

REPORT OF THE APPEALS PANEL

Date: 22 August 2012
Appellant: TIMwe (SP)
Complaint Number: Various complaint numbers: 5339, 5692, 5853, 5928, 5972, 6055, 6103, 6306, 6365, 6611, 6751, 6753, 6760, 6818, 7085, 7673
Applicable versions: Code versions 6.2, 7.0 & 7.4

1. BACKGROUND TO THIS APPEAL

- 1.1 This appeal is unique in a number of respects that will become apparent below and therefore this appeal report differs substantially from the format and structure usually employed by this panel.
- 1.2 A large number of complaints were filed against the service provider (SP), TIMwe, based in Portugal, during a short period of time, for services provided during early 2009. Thirteen of these complaints pertain to one service (the “games club” to which the majority of complainants were subscribed by doing an “IQ world test”). Three complaints pertain to other services (the “pop club”, “thermometer” and “horoscope” services).
- 1.3 The SP was found to have breached various clauses of the Code of Conduct in all of the listed complaints and was consequently sanctioned in relation to the relevant individual breaches. The sanctions included multiple sanctions in relation to the thirteen complaints lodged in respect of the same service (“games club”) and therefore constitute multiple sanctions for essentially the same breaches. The sanctions imposed by the various adjudicators included: (i) the suspension of services; (ii) reimbursement to complainants and other customers; (iii) the requirement that the SP correct its advertisements and services in order to comply with the Code and (iv) the imposition of fines (see Table in 1.6 below – the complete adjudicators reports of these complaints can be accessed on the WASPA web site).
- 1.4 According to the information provided to this panel the SP complied with all the sanctions imposed in complaints 5339, 5692, 5853 and 5928. These four complaints form part of the batch of thirteen complaints lodged against the SP’s “games club” service. Except for the fines payable, the SP also complied with all

the remaining sanctions imposed in the remaining nine listed complaints lodged against the “games club” service. The SP therefore did not pay the fines imposed by the adjudicators in the nine remaining complaints lodged in terms of the SP’s “games club” service; being complaint numbers 5972, 6055, 6103, 6306, 6611, 6751, 6753, 6760, and 7673.

- 1.5 The SP, according to the WASPA secretariat, did not pay the fines imposed by the adjudicators in terms of the complaints lodged against the other three services namely; complaint 6365, the “pop club service”, complaint 6818, the “thermometer” service and complaint 7085, the “horoscope” service. The SP apparently did comply with the other sanctions imposed by the adjudicators.
- 1.6 Below is a summative exposition of the sixteen complaints, which form the subject of this appeal:

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Complaint No.	Date of complaint & date report published	Service description	Clauses breached (Versions 6.2, 7.0 and 7.4 of the Code)	Sanctions imposed	SP compliance
5339	Complaint: 3 December 2008 Report: 17 July 2009	Subscription service; "IQ-World Test"	(Version 6.2) 1. Rule 9.2.2.1 of Advertising Rules (Formatting & Font criteria for T&C text 2. Clause 4.1.2 (Members must not knowingly disseminate false or deceptive information	1. R5000 fine for the breach of Rule 9.2.2.1 2. R20 000 fine for breach of Clause 4.1.2	Both fines paid in full by SP
5692	Unsubscribe request by complainant: 30 January 2009 Date of complaint: 2 February 2009 Date of request for escalation: 3 June 2009 Report: 31 August 2009	Subscription service: "IQ test (Games Club)"	(Version 6.2) 1. Clause 3.1.2 of the Code (Lawful Conduct)	1. Reimbursement to complainant 2. R40 000 fine (R30 000 suspended for 6 months)	Reimbursement and payment of fine complied with
5853	Unsubscribe request by complainant: 30 January 2009 Complaint: 23 February 2009 Report:	Subscription service: "IQ World Test"	(Version 6.2) 1. Clause 4.1.3 (Member must provide full contact details) 2. Clause 11.1.2 (Subscription	1. Suspension of service 2. SMS notification to all subscribers 3. Amendment of website 4. Reimbursement to	Reimbursement and payment of fines complied with

