



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	#0373
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 #30. These complaints to an extent mirror those raised by the same Complainant under Complaint #0372 against the same SP but in respect of Exactmobile Directory #31.

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

<u>Complaint # 1</u>	<u>Response #1</u>
On page 19 of the exactmobile book advertisement #30, the code 32227 is shown without a price This contravenes the following rules: 6.2.2 COST OF ACCESS DISPLAY RULES	The adjudicator is advised that this complaint is identical to WASPA complaint number 306. Please refer to the response to complaint number 306.

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.

6.2.2.1 Formatting of Access Cost Text: - o The size of the text showing the cost of access must be in 11 point font size This is 11 point Arial Font - o The access cost text must be in a non-serif font, preferably 'Arial' font. - o All access cost information must be placed horizontally. 6.2.2.2 Position of Cost Text For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number or Content access code in a non-serif font, even if there is a uniform cost of access displayed throughout the Content booklet and/or a series of pages in a booklet allocated to one advertiser. If multiple offers are made in the same advertisement (spread across one or more pages) and the cost differs with each offering, each offering must clearly show the individual costs, again immediately below, or above, or adjacent to the unique access number in a non-serif font.	
<u>Complaint # 2</u> On page 20 of the exactmobile book advertisement #30, the code 33333 is shown without a price This contravenes the following rules: 6.2.2 COST OF ACCESS DISPLAY RULES 6.2.2.1 Formatting of Access Cost Text: o The size of the text showing the cost of access must	<u>Response #2</u> The adjudicator is advised that this complaint is identical to WASPA complaint number 306. Please refer to the response to complaint number 306.

be in 11 point font size This is 11 point Arial Font o The access cost text must be in a non-serif font, preferably 'Arial' font. o All access cost information must be placed horizontally. 6.2.2.2 Position of Cost Text For each unique access number, the full and final cost of the access must be displayed immediately below, or above, or adjacent to the unique access number or Content access code in a non-serif font, even if there is a uniform cost of access displayed throughout the Content booklet and/or a series of pages in a booklet allocated to one advertiser. If multiple offers are made in the same advertisement (spread across one or more pages) and the cost differs with each offering, each offering must clearly show the individual costs, again immediately below, or above, or adjacent to the unique access number in a non-serif font.	
<u>Complaint # 3</u> 6.3.4 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: They do not show even an approximate network cost of accessing their service or even that there WILL be a network cost. This information is NOT shown on pages 19 & 20.	<u>Response #3</u> The Exactmobile Directory must be read in its entirety – it is one large ad. 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 a download is approx R0.20 to R0.60. Wherever this symbol is used on individual pages, the user can refer back to Page 1 for an explanation. The W symbol is used next to each section where WAP is required and a bearer cost will be applicable. Page 19 is not a download service and no data charges are applicable, hence why it does not contain a W

	symbol.
<u>Complaint # 4</u> They say in their advertisement on page 19 that: "Top Hotties will WIN eXactmobile credits and maybe even a holiday" This is a competition which DOES NOT show a closing date as required. When exactly is the closing date? 2015? It also does not show any details of the competition, including any restrictions on prizes as is required in your rules. My complaint: This should be part of the Terms and Conditions of the competition. This contravenes the WASPA Advertisiing Guidelines # 12 which says they must "INDICATE CLOSING DATE AND T&Cs OF COMPETITIONS" and contravenes #6.3.5 COMPETITIONS: Indicate If Prize Award is Conditional // Must have and show a closing date ☐EPromotional material must clearly state any information which is likely to affect a decision to participate, including: - o the closing date; - o any significant terms and conditions, including any restriction on the number of entries or prizes which may be won; - o an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes; - o any significant age, geographic, or other eligibility	<u>Response #4</u> The complainant has not read the promotion on Page 19. The promotion is for users to Vote for their favourite SA Hottie. There are no prizes offered to users that Vote. At the top it clearly states that Top Hotties will win Exactcredits. It does not state that if you vote for a Hottie you will win a prize. Therefore this is NOT a competition where prizes are offered to people who are voting (i.e. using the PRS services). People voting are not part of the competition.

