the Ducati mobile game**** and win a Ducati Bag worth over R1.500!" And secondly, "Club members who ***download**** any Kayne West content could win elite Golden Circle Tickets!" My complaint #4: Eaxctmobile do not subscribe consumers via an independent transaction. Instead they craftily (a) bundle chances to win something to entice people to subscribe to their club. (b) Indicate that you have to "Download the Ducati Game" or "Download Kayne West Content"	<u>Response to Complaint # 4</u> The specific page mentioned states "Join the Exactmobile Club". It further states the benefits to club members. The only call to action on this page is to join the Club. The user is not able to enter any competitions, download any content or use any content service. Users are told of the benefits of joining the club. The ad also states the "Ultimate WAP site" The benefits for the user if they join the club are on the WAP site. The purchasing of content, entering competitions etc can only be made on the WAP site, where the full details of downloads and competitions are displayed. Although the ad states "Download the Ducati game", there is no way to download the game from this ad. There is no short code and no content code. Therefore content is not bundled with the Club service. All that is occurring here is that users are being given examples of exclusive services available to Club members. There is no content/competition service actually being sold.

Thus my complaint #4: THIS CALL TO DOWNLOAD SPECIFIC DUCATI & KAYNE WEST CONTENT IS BLATANT BUNDLING OF CONTENT TO ENTICE SOMEONE TO SUBSCRIBE TO THE CLUB This bundling is thus TWICE in contravention of the independent transaction rules of WASPA and I wish there to be the STRONGEST action taken by WASPA against these people.	
<u>Complaint # 5</u> WASPA Advertising Guidelines # 12 INDICATE CLOSING DATE AND T&Cs OF COMPETITIONS They are advertising two competitions but DO NOT INDICATE A CLOSING DATE!! Specifically: "Download the Ducati mobile game and win a Ducati Bag worth over R1.500!" And: "Club members who download any Kayne West content could win elite Golden Circle Tickets!" My complaint #5: Exactmobile do not show any closing dates for these two competitions, nor any Terms and conditions whatsoever about these competitions This is another ripoff as no one will ever know if they ever paid out the so-called prizes.	<u>Response to Complaint # 5</u> The specific page mentioned states "Join the Exactmobile Club". It further states the benefits to club members. Although the ad states "Download the Ducati game", there is no way to download the game from this ad. There is no short code and no content code. This ad is a promotion of a competition which can only be entered on the Exactmobile WAP portal. Within the WAP portal, specific details are provided to the user, if the user wishes to download the game and therefore be entered into the competition. As there is no call to action, as the actual competition entry mechanism is not within this ad, it is not necessary to display the specific terms and conditions within this ad. When on the WAP site, one of the options available is to purchase content. Users purchasing this content are entered into a draw at no additional cost, other than the cost of purchasing the specific content. The ad therefore does not give the user an option of entering the competition, but rather tells the user where to go if they wish to be entered into the competition. Once the competition has closed on the WAP site, all references to the competition are removed, and therefore the user will not be able to enter after the

	competition has closed. Despite this, during the competition the closing date is displayed anyway. This is very different to a Premium Rate SMS competition, where the user can still enter after the competition has closed and therefore the specific closing date must be specified. There is also no additional cost to the user to enter the competition. The only cost is for users to purchase the game at the price defined within the download.
<u>Complaint # 6</u> WASPA Advertising Guidelines # 11. INDICATE IF ACCESS TO SERVICE AUTOMATICALLY PLACES USER ON A DISTRIBUTION LIST. INDICATE METHOD & COST OF UNSUBSCRIBING. My complaint #6: EXACTMOBILE do not indicate as THEY SHOULD that they will send you endless SMS updates once you are part of their club. These updates relate to OTHER services offered by Exactmobile. There is no consent provided on my part for this, nor any initial indication in their advertising that they WILL be sending you spam SMS.	<u>Response to Complaint # 6</u> Clause 5.2.1 (b) of the Code of conduct states: the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; Within the terms and conditions as placed on www.exactmobile.co.za (a site clearly advertised within the Directory) the following is stated: “Exactmobile may send marketing information to users via SMS, MMS or email to inform users of new products and services. Messages are based on previous purchases of Exactmobile products. Users wishing not to receive these messages should send the words “stop SMS” to 3 222 7 (R1.00). Users may also log in to www.exactmobile.co.za to manage all messages and other services”. Exactmobile will however in future make this statement even more apparent to the users.
<u>Complaint # 7</u> WASPA Ad Guidelines #16. Indicate that consent to use service must first be required by bill payer • Obtain bill payers consent before using this service	<u>Response to Complaint # 7</u> The WASPA Code of conduct in Section 7 Children’s Services – Requires that in the terms and conditions, the service must state the service should only be used