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	17 July 2009		request must be Independent) 3. Clause 11.2.4 (Termination mechanism must be functional) 4. Rule 9.2 of Advertising Rules - generally (Formatting of terms of use on website)	complainant 5. R5000 fine for breach of clause 4.1.3 6. R20 000 fine for breach of clause 11.1.2 7. R20 000 fine for breach of clause 11.2.4	
5928	Breach alleged by WASPA Monitor 3 March 2009 Report: 17 July 2009	Subscription service: "IQ World Test"	(Version 6.2) 1. Clause 4.1.1 (Members are committed to honest & fair dealings) 2. Clause 4.1.3 (Member must provide full contact details) 3. Clause 11.1.1 (Service must be prominently identified as subscription service) 4. Clause 11.1.2 (Subscription request must be Independent) 5. Clause 11.1.4 (No automatic subscription on request for non-subscription service)	1. Suspension of service 2. SMS notification to all subscribers 3. Amendment of website 4. R20 000 for breach of clauses 4.1.1 & 11.1.1 5. R5000 fine for breach of clause 4.1.3 6. R30 000 fine for breach of clauses 11.1.2 & 11.1.4.	Payment of fines complied with

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			6. Rule 9.2 of Advertising Rules - generally (Formatting of terms of use on website)		
5972 (appealed 15 March 2010 & 5 October 2011)	Complaint: 6 March 2009 Report: 3 December 2009	Subscription service: "IQ World Test"	(Version 6.2) 1. Clause 4.1.2 (Members must not knowingly disseminate false or deceptive information) 2. Clause 4.1.3 (Member must provide full contact details) 3. Clause 11.1.2 (Subscription request must be independent) 4. Clause 11.2.4 (Termination mechanism must be functional) 5. Rule 9.2 of Advertising Rules - generally (Formatting of terms of use on website)	1. Suspension of service 2. SMS notification to all subscribers 3. Amendment of website 4. Reimbursement to complainant 5. R75 000 fine for breach of clause 4.1.2 6. R20 000 fine for breach of clause 4.1.3 7. R75 000 fine for breach of clause 11.1.2	None of the fines paid
6055 (appealed 15 March 2010 & 5 October)	Complaint: 19 March 2009 Report: 3 December 2009	Subscription service: "IQ World Test"	(Version 6.2) 1. Clause 4.1.1 (Members are committed to honest & fair dealings)	1. Suspension of service 2. SMS notification to all subscribers 3. Amendment of	None of the fines paid

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2011)			2. Clause 4.1.2 (Members must not knowingly disseminate false or deceptive information) 3. Clause 6.1.1. (Members are bound by Ad Rules) 4. Clause 6.2.5 (Price of premium rated service must be easily and clearly visible) 5. Clause 11.1.2 (Subscription request must be Independent) 6. Rule 9.2.1 of the Advertising Rules generally (Formatting of terms of use on website)	website 4. R75 000 fine for breach of clauses 4.1.1 & 4.1.2 6. R75 000 fine for breach of clause 6.2.5 and Rule 9.2.1 7. R75 000 fine for breach of clause 11.1.2	
6103 (appealed 15 March 2010 & 5 October 2011)	Complainant was subscribed without her knowledge during February 2009 Complaint: 26 March 2009 Report: 3 December 2009	SMS notification received; welcomed complainant to "Games Club". Service to which complainant allegedly subscribed, unknown to complainant and	(Version 6.2) 1. Clause 11.1.2 (Subscription request must be independent) 2. Clause 11.2.2 (Customers must be able to unsubscribe with no more than two words of which one must be STOP)	1. Reimbursement to complainant 2. To unsubscribe complainant 3. SMS notification to all subscribers 4. R25 000 fine for breach of clause 11.1.2 5. R75 000 fine for breach of clause 11.2.2	None of the fines paid

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		adjudicator			
6306 (appealed 15 March 2010 & 5 October 2011)	Complainant was subscribed to service during March 2009; unsubscribed 21 April 2009; Complaint: 24 April 2009 Report: 3 December 2009	Subscription Service "Games club" (per SP logs)	(Version 7.0) 1. Clause 11.1.2 (Subscription request must be independent) 2. Clause 11.1.10 (subscription activation message must include specified subscription service information) 3. Clause 11.2.1 (Monthly reminder SMS to be sent to all subscribers) 4. Clause 11.2.2 (Format of message prescribed in clause 11.2.1)	1. Reimbursement to complainant 2. SMS notification to all subscribers 3. R25 000 fine for breach of clause 11.1.2 4. R25 000 fine for breach of clause 11.1.10 5. R25 000 fine for breach of clause 11.2.1 6. R75 000 fine for breach of clause 11.2.2	None of the fines paid
6365 (appealed 5 October 2011)	Complaint: 4 May 2009 Report: 3 December 2009	Subscription service "Pop Club" (Beyonce song single content item used in advertisement)	(Version 7.0 – with consideration also given to version 7.4) 1. Clause 11.1.2 (Subscription request must be independent) 2. Clause 11.1.3 (Advertisement for subscription must contain at least 2 examples of content items)	1. Suspension of advertisement for the service and the service itself. 2. SMS to all existing subscribers in format as prescribed in clause 11.4 of the Code 3. R150 000 fine for the breach of clause 11.1.2 of the Code as read with clauses 11.1.3 & 11.1.5 of the	Fines not paid

