

REPORT OF THE APPEALS PANEL

Date: 10 May 2010
Appellant: Exactmobile (SP)
Complaint Numbers: 4973
Applicable versions: Code of Conduct v6.2 read with Advertising Guidelines v1.6

1 BACKGROUND TO THE APPEAL

- 1.1 This is an appeal against the finding against and sanction imposed on the Appellant by the adjudicator in [complaint 4973](#).
- 1.2 In that matter a member of the public alleged that she had been billed by the Appellant and another WASPA member, Mira Networks, but denied that she had subscribed to their services or that they had consent to bill her. The complainant requested WASPA to secure a refund.
- 1.3 The Appellant, in its response to the complaint, indicated that the complainant had both subscribed to and utilised its services and provided logs to support its position. The Appellant declined to refund the complainant on the basis that it had not breached the Code.
- 1.4 The adjudicator found that the complainant had subscribed to the service, although reservations were expressed as to whether the Appellant had provided evidence of this.
- 1.5 In examining the logs provided, however, the adjudicator was of the view that certain of the messages sent by the Appellant to the complainant during the course of the subscription were non-compliant with the Code in that they did not include an instruction on how to opt-out from receiving such messages.
- 1.6 On this basis of this finding the adjudicator ordered the Appellant to refund the complainant and imposed a fine of “R10 000 for the basic contravention, plus an amount of R500 for every 1 of the 22 commercial communications sent without the appropriate unsubscribe information”, i.e. a total of R21 000.
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2 THE APPLICATION OF THE CODE AND AD RULES

The Code, v6.2

- 2.1 The following provisions were considered:

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2.8. A “commercial message” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator’s database, so as not to receive any further messages from that message originator.

6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must immediately be sent to the customer. This welcome message must be a clear notification of the following information, and should not be mistaken for an advert or marketing message:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider’s telephone number.

11.1.8. A monthly reminder SMS must be sent to all subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.1.9. The monthly reminder SMS must adhere to the following format:

- (a) The monthly reminder must begin with either “Reminder: You are a member of NAME OF SERVICE” or “You are subscribed to NAME OF SERVICE”.
- (b) Any marketing for a new service must appear after the cost and frequency of the existing service and the service provider’s telephone number.

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11.1.11. The format of both the initial notification message and the monthly reminder should comply with the relevant section of the WASPA Advertising Rules.

3 GROUNDS OF APPEAL

3.1 The first part of the appeal document lodged with the WASPA Secretariat sets out contentions relating to the manner of sign-up to the subscription service and seeks to bolster the Appellant's position that the complainant subscribed to and utilised its service.

3.2 Thereafter the Appellant sets out the grounds on which it bases its allegation that the adjudicator erred in finding that messages sent out as subscription reminder messages pursuant to the requirements of the Code of Conduct were commercial messages which required the inclusion of an opt-out instructions:

"By being a member of a subscription service, it is a requirement of the WASP to send monthly reminders to the client. According to the Code of conduct which was in force at the time of this complaint, namely Ver 6.2 dated (14 Aug 2008), I refer to [section 11.1.8]

It was not a requirement during this version of the code of conduct, nor is it a requirement in the current code of conduct to give the user an option to opt out of receiving reminders. Only in the latest version of the code of conduct is it also a requirement for the WASP to give details of how to unsubscribe from the service.

As can be seen from the logs submitted the subscriber was sent regular monthly reminders that they are subscribed to this service and the user made use of the benefits offered.

Exactmobile believes that the adjudicator has erred in believing that the monthly reminder SMS were marketing messages. If these were marketing messages, Exactmobile would not have sent the same message to the subscriber every month, just after billing has taken place. If in fact these were marketing messages, then Exactmobile would be in breach as there is no opt out, and would then have been in breach of not sending reminder messages to the subscriber.

The reason Exactmobile did not offer a refund is because Exactmobile complied fully with the WASPA code of conduct and did nothing wrong. The subscriber did subscribe to the service through a double opt in process on the WAP Portal. The subscriber also made use of the club discounts offered on 9 occasions. The subscriber also received monthly reminders as required by the code."

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3.3 The Appellant's concluded:

"Exactmobile is therefore of the opinion in that the adjudicator made an error in judgement in this matter. The adjudicator considered the reminder messages to be marketing messages and therefore fined Exactmobile for sending marketing messages to the client without the option to opt out."

4 FINDINGS OF APPEALS PANEL

4.1 The panel did not consider any aspect of the appeal relating to whether or not the complainant subscribed to the service. This was disposed of by the adjudicator in favour of the Appellant and is accordingly extraneous to this appeal.

4.2 The panel agrees with the argument raised by the Appellant, which should not be penalised for following the provisions of the Code. The messages construed as commercial messages by the adjudicator were clearly the monthly reminder messages in the form as mandated by the Code as it existed at that time.

4.3 The Appeal is allowed and the following is substituted for the decision of the adjudicator and the sanction imposed:

"The complaint is dismissed."

4.4 The appeal fee is refundable.