My complaint #7: they do not indicate this anywhere in their booklet	with the agreement of the bill payer. The Exactmobile services are not Children's services. The services are not advertised within Children's marketing channels. From research done by Exactmobile, the average age of its users is 22. Although it is possible for Children, i.e. persons under the age of 16 to use these services, persons under the age of 16 are not permitted to work, and therefore any money that Children receive will have been obtained from an adult. The adult will therefore have full knowledge of the spending of the Child. Therefore a Child will not be able to use these services without the bill payer's knowledge and therefore permission. If Exactmobile's services are Children's services, then surely every single VAS product must be deemed to be a Children's service (as Children watch TV and can get hold of magazines, etc.) and hence all ads for all premium rated services – whether on TV or in print or other – should carry this message (which they currently do not)? Indeed Call Me ads do not carry this message. What could be more of a Children's service than a Call Me SMS ad, a service aimed at children so their parents can call them back? As this clause is ambiguous, Exactmobile will in future add that "Bill Payers permission is required" so that if children do use the service, they will see the clause.
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An electronic copy of the specifically relevant pages is appended to and incorporated into this Adjudication².

Finally, it is, I believe, necessary to quote some of the general text of the Complaint so as to facilitate a better understanding of the broader context thereof:

² See Annexure A – Extract from Exactmobile Directory #32

"In conclusion, these people are OUT TO MISLEAD & BLATANTLY RIP OFF the public with their so-called 'Club' which is actually a covert subscription service who they do not disclose as they should have to.

So please

- close their 33333 service IMMEDIATELY
 - make them unsubscribe EVERY SINGLE PERSON
 - fine them R1million or MORE for all the people they have conned."
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Sections of the Code and Advertising Rules considered

Complaint # 1

Code:

Section 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"

Section 11.1 – Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services".

Advertising Rules:

Section 6.3.13 (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.

Complaint # 2

Advertising Rules:

6.3.11 NETWORK COMPATIBILITY: Indicate If Services Are Network-dependent //

Indicate if subscription-type dependent

- There must be a clear indication in the advertisement detailing which mobile networks the user must have access to for fully access any Content and/or participate in the service offered
- If only contract-only or prepaid-only users have access to the service, this must be indicated

6.2.3.2 Positioning Of T&C Text

- If the T&C associated with all access numbers in a Content booklet are generally consistent and applicable to all the Content and services within a Content booklet, then it is sufficient that these consistent T&Cs be placed in a reference page or section at the front of the booklet. However where there is any deviation from these general T&Cs, these deviations must be explicitly indicated immediately close to the access number/s, or Content/services to which this deviation in general T&Cs is applicable.

Complaint #3***Advertising Rules:*****6.2.3.2 Positioning Of T&C Text**

- If the T&C associated with all access numbers in a Content booklet are generally consistent and applicable to all the Content and services within a Content booklet, then it is sufficient that these consistent T&Cs be placed in a reference page or section at the front of the booklet.
However where there is any deviation from these general T&Cs, these deviations must be explicitly indicated immediately close to the access number/s, or Content/services to which this deviation in general T&Cs is applicable.
- The pricing and T&C text must not be positioned or formatted in a manner where it may be obscured by other text or visual information that may be displayed as part of the ad
- The cost and T&C text must not be part of a colour scheme that may obscure easy reading of complete details of the price and T&C

6.3.4 BEARER REQUIREMENTS & CHARGES: Indicate need for and possibility of additional bearer charges eg WAP

If any additional bearers (eg WAP and/or GPRS) are required for full access to the advertised service/Content, and where charges will be incurred by a user over and above the cost of the Content or service offered by the advertiser, then the display text in both the body of the advertisement as well as in the T&C must indicate that additional bearer charges may apply.

eg "R10/Game + WAP charges"

6.3.12 PRICING: Show component, bearer and total cost //

Overview:

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

Complaint #4

Code:

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.