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			3. Clause 11.1.5 (No automatic subscription on request for non-subscription service) 4. Rule 2 of the Advertising Rules generally (Rules regarding pricing of the service)	Code 4. R20 000 fine for non-compliance with Rule 2 of the Advertising Rules.	
6611 (appealed 5 October 2011)	Complainant subscribed to service during March 2009; Complaint: 27 May 2009 Report: 31 January 2010	Subscription service "Games Club" (per SP Logs)	(Version 7.0 – with consideration also given to version 7.4) 1. Clause 11.1.2 (Subscription request must be independent) 2. Clause 11.5.2 (Must be able to unsubscribe by SMSing no more than two words one of which must be "STOP"). 3. Clause 11.5.5 (Termination mechanism must be functional and accessible at all times). 4. Clause 11.5.6 of V7.4 (Unsubscribe notification in prescribed format)	1. Subscriber must be refunded all amounts charged in terms of subscription 2. Subscriber to be unsubscribed 3. Suspension of service pending compliance with Code 4. SMS to all existing subscribers in format as prescribed in clause 11.4 of the Code 5. R25 000 fine for breach of clause 11.1.2 6. R75 000 fine for breach of clause 11.2.2 7. R75 000 fine for breach of clause 11.5.5	Complainant reimbursed Fines not paid

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			must follow an unsubscribe request).		
6751 (appealed 5 October 2011)	Complainant was subscribed to the service on 2 February 2009. Complaint: 8 June 2009 Report: 31 January 2010	Subscription service. Complainant subscribed through doing "IQ Test". Complainant was subscribed to service called "Games Club". (per SP logs).	(Version 7.0 – with consideration also given to version 7.4). 1. Clause 11.1.2 (Subscription request must be independent) 2. Clause 11.1.5 (No automatic subscription on request for non-subscription service) 3. Clause 11.1.10 (Initiation of subscription service by pin sending of pin code – subscriber must receive subscription service information in prescribed format). 4. Clause 11.2.1 (Monthly reminder message to be sent to all subscribers). 5. Clause 11.2.2 (Prescribed format of reminder message prescribed in clause 11.2.1) 6. Clause 11.5.2	1. Complainant must be refunded all amounts charged in terms of subscription 2. Subscriber to be unsubscribed 3. Suspension of service pending compliance with Code 4. SMS to all existing subscribers in format as prescribed in clause 11.4 of the Code 5. R75 000 fine for breach of clauses 11.1.2 and 11.1.5 6. R50 000 fine for breach of clause 11.1.10 7. R75 000 fine for breach of clause 11.5.5	Complainant reimbursed Fines not paid

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			(Must be able to unsubscribe by SMSing no more than two words one of which must be "STOP"). 7. Clause 11.5.6 of v7.4 of Code (Unsubscribe message to be sent in prescribed format).		
6753 (appealed 5 October 2011)	Complainant was subscribed to the service on 29 January 2009. Complaint: 8 June 2009 Report: 31 January 2010	Subscription service. Complainant was subscribed to service called "Games Club" (per SP logs).	(Version 7.0 – with consideration also given to version 7.4). 1. Clause 11.1.2 (Subscription request must be independent) 2. Clause 11.1.10 (Initiation of subscription service by pin sending of pin code – subscriber must receive subscription service information in prescribed format). 3. Clause 11.2.1 (Monthly reminder message to be sent to all subscribers). 4. Clause 11.2.2	1. Subscriber to be unsubscribed 2. Suspension of service pending compliance with Code 3. SMS to all existing subscribers in format as prescribed in clause 11.4 of the Code 4. R75 000 fine for breach of clause 11.1.2 5. R50 000 fine for breach of clause 11.1.10 6. R75 000 fine for breach of clause 11.5.2	Fines not paid