restrictions; o any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item. o any significant facility, access or skill a consumer must have in order to obtain, use or otherwise access the full or even partial extent of the award promised in the advertisement. e.g. Having access to and being able to use the Internet in order to fully utilize the prize	
<u>Complaint # 5</u> WASPA Advertisiing Guidelines # 11. INDICATE IF ACCESS TO SERVICE AUTOMATICALLY PLACES USER ON A DISTRIBUTION LIST. INDICATE METHOD & COST OF UNSUBSCRIBING. My complaint #6 [Adjudicator's note – should be 5]: EXACTMOBILE do not indiacte as THEY SHOULD that they will send you endless SMS updates. 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 #5</u> Response : 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 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 clause more apparent to users.
<u>Complaint # 6</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 My complaint #6: they do not indicate this anywhere in	<u>Response #6</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 with the agreement of the bill payer.

their booklet	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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Sections of the Code and Advertising Rules consideredComplaint # 1

None.

Complaint # 2

None.

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"

Complaint # 4*Code:*

2.9. A "**competition service**" is any competition or game with prizes or entry mechanism into a draw.

Advertising Rules:

6.3.5 COMPETITIONS: Indicate If Prize Award is Conditional // Must have and show a closing date If Conditional

(Note: This section is not meant to be an exhaustive overview of any possible permutation of competition types. The general guiding principles remain however)

- Promotional material must clearly state any information which is likely to affect a decision to participate, including:
 - the closing date;
 - any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;
 - an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;
 - any significant age, geographic, or other eligibility restrictions;
 - any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.
 - any significant facility, access or skill a consumer must have in order to obtain, use or otherwise access the full or even partial extent of the award promised in the advertisement. e.g. Having access to and being able to use the Internet in order to fully utilize the prize

Complaint # 5

Advertising Rules:

11.11 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 #6

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.

DecisionComplaint # 1

This Complaint, originating from a different competitor Complainant, has already been adjudicated under the consolidated Adjudicator's Report in respect of Complaints #0306 and #0307. Under this Report the SP was found to have breached the Code as alleged but the Adjudicator accepted that the breach flowed from a simple clerical error.

The following order was made as regards an applicable sanction:

"In the circumstances no order is made as to any sanction and the fact of the breach under the respective Complaints should not be regarded as an adverse finding against the SP for the purposes of determining any sanction in any future matter involving the SP as Respondent."

The matter is accordingly *res judicata* and no further finding can be made.

Complaint # 2

This Complaint, originating from a different competitor Complainant, has already been adjudicated under the consolidated Adjudicator's Report in respect of Complaints #0306 and #0307. Under this Report the SP was found to have breached the Code as alleged but the Adjudicator accepted that the breach flowed from a simple clerical error.

The following order was made as regards an applicable sanction:

"In the circumstances no order is made as to any sanction and the fact of the breach under the respective Complaints should not be regarded as an adverse

finding against the SP for the purposes of determining any sanction in any future matter involving the SP as Respondent.”

The matter is accordingly *res judicata* and no further finding can be made.

Complaint # 3²

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 6.2.3.2.³

This aspect of the Complaint is dismissed.

Complaint # 4

The SP’s Response is partially accepted. The advertisement on page 19 of the Directory does not constitute a competition insofar as consumers are invited to vote for their “favourite hottie” is concerned.

There are, however, two elements presented on the page in question, the second of which is an invitation to consumers to enter themselves into as a “hottie”. In the event

² This Complaint mirrors that brought by the same Complainant against the same SP in respect Exactmobile Directory #31 and as set out in the Adjudicator’s Report in respect of Complaint #0372 (Sub-complaint #3).

³ 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.”

of a consumer availing him or herself of this opportunity he or she stands to win Exactmobile credits and, possibly, a holiday. This does constitute a competition service as defined by the Code.

As a result the obligation to display the information set out in section 6.3.5 of the Advertising Rules arises. The SP has failed to do this and is accordingly in breach of this section as alleged by the Complainant.

This aspect of the Complaint is upheld. 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 # 5⁴

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 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

⁴ This Complaint mirrors that brought by the same Complainant against the same SP in respect Exactmobile Directory #31 and as set out in the Adjudicator's Report in respect of Complaint #0372 (Sub-complaint #7).

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 # 6⁵

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.

⁵ This Complaint mirrors that brought by the same Complainant against the same SP in respect Exactmobile Directory #31 and as set out in the Adjudicator's Report in respect of Complaint #0372 (Sub-complaint #6).