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:

6.3.13(v) Must clearly Differentiate Between Non-subscription and subscription Types if both available in the same advertisement:

Taking into account the provisions in section 11.1.2 in v3.2 of the WASPA Code Of Conduct on relating to an "independent transaction," if an advertisement has components to it that promote

(a) Content that is ordinarily made available to a consumer on payment of a once-off payment for that individual Content without the need to subscribe to that service,
AND

(b) Content that will be available at all, and/or at a particular price or even free only if the consumer subscribes to a subscription service,

then this distinction between the availability of non-subscription and subscription charging must be made clear by unambiguously demarcating in separate sections (and not just wording) the non-subscription portion from the subscription service portion or Content in the advertisement.

Complaint #5*Code:*

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.

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

(a) the closing date;

(b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;

(c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;

(d) any significant age, geographic or other eligibility restrictions;

(e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.

Complaint #6*Advertising Rules:*

6.3.8 DISTRIBUTION LISTS: Indicate If Consumer Automatically Placed On List. //

No sexual or sexually suggestive Content in list if the list recipient does not request or expect it. // Provide reasonable opt-out procedure // Sender must have direct and recent association with recipient

- If by requesting any Content or accessing a service, the consumer so doing is automatically placed on a distribution list that will continuously or periodically send that consumer further related or unrelated communications from that Content provider or any other Content provider or advertiser, then the T&C text must explicitly specify in the T&C that updates will be sent until cancelled. [Note that v3.2 of the Code of Conduct specifies that the sender must have a "Direct & Recent" association with the recipient].

Best Practice Suggestion

Display text: "Updates sent until cancelled"

Complaint #7*Code:*

2.6. A **child** refers to a natural person under 18 years of age

2.7. **Children's services** are those which, either wholly or in part, are aimed at or would reasonably be expected to be particularly attractive to children.

7.1. Parental permission

7.1.1. The terms and conditions for children's services must indicate that the service should only be used with the permission of the child's parent or guardian.

7.1.2. The terms and conditions for children's services must indicate that the service should only be used with the agreement of the person responsible for paying the phone bill.

Decision

Complaint # 1

The Code (section 11.1) is explicit with regard to the requirement that the words "subscription service" must appear and this is emphasised and expanded by section 6.3.13(1) of the Advertising Rules, which also makes reference to "subscription-like and subscription-based" services. The rationale for this requirement lies in the need to avoid creating confusion on the part of consumers and in the efforts of WASPA to educate consumers around subscription services.

The SP, in its Response, at first appears to try and argue that this requirement is impractical and misleading to consumers in the specific instance and further that its Club service is not really a subscription service. I do not think it is necessary to entertain these arguments at length and, indeed, the SP itself comes to the conclusion that it is required by the Code and Advertising Rules to use the actual words "subscription service" and undertakes to do so in future.

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 definition.

Furthermore the SP's obfuscation is somewhat ironic given its involvement in earlier Adjudications which have examined the status under the Code of download "clubs".

In the Adjudicator's Report in respect of Complaint #0052³, in which matter the current SP was the Complainant, the Independent Adjudicator stated unequivocally that:

- A download "club" is a subscription service, however differentiated from
- earlier subscription services in that the subscriber selects one or more content items, rather than having content pushed to the subscriber;
- The complainant operates a similar service, using its WAP portal to allow subscribers to select content rather than relying on a subscriber SMSing a product code;
- Clarity and differentiation of service and pricing in a "hybrid" advertisement is more difficult than in an advert for one of specific content or a subscription service and needs careful evaluation in terms of the WASPA Advertising
- Guidelines; and
- Download "clubs" require careful attention to ensure that consumers are neither confused nor harmed."

In the Adjudicator's Report in respect of Complaint #0056⁴ 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" 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.

The SP correctly identifies the promotion of an amendment to the Code and/or Advertising Rules as being its correct course of action. Until such time as such an amendment is effected the SP remains bound by the Code and Advertising Rules as they stand. Likewise the Independent Adjudicator is bound by the four corners of the Code, Advertising Rules and such national law as may overlap with the Code and Advertising Rules.

³ See <http://www.waspa.org.za/code/download/0052.pdf>

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

In the circumstances the SP has breached section 11.1 of the Code and section 6.3.13(i) of the Advertising Rules. It should be noted that this breach is at the root of many of the subsequent complaints launched against the SP's Directories.