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			(Prescribed format of reminder message prescribed in clause 11.2.1) 5. Clause 11.5.2 (Must be able to unsubscribe by SMSing no more than two words one of which must be "STOP"). 6. Clause 11.5.6 of v7.4 of Code (Unsubscribe message to be sent in prescribed format).		
6760 (appealed 5 October 2011)	Complainant was subscribed to the service on 12 February 2009. Complaint: 9 June 2009 Report: 31 January 2010	Subscription service. Complainant was subscribed to service called "Games Club". (per SP logs).	(Version 7.0 – with consideration also given to version 7.4). 1. Clause 11.1.2 (Subscription request must be independent) 2. Clause 11.1.10 (Initiation of subscription service by pin sending of pin code – subscriber must receive subscription service information in prescribed format).	1. Complainant must be refunded all amounts charged in terms of subscription 2. Complainant to be unsubscribed 3. Suspension of service pending compliance with Code 4. SMS to all existing subscribers in format as prescribed in clause 11.4 of the Code 5. R75 000 fine for breach of clause 11.1.2.	Complainant refunded Fines not paid

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			3. Clause 11.2.1 (Monthly reminder message to be sent to all subscribers). 4. Clause 11.2.2 (Prescribed format of reminder message prescribed in clause 11.2.1) 5. Clause 11.5.2 (Must be able to unsubscribe by SMSing no more than two words one of which must be "STOP"). 6. Clause 11.5.6 of v7.4 of Code (Unsubscribe message to be sent in prescribed format).	6. R50 000 fine for breach of clause 11.1.10 7. R75 000 fine for breach of clause 11.2.2 8. R75 000 fine for breach of clause 11.5.2	
6818 (appealed 5 October 2011)	WASPA Monitor lodged complaint on 18 June 2009 against advertisement on television. Report: Dated: 11 December 2009 Published: 31 January 2010	Subscription service. Service advertised called "Thermometer" which is aimed at testing the "hotness" of a relationship.	(Version 7.4 of the Code) 1. Clause 11.1.2 (Subscription request must be independent)	1. R150 000 fine for breach of clause 11.1.2. 2. The SP must stop flighting the "Thermometer" TV commercial. 3. The SP must refund all subscribers to the "Thermometer" subscription service	Subscribers refunded Fine not paid

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				in full. 4. The SP must notify all subscribers that they are entitled to claim a full refund.	
7085 (appealed 5 October 2011)	WASPA Monitor lodged complaint on 20 July 2009. Report: Dated: 9 December 2009 Published: 3 February 2010	Subscription service. "Horoscope Club" advertisement on landing page.	(Version 7.4 of the Code) 1. Clause 3.3.1 (Members will not offer services they cannot provide) 2. Clause 11.1.1 (Promotional material must explicitly identify service as "subscription" service) 3. Clause 11.1.2 (Subscription request must be independent) 4. Clause 11.1.3 (Advertisement for subscription must contain at least 2 examples of content items)	1. R 125 000 fine for breach of clauses 3.3.1, 11.1.1, 11.1.2 and 11.1.3. 1. Immediately stop the "Horoscope" service and take down the web based advertisement. 2. Refund all subscribers to the service in full. 3. Notify all subscribers that they are entitled to the aforesaid refund.	Fine not paid
7673 (no appeal)	Complainant was subscribed to service on 19 January 2009. Complaint:	Subscription service. Complainant was subscribed to service called	Version 6.2 with consideration also given to version 7.0) 1. A number sub-clauses of clause 4.1	1. Complainant must be refunded all amounts charged in terms of subscription 2. R50 000 fine the	Subscriber refunded Fines not paid

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	23 September 2009 Report: 10 January 2010	"Games Club".	including clauses 4.1.1, 4.1.3 – 4.1.10 (Provision of information to customers) 2. Clauses 4.2.1 & 4.2.2 (Privacy of confidentiality of communications and information) 3. A number of sub-clauses of clause 11.1 including clauses 11.1.2, 11.1.3, 11.1.7 – 11.1.9 and 11.1.11. (All of these clauses relate to subscription services). 4. Clauses 5.2.1 & 5.2.2 (Identification of spam) & clauses 5.3.1 & 5.3.2 (Prevention of spam).	breach of various sub-clauses of clause 4. 3. R50 000 fine the breach of various sub-clauses of clause 5. 4. R50 000 fine the breach of various sub-clauses of clause 11.	
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2. THE SP'S APPEALS

Although we refer to the “appeal” in this report, we are in fact referring to several appeals lodged at different times in relation to different adjudications on various complaints.

- 2.1 On the 15th of March 2010 the SP filed a very brief appeal, quoted in full below, against the adjudicators’ decisions in complaints 5972, 6055, 6103 and 6306 with regards to the SP’s “games club” service only (the initial appeal):

- 2.1.1 “I would like to lodge an late appeal on the following *Complaints #5972. #6055, #6103 & #6306* which are fines for the same offense regarding the IQ test campaign. We have been repeatedly fined for the same offense (IQ Test campaign) on Complaints number: #5339, #5853 & #5972.

We have been fined more than once before for the same campaign, IQ test. TIMwe proactively stop the IQ test campaign before any complaint was lodge against TIMwe, we had a few complaints by our clients and proactively stop the service. This campaign was run by an affiliate that no longer works with us. I believed we showed good faith in removing this campaign.

We are not arguing the decision as we proactively stopped the campaign and paid the fines on complaints #5339, #5853 & #5972 we only appeal against being fined over and over for the same offense.”

- 2.2 The SP, for reasons unknown to this panel, did not include the remaining five complaints regarding the SP’s “games club” service and for which the fines imposed remained payable at the time of its initial appeal.
- 2.3 On the 5th of October 2011, close to two years after most of the complaints which form the subject of this appeal had been adjudicated (but before the appeals panel had reached a decision in terms of the initial appeal) the SP filed comprehensive individual appeals against all the decisions in respect of which the fines have not been paid, except the decision on complaint 7673. The SP therefore lodged additional appeals against complaints 5972, 6055, 6103, 6306, 6365, 6611, 6751, 6753, 6760, 6818 and 7085 (the additional appeals).
- 2.4 For the reasons discussed in 3.4 below relating to late filing of appeals, the panel has not considered these additional appeals with the result that the full text of these appeals is not included in this report.

3. THE APPEALS PANEL’S DECISION

- 3.1 As stated at the beginning of this report this appeal is unique in a number of respects. Having outlined some of the additional matters we note that (i) the appeal essentially incorporates the decisions reached in no less than sixteen

complaints, extending over a period of some 6 months, in which four of the SP's services form the subject matter; (ii) two rounds of appeals were filed. The first round deals with four decisions (the initial appeal), and the second round deals with the same four decisions appealed against in the first round, as well as new appeals against the decisions in seven additional complaints (the additional appeals); (iii) both the rounds of appeals were filed late without any arrangements for the late filing of the appeals being made; and (iv) the amount of the outstanding fines payable by the SP totals R2 715 000 in relation to both the complaints referred to in the initial appeal and the additional appeals.

3.2 The Code of Conduct is clear, comprehensive and is refined often, but unfortunately the Code cannot provide for every eventuality. This appeal posed questions to this panel for which the Code does not provide clear answers and our decision therefore is based not only on the letter of the Code, but has been guided by principles of fairness and equity as reflected in the Constitution of South Africa, and in the common law.

3.3 Having had proper regard to the number of complaints involved, the history of this appeal in context of duration and man-hours, the importance of the outcome of this appeal for the future of the SP's business and the general complexity of the issues involved this panel essentially needed to answer two questions. First, should the panel condone the late filing of the SP's appeals? Second, what do we regard as the appropriate approach towards sanctioning in the event that multiple complaints are lodged at more or less the same time in respect of the same service and against the same SP?

3.4 *The panel's finding and decision regarding the late filing of appeals*

3.4.1 Should the panel condone the late filing of the SP's appeals? The Code is very clear in this regard. Clause 13.3.14 (in versions 6.2, 7.0. and 7.4 of the Code which are applicable) reads:

"The member has five working days to notify the secretariat if it wishes to appeal against the decision of the adjudicator."

3.4.2 The SP filed its initial appeal on the 15th of March 2010. For clarity we repeat that it is unclear to this panel why the SP only filed this appeal against only four decisions and not the other five decisions reached in terms of its "games club" service as well. The adjudicators' decisions in all four of these complaints were published and reported to the SP on the 3rd of December 2010. It is therefore clear that the SP, who admits as much in its appeal quoted in 2.1.1 above, filed its initial appeal more than three months late.