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 opportunity to determine exactly 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;
- The undertaking by the SP to comply with section 11.1.1 of the Code in future;
- 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
- a comfort message is sent to subscribers by the SP, in terms of Section 11.1.7. of the WASPA Code of Conduct.⁵

⁵ see <http://www.waspa.org.za/code/download/0056.pdf>

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 it is clear that there are factors which tend towards both mitigation and aggravation of the breach. The very fact that issues such as this are still arising of itself suggests that there is a very real need for a sanction which serves to demonstrate to the industry that breaches of this nature are regarded in a very serious light.

The SP is issued with a fine of R75 000 in respect of the breach of section 11.1.1 of the Code. Given the existence of certain mitigating factors, in particular the finding that the SP had taken steps to minimise consumer confusion, payment of R50 000 of this fine is suspended for 2 years and triggered by a failure by the SP to properly observe the requirements of Section 11.1.1 of the Code or section 6.3.13(i) of the Advertising Rules during that time and in addition to any sanction which may be imposed in respect of the triggering breach.

Complaint # 2

The question of network compatibility is an element of the terms and conditions ("T&C") of the service in question. Section 6.3.11 of the Advertising Rules requires a "clear indication" of the network a user must have access to in order to participate in a service which is offered. Such indication must appear "in the advertisement".

Section 6.2.3.2 of the Advertising Rules applies to the positioning of the T&C in content booklets in general and creates an exception to the rule that all T&C in respect of a service advertised must appear in the advertisement itself. This exception is to the effect that, where the T&C are consistent and applicable to all content and service in the booklet, then compliance can be achieved through placing "these consistent" T&Cs in a reference page or section. The quoted portion in the previous sentence indicates clearly that, where only some T&Cs are common to all contents and services, these can be placed in a reference page or section. Non-consistent T&Cs would then be contained within the specific advertisement for the content or service to which they pertain.

In the instant case the T&C relating to network compatibility is consistent throughout the booklet and applicable to all content or services offered therein. This T&C is clearly stated on the front cover of the Directory and is unequivocal.

The exception applies and the Complaint cannot be upheld.

Complaint # 3⁶

The applicability or otherwise of network or bearer cost is properly a term and condition of the service to which the cost or absence of cost relates.

In the Directory as a whole there are certain services which require no WAP access and others which do (implying an additional access cost). The SP has treated the advertisement of all services requiring WAP access in a consistent manner through the use of a clear and unambiguous symbol which is clearly explained on the "How to use this service" page of the Directory (page 1). This symbol is placed immediately adjacent to any service which requires WAP access.

It is my opinion that the approach adopted by the SP in this regard is such as to comply with the requirements of the Code and Advertising Rules. The T&C relating to WAP access, while not associated with all access numbers in the Directory, is applicable to a significant proportion of advertised services and the display of such T&C properly falls within the exception created by section 6.2.3.2.⁷

This aspect of the Complaint is dismissed.

Complaint # 4

The use of specific content items for the purpose of advertising a subscription service has been considered in a number of Adjudications delivered under the WASPA Code of Conduct. I think it will be useful and instructive to review some of this material.

⁶ This Complaint mirrors that brought by the same Complainant against the same SP in respect Exactmobile Directory #30 and as set out in the Adjudicator's Report in respect of Complaint #0373 (Sub-complaint #3).

⁷ Viz. "If the T&C associated with all access numbers in a Content booklet are generally consistent and applicable to all the Content and services within a Content booklet, then it is sufficient that these consistent T&Cs be placed in a reference page or section at the front of the booklet."

In the WASPA Appeal Panel Findings for Complaint no #0002 #0011 #0026 #0037 #0058⁸ the Appeal Panel had cause to consider the meaning of section 11.2 of the Code. After noting that the clause did admit to some ambiguity, the Appeal Panel stated:

“The meaning of clause 11.1.2 becomes apparent if it is read in context with the rest of clause 11.1, especially the heading of clause 11.1 (*“Manner of subscription”*) and clause 11.1.4. Clause 11.1.4 provides that customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. It becomes clear that clause 11.1.2 prohibits the subscription service from being dependent on the ordering of content and that the customer must be specifically intent on subscribing to a subscription service and not the ordering of content.

The second part of clause 11.1.2 also makes it clear that an offer to customers to sign up for a subscription service should not mislead customers to believe that they are subscribing to anything other than a subscription service. We are therefore of the view that clause 11.1.2 prohibits requests for subscription services from being dependent on requests for specific items of content.”

(my emphasis)

In the Adjudicator’s Report in respect of Complaint #0022⁹ the Independent Adjudicator laid out the approach to be taken and some of the factors to be taken into account in determining whether any particular advert breaches section 11 of the Code.

“It is reasonable and appropriate for providers of subscription services to give customers and potential customers of their subscription service an indication of the type of content or service to be delivered. However, use of one or more specific items of content as an indication or example of content to be provided in terms of a subscription service, has the possibility of confusing a customer or potential customer so that they believe they are acquiring a specific content item or service rather than subscribing to a subscription service. This is prohibited in Clause 4.1.1 of the WASPA Code of Conduct requiring honest and fair dealings with customers and Clause 4.1.2 of the WASPA Code of Conduct requiring members to “not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”. Advertising of this nature is also likely to be in breach of Clause 11.1 of the WASPA Code of Conduct.

However, the WASPA Code of Conduct does not specifically prohibit the use of a content item or items in advertising for a subscription service; provided that the content item or items is clearly and only being used as an indication or example of the type of content to be provided in terms of the subscription service. This is of course subject to the further proviso that such use does not breach Clauses 4.1.1, 4.1.2 and 11.1.1 of the WASPA Code of Conduct and that the business processes involved do not breach Clauses 11.1.2 and 11.1.4 of the WASPA Code of Conduct (as these Clauses or other Clauses of the WASPA Code of Conduct may be amplified or further explained by advisories issued by WASPA from time to time, in this case the WASPA Advisory on Subscription Services).

⁸ See http://www.waspa.org.za/code/download/0002_11_26_37_58_appeal.pdf

⁹ See <http://www.waspa.org.za/code/download/0022.pdf>

Assessing whether a content item or items is clearly and only being used as an indication or example, or whether it is likely to mislead (intentionally or unintentionally) can only be done in the context of the specific advertisement. There are a number of factors to be considered, both individually and in relation to each other inter alia and by way of example only, including:

- The use of keywords. Specific content is more likely to be an example only if a single, generic keyword used for the subscription request, while the use of one or more content specific or content related keywords is likely to cause confusion.
- The indication that the service being advertised is a subscription service and the prominence and clarity of such indication (visual, auditory or otherwise); particularly in comparison with the indication (visual, auditory or otherwise) of the content example/s.
- The indication that there will be a continual billing process and the billing frequency as well as an indication of the amount to be billed and the prominence and clarity of such indication.
- The indication that there will be ongoing, continual and regular delivery of content and the frequency of such delivery, having regard to the prominence and clarity of such indication.
- Whether there is a mix of content items and a subscription service being advertised or only a subscription service.
- Whether the same short code or access number is used for both content items and a subscription service.
- Whether similar key words are used for content items and a subscription service.
- The clear differentiation between the content examples or indicators and the subscription service itself."

(my emphasis)

In my opinion the clearest test to be applied in cases where a SP uses reference to specific content in the course of advertising a subscription service is laid out in the Adjudicator's Report in respect of Complaint #0001¹⁰:

"It is not the intention of this decision to require only generic content be used in advertisements for subscription services. If a member (or an Information Provider) wishes to refer to specific content in advertising, this must be done in such a way that a reasonable consumer will understand that the specific content referred to is only an example of the content to be received by subscription. Alternatively the member (or an Information Provider) must implement a process to ensure that the initial transaction for specific content is independent of the subscription service. Such a process could include a double opt-in, in terms of which a request to receive specific content and an opt-in to subscribe are contained in two separate consumer initiated communications and/or transactions requiring a specific action [but not the inaction] of the consumer).

(my emphasis)

It is clear from the above that so-called "hybrid" adverts – adverts that combine the promotion of a subscription service with specific content – are neither expressly prohibited nor permitted by the Code. SPs who use such adverts should, however, be aware of the clear risk of heightened confusion in the minds of consumers and the accompanying possibility of other breaches of the Code and/or Advertising Rules.

¹⁰ see <http://www.waspa.org.za/code/download/0001.pdf>

Turning to the matter at hand it is the SP's contention that there is only a single call to action on the specific page and that the advertising material relating to the Ducati and Kanye West competitions is nothing more than an illustration of the benefits of joining the Exactmobile Club. A consumer could not action (i.e. enter) either competition without first independently joining the Exactmobile Club.