- 3.4.3 The SP filed its additional appeals, against the decisions which were made in terms of the SP's "games club" service, the decision reached in terms of complaint 6365 regarding the SP's "pop club" service, the decision reached in terms of complaint 6818 regarding the SP's "thermometer" service and lastly, the decision reached in terms of complaint 7085 regarding the SP's "horoscope" service, on the 5th of October 2011. The dates on which the decisions named above were reported ranged from the 3rd of December 2009 to the 3rd of February 2010. The SP's additional appeals were therefore filed anything between twenty and twenty-two months late.
- 3.4.4 According to the WASPA Secretariat, numerous attempts were made and much correspondence exchanged in an effort to assist the SP in lodging an appeal in the weeks following the publication of the adjudicators' reports. Still the SP only managed to file a painfully short appeal three months late and another round of more comprehensive appeals close to two years late. Such a state of affairs is unacceptable and it cannot in all fairness be expected of this panel to condone behavior which speaks of such blatant disregard for the provisions of the Code of Conduct or the industry which it seeks to regulate. If we were to allow members to lodge appeals when it suits them and if we were weak in our strict application and enforcement of the relevant provisions of the Code (which are clear), the Code will fast be nothing more than a worthless bunch of rules with no effect and WASPA a body which will soon lose the respect of its members and most importantly its legitimacy in the eyes of consumers which it aims to serve and protect.
- 3.4.5 Service providers that earn revenue by providing services to the public have a responsibility to ensure that their services comply with Code, in the same way that WASPA, its adjudicators and this panel have a responsibility to ensure that this is done by applying and enforcing the provisions of the Code without favour or prejudice. If this panel were to accept the late appeals of the SP, the SP will quite obviously be favoured above all other members of WASPA of whom it is expected to file their appeals within the prescribed five days and these members will be prejudiced to the benefit of the SP whose only excuse seem to be that their own house was not in order.
- 3.4.6 It is not entirely outside the realms of possibility for WASPA to grant extensions for the filing of appeals or for this panel to condone the late filing of appeals if circumstance renders such actions necessary or reasonable. This appeal is however not such a case, and members, especially foreign service providers who may not be intimately familiar with local industry practices, are hereby cautioned to strictly adhere to the provisions of the Code.

3.4.6 The SP's request for the condonation of the late filing of its appeals is therefore dismissed.

3.5 *The panel's finding and decision regarding the sanctions imposed*

3.5.1 While this issue is not strictly within our province because we are in effect rejecting the appeals, we have asked ourselves what this panel regards as the appropriate approach towards sanctioning in the event that multiple complaints are lodged at more or less the same time against the same service.

3.5.2 The Code does not make specific provision for how the eventuality of numerous complaints being lodged against the same service should be administered by WASPA or what effect such an eventuality should have on sanctioning. In theory each individual complaint lodged against a particular service can in itself lead to the imposition of any of the possible sanctions in the Code, which includes the payment of a fine.

3.5.2 Ideally as many complaints as possible lodged against the same service within a particular period of time should be considered together, by the same adjudicator. The number of complaints can then be viewed by the adjudicator as an aggravating circumstance in consideration of sanction, rather than numerous sanctions being imposed by two or more adjudicators for what is in essence the same breach. This according to the WASPA Secretariat, is done where possible, but is practically speaking very difficult to do and not only places an enormous administrative burden on the WASPA secretariat but it also has a substantial delaying effect on the adjudication of disputes. Complaints are administered, and assigned to adjudicators, on a case-by-case basis. It can surely not be expected of the WASPA secretariat to have the gift of foresight in order to know whether or when two or more complaints will be lodged against the same service in a certain period of time. The Secretariat does not have the administrative capacity to hold back complaints for adjudication in order to assign complaints to the same adjudicator should such a situation possibly present itself. The delay in the adjudication of complaints generally, but especially where the adjudication of a complaint is urgent (for example, where serious breaches of the Code are committed) in any event makes the bundling together of complaints for adjudication a very difficult thing to do, and in certain circumstances an undesirable practice to implement.

3.5.3 Our answer to the tricky question posed by this appeal as stated in 3.5.1 above is that complaints lodged against the same service should ideally be considered together, by the same adjudicator, which could then view the number of complaints as an aggravating circumstance in consideration of sanction. The strict proviso to this principle that this is not a right in terms of the Code on which members can insist, however, applies. Practical circumstance and industry needs do not allow for this

practice to be applied on a consistent basis and we therefore categorically state that our view in this regard does not create a separate or new ground of appeal. By holding this view this panel is merely exercising its discretion in order to avoid an unfair outcome brought about by unusual circumstances.