In considering the validity of this Response the following questions need to be addressed:

- Has the advert been presented in such a way that a reasonable consumer will understand that the specific content referred to is only an example of the content to be received by subscription?
- If not, has the SP employed a technical solution such as a double opt-in system to ensure the independence of any subscription transaction vis-à-vis any request for specific content?

After consideration of the advert in question it is my finding that the answer to the first question can be answered in the affirmative and that section 11.1.2 of the Code has not been breached in this instance. In reaching this conclusion I have taken into account the following factors:

- There is a single keyword on the page, viz. "CLUB";
- No access code is attached to the specific content advertised;
- The advert clearly indicates that there will be a continual billing process at R10 per month. This indication is, in my judgement, prominent to the extent that the reasonable consumer would take note thereof.
- The failure of the SP to use the words "Subscription Service". The SP has been sanctioned for this failure under "Complaint #1" above but the absence of these words is an important consideration in assessing potential confusion to consumers.
- What is, in my opinion, a clear distinction between the subscription service and the content examples.

Having made this finding any consideration of the second element of the enquiry as regards technical measures adopted is unnecessary.

The failure of the SP to provide details of the competitions featured as available content in the advert is dealt with separately below and does not have any bearing on the enquiry into whether the advert constitutes a breach of section 11.1.2 of the Code.

There is furthermore no evidence of a breach of section 11.1.4 of the Code insofar as here is no likelihood of a consumer being automatically subscribed to the subscription service as a result of a quest for non-subscription content. The absence of any keywords or access codes relating specifically to the advertised competitions implies that consumers would not be able to request such content even if they were confused as to the true nature of the service being advertised.

The Complaint is accordingly not upheld.

Complaint # 5

The difficulty for the SP raised here is once again due to its decision to combine a promotion for a subscription service with the featuring of specific content available through said subscription service.

The crisp question falling to be decided is whether the SP was obliged to provide the information set out in section 9.1.1 and 9.1.4 of the Code when using advertisements of the two competitions for the promotion of its subscription service.

In the Adjudicator's Report in respect of Complaint #0056¹¹ the Adjudicator considered whether a promotional SMS containing the text "*Win a fab Citroen C2!*" without any further details regarding this competition was in breach of section 9 of the Code.

"The Adjudicator recognised the technical limitation of SMS to 160 characters, however the SP has elected to make use of this communication technology and must operate within its confines. The SP had the election of using multiple SMS messages, MMS messages or not communicating with the consumer at all. In exercising its election to restrict its communication to a single SMS message and failing to include the required information, the SP failed to comply with clause 9.1.4. It should be noted that the SP failed to include any reference to its full terms and conditions available via its Internet web site and call centre, in the promotional SMS message. The Adjudicator accepted that the terms applicable to the competition were available, however they were not specifically stated in the promotional material for the competition (in this case the promotional SMS message received by the complainant)."

¹¹ see <http://www.waspa.org.za/code/download/0056.pdf>

Notwithstanding the fact that a different promotional medium was used as opposed to the instant matter, I find the decision in Report #0056 to be directly relevant.

The primary decision to be made by a consumer, when viewing the specific page complained about, is not whether to enter either of the competitions alluded to, but rather whether or not they wish to join the Exactmobile Club. The text relating to competitions exists solely for the purpose of persuading consumers of the merits of belonging to the Exactmobile Club. It does not constitute a call to action. The call to action occurs once the consumer has joined the Exactmobile Club at which stage he or she would, in general, be able to assess whether or not to enter the competition after reviewing the cost and terms and conditions applicable.

This does not, however, detract from the fact that the opportunity to enter into one or other of the featured competitions may play a role in the decision of the consumer as to whether to subscribe. There is a possible secondary decision to be made by the consumer as to whether, on the basis of the information presented, he or she wishes to enter one or both of the competitions. In this sense it is my finding that the presentation of certain details regarding the competition also constitutes promotional material for the actual competitions and not just for the subscription service through which they can be accessed.

By logical extension information relevant to the competitions, particularly the closing dates, may have a direct bearing on whether the consumer subscribes or not. The SP states in its Response that "all references to the competition are removed" once the competition is closed. But this ignores the lifespan of printed media such as a content booklet which may well be consulted by a consumer some time after the competitions have officially closed.