3.5.4

In context of the above this panel is of the opinion that although it is allowed in terms of the Code and in no way contrary to common practice, the duplication of sanctions for what were essentially the same breaches of the Code in relation to the same service has in this specific case amounted to the SP having been unfairly prejudiced to a significant extent.

- (a) The SP has been fined a total amount of R1,8 million for breaches relating to one service.
- (b) The SP has already paid fines totaling an amount of R135 000.
- (c) Additionally, an amount of R30 000 was suspended by the adjudicator in complaint 5692.
- (d) The SP therefore still needs to pay a total amount of R1, 640 000 in fines in relation to the breaches by it of the Code in relation to one service.
- (e) Even in context of the numerous serious breaches of the Code attributed to the service in question, the panel finds the total of R1.8 million to be harsh and inequitable as it is excessively high when the sanctions imposed for the breaches of the SP's "games club" service are viewed collectively.

3.6

In context of all the above our decision is as follows:

3.6.1

Considering that the SP has already paid fines to the amount R130 000 (imposed in terms of complaints 5339, 5692, 5853 and 5928) and has complied with all the other sanctions imposed in terms of the breaches of its "games club service" the SP is hereby released from paying the fines imposed in terms of complaint numbers 5972, 6055, 6103, 6306, 6611, 6751, 6753, 6760, and 7673 totaling R1, 640 000, subject to 3.6.2.

3.6.2

The amount of R300 000 of the above amount of R1, 640 000 is suspended for a period of six months from the date of this decision. If any of the SP's services against which a complaint is lodged within a six month period after the date of this appeal report being published is found to be in breach of any of the same clauses of the Code which it was found to have breached in terms of any of the nine complaints listed in 3.6.1 above, the amount of R300 000 will be payable to WASPA within five days of the publication of such a decision by any adjudicator.

The following findings relate to the additional appeals as we have called them. The panel's reasoning for upholding the fines for the other three complaints is that they are in relation to three distinct services – each with their own breaches in no way related to the "games club" service and that there is therefore no duplication of "breaches" or fines. The question of equity as we have applied it in relation to the initial appeal, therefore does not arise in relation to the additional appeals filed in relation to the three distinct services.

- 3.6.3 Because of the late filing of the appeal in terms of complaint 6365 (the SP's "pop club" service) and the panel's decision not to consider the appeal or its merits as explained in 3.4 above the SP remains liable for the payment of the fines imposed by the adjudicator totaling R170 000.
- 3.6.4 Because of the late filing of the appeal in terms of complaint 6818 (the SP's "thermometer" service) and the panel's decision not to consider the appeal or its merits as explained in 3.4 above the SP remains liable for the payment of the fines imposed by the adjudicator totaling R150 000.
- 3.6.5 Because of the late filing of the appeal in terms of complaint 7085 (the SP's "horoscope club" service) and the panel's decision not to consider the appeal or its merits as explained in 3.4 above the SP remains liable for the payment of the fines imposed by the adjudicator totaling R125 000.
- 3.6.6 The panel considers the non-payment of the fines owed by the SP in terms of all the complaints dealt with in this appeal, over such a long period of time, in absence of an appeal, to be unacceptable. We therefore, in terms of clause 13.6.8 of the Code, which allows this panel to determine sanctions it finds appropriate, recommend that the SP, in the event of the SP being sanctioned within one year of the date of this appeal report for any breach whatsoever, and in the absence of a properly and timeously filed appeal, be suspended from WASPA for a period of six months and that the SP's access to all networks be terminated for that period should the SP not comply with the sanctions imposed within the time frames prescribed by an adjudicator.
- 3.6.7 It is further ordered in terms of clauses 13.6.8 and 13.6.12 of the Code that the SP be suspended from WASPA for a period of six months and that the SP's access to all networks be terminated for that period should the SP not comply fully with the decisions of this panel within 5 working days of the publication of this appeals report as stated in the Code.
- 3.6.8 The SP is also reprimanded for providing a number of services that did not comply with the Code in so many respects. The SP is hereby warned not to expect any leniency from adjudicators or this panel should the SP persist in providing services in breach of the Code.
- 3.6.9 The appeal fee is not to be refunded.

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