In the circumstances the failure to provide the necessary information is potentially prejudicial to consumers. From the balance of the advert it is clear that there may be costs over and above the subscription fee to enter either of the competitions, but these costs are not specified. It is not sufficient in a printed advert for there to be reference to a website on which such terms and conditions are displayed (although this may, under ain circumstances, be permissible in an electronic advert).

The Complaint is upheld and the SP found to have breached sections 9.1.1 and 9.1.4 of the Code.

In considering a sanction I have had reference to the sanction imposed by the Independent Adjudicator in his Report in respect of Complaint #0056.

The SP is ordered to pay a fine of

- R2 500 in respect of the breach of section 9.1.1 of the Code; and
- R12 500 in respect of the breach of section 9.1.4 of the Code.

Such fines are payable to the WASPA Secretariat within 5 days of date hereof.

Complaint # 6

There are two aspects raised – that the SP did not indicate to users that access to the Club service would result in update messages being received and that such messages were unsolicited commercial messages.

Under the opt-in system mandated by the Code it is necessary to have the consent of the recipient. The Code is clear that where a message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator, this constitutes sufficient consent for the SMS not to be considered unsolicited. The messages are accordingly not spam within the meaning of the Code.

It is my finding, however, that the provisions of section 6.11.11 of the Advertising Guidelines make it clear that a SP must go further. A reasonable expectation of receiving further messages can only be created by the taking of positive action by the SP. This should take the form of explicit language to that effect.

‘If by requesting any Content or accessing a service, the consumer so doing is automatically placed on a distribution list that will continuously or periodically send that consumer further related or unrelated communications from that Content provider or any other Content provider or advertiser, then the T&C text must explicitly specify in the T&C that updates will be sent until cancelled.’

The SP has failed to do this and I find that section 11.11 of the Advertising Guidelines has been breached. The fact that updates and other marketing messages will be sent is a term and condition of the service and must be displayed in the appropriate manner. Reference to a clause on a website is not sufficient.

The SP is fined the sum of R7 500.00 payable to the WASPA Secretariat within five (5) days of the date of issue of this Report.

Complaint # 7

The reference to “WASPA Ad Guidelines #16” is taken to refer to section 6.14.1.16 regarding mandatory information to be disclosed.

The SP is incorrect in regarding a child as being a person under 16 years of age – for the purposes of the Code a child is a person under 18 years of age. This is not an insignificant difference.

If the average age of the SP’s services is 22 it would seem inevitable that a number of these users are children as defined by the Code. It would be reasonable to expect animated cartoon character downloads to be attractive to children. While other services or content may not be children’s services, this does not detract from the need to state clearly that the bill payer’s permission is required in respect of the use of those services that are.

Further it could be quite convincingly argued that the entire Directory could reasonably be expected to be attractive to those not far under the age of 18.

I cannot accept the SP’s argument that the giving of money by a parent to a child means that the parent has “full knowledge” of the child’s spending. This is a *non-sequitur* and it is impossible to distil any essence of implied consent or permission from the fact that money was obtained from a parent in the first place. I am further more not concerned with the nature of services provided by other SPs and whether they constitute children’s services. I am satisfied that at least some of the content and services provided in the Directory were children’s services for the purpose of the Code.

The sections of the Code relating to children's services are not ambiguous in their application in this matter and the SP has breached the Code by not providing the necessary text.

I am willing to accept, however, for the purpose of determining the appropriate sanction, that there is a degree of confusion as to what constitutes a "children's service" and that, in the light of the interpretation adopted in this Report, widespread need for compliance in this regard. The SP is fined the sum of R20 000 suspended for 1 year and triggered by a failure by the SP to properly observe the requirements of Section 7 of the Code during that time and in addition to any sanction which may be imposed in respect of the triggering breach.

Annexure A: Extract from Exactmobile Directory # 31



Join the exactmobile NOW! CLUB

the ultimate wap site!

sms CLUB to 3 33 33
R10/month!

CLUB MEMBERS GET:

- 1** SAVINGS of up to 25% ON ALL PURCHASES made on eXactmobile NOW! or on www.exactmobile.co.za
- 2** 7 Day EXCLUSIVE access to the best content (e.g. Latest Movies, Branded Games and more)
- 3** DOUBLE eXactCredit loyalty rewards!
- 4** To enter fantastic CLUB only COMPETITIONS

Download the DUCATI MOBILE GAME & WIN a DUCATI bag worth over R1,000!

Club members who download any Kayne West content could win elite Golden Circle tickets!