

REPORT OF THE APPEALS PANEL

Date: 27 November 2010
Service Provider: Integrat
Information Provider: Mobile Toe
Complaint Number: 6708
Code Version: 7.0

1. BACKGROUND TO THIS APPEAL

- 1.1 The appeal relates to an adjudication regarding the 'Brain Teasers' service provided by Mobile Toe, the Information Provider (IP), through the Service Provider Integrat (SP), the only appellant in this matter. The service was a subscription service advertised on Facebook.
 - 1.2 The complainant, a consumer, was subscribed to the service which forms the subject of the complaint, on or around 25 April 2009 after clicking on an advertisement for the service.
 - 1.3 An unsubscribe request was lodged by the complainant on the WASPA website on 1 June 2009.
 - 1.4 After being unsubscribed the complainant requested a full refund of all the charges debited against her cellphone account. The SP duly paid a refund in the amount of R300 to the complainant on 11 June 2009. The complainant was not satisfied with a 'partial refund' of the total amount of R500 debited against her account.
 - 1.5 The SP refused to refund the 'full' amount of R500 claimed by the complainant stating that the complainant's account was only debited by the R300, already refunded, and that the complainant was fully aware of the charges that would be debited.
 - 1.6 The complaint was escalated to formal adjudication in terms of the WASPA Code of Conduct.
 - 1.7 At the time the complaint was originally lodged in June 2009 the IP was not a member of WASPA, but became a member of WASPA on 1 July 2009. The SP was a full member of WASPA at all times.
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2. ADJUDICATOR'S REQUEST FOR FURTHER INFORMATION AND IPs RESPONSE

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- 2.1 The adjudicator requested further information from the SP which included all the screenshots that would have been viewed in the process of subscribing to the service as well as a description of how the service operated. This request for further information was delivered to the SP by WASPA on 17 November 2009.
- 2.2 The IP, and not the SP, submitted a reply, together with a number of screenshots on 20 November 2009. All the screenshots form part of the record and are included in the adjudicator's report and will therefore not be reproduced here. The IP's reply is set out below:

2.2.1

'This service was operating over 6 months ago and any site has long since been deleted due to our policy of only having live sites present on our systems to ensure that we do not have non-compliant 'old' sites accessible by customers (we are currently marketing mind50y).

Thankfully, I have managed to find some screenshots of a site that was connected to mind50w, these are attached. I believe that this was the site that the customer visited. As you can see, all required information is present. This is an IQ service where the customer joins a subscription service of IQ text alerts. This was clearly communicated to the customer on the site and in the PIN message that was sent to them before they subscribed:

Enter pin 5125! U'll b subscribed to mind50w from MobileToe @ R50.00/1 times every week(s). Help? Call 0822350400, VAS rates apply. To unsubscribe, sms STOP to 31990.

As you can see from the above, all details of the price, frequency, the fact that the service was subscription and how to stop the service was sent to the customer.'

As you are aware the subscriber was refunded R300 out of R350 as a gesture of good faith. She is under the impression that we billed her much more - she is unable to provide a bill which indicates this and our records indicate that R350 was billed.'

3. ADJUDICATOR'S DECISION

- 3.1 The adjudicator firstly mentions that the question of whether a full refund should be paid to the complainant is largely determined by whether the service complained of complied with the Code.
- 3.2 The adjudicator mentions the fact that section 13.3.8 of the Code empowers an adjudicator to request additional information relating to a complaint,

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including information '*relating to any potential breaches of the Code of Conduct not specified in the original complaint*'.

- 3.3 The adjudicator states having had regard to section 4.1.1. (honest and fair dealings) and section 6.2.5 (price of service must be easily and clearly visible) of the Code.
- 3.4 According to the adjudicator the font colour used to display the pricing information has the effect of making the pricing information neither '*easily*' nor '*clearly*' visible as is expressly required by the Code.
- 3.5 The adjudicator furthermore considers section 11.1.2 of the Code as also being relevant to the complaint. The adjudicator believes the word '*independent*' to have a clear and unambiguous meaning and states that it follows that if a request to join a subscription service is dependent on any other request it would not be an '*independent*' request. The subscription request in the service which forms the basis of the complaint is according to the adjudicator dependent on a consumer initiating and completing a request for an IQ score and is the subscription request and consequently not an independent transaction request.
- 3.6 In summary, the adjudicator finds the service which forms the basis of the complaint to have breached sections 4.1.1, 6.2.5 and 11.1.2 of the Code.
- 3.7 Sanctions imposed by the adjudicator
 - 3.7.1 The adjudicator mentions not only considering the breaches of the Code in the complaint to be of a serious nature with regard to the primary objective of the Code (as described in section 1.2 of the Code) but also notes complaint 4868 which was lodged against the same SP and IP for the same service. With regard to the reference made to complaint 4868 the adjudicator points to the fact that the SP and IP were alerted to the fact that a WASPA adjudicator regarded the subscription mechanism as '*potentially confusing*' and that the SP and IP none the less continued to offer the service and that the adjudicator therefore does not regard '*a light sanction as being appropriate*'.
 - 3.7.2 The adjudicator continues by imposing numerous and very detailed sanctions on the SP. In short, the adjudicator directs the SP to:
 - 3.7.2.1 Suspend all services and billing for services that may be provided by the IP pending compliance with the sanctions provided in the adjudicator's report; (as per paragraph 1 of the adjudicator's sanctions).
 - 3.7.2.2 Refund the complainant the remaining R50 plus interest as well as pay the complainant an additional amount of R1000 in compensation; (as per paragraph 2 of the adjudicator's sanctions).

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3.7.2.3 Deliver to WASPA a list of the numbers of consumers that were subscribed to the service or any other similar service; (as per paragraph 3 of the adjudicator's sanctions) and specifically:

- 3.7.2.3.1 deliver a sms to all consumers who were subscribed to the service informing them that the service is in breach of the Code and that they can call the SP in order to get a refund;
- 3.7.2.3.2 fully refund all consumers claiming such a refund; and
- 3.7.2.3.3 report to WASPA (by way of an affidavit signed by the most senior executive of the SP) that the sms informing consumers of the refund was indeed sent and that all consumers that claimed a refund have indeed been refunded in full;

3.7.2.4 Collect from the IP and pay over to WASPA an amount of R350 000, failing which the SP shall; (as per paragraph 4 of the adjudicator's sanctions);

- 3.7.2.4.1 provide WASPA with an account detailing all revenue received by it in respect of all subscription services provided by the IP or any related entity and specifying the IP and SP's share in such revenue;
- 3.7.2.4.2 permit WASPA to appoint an independent person to audit the accuracy of such an account;
- 3.7.2.4.3 provide WASPA and the auditor with all consents required to facilitate the conduct of such an audit including a consent to permit any network provider to furnish WASPA and the auditor with copies of all relevant records that can reasonably be required;
- 3.7.2.4.4 withhold any payment due for payment by the SP to the IP; and
- 3.7.2.4.5 pay over to WASPA the SP's service fees and the SP's revenue share in respect of all subscription services provided by the IP from 24 April onwards until such time as WASPA has received payment of the R350 000.

3.7.2.5 In the event an appeal is lodged, the interest on any refund to the complainant or consumers shall continue to run (as per paragraph 5 of the adjudicator's sanctions);

- 3.7.2.5.1. from 24 April 2009 in the case of the R50 payable to the complainant; and
- 3.7.2.5.2. from the 6th day of the delivery of the adjudicator's report in the case of the additional R1000 payable to the complainant and refunds payable to consumers as ordered.

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- 3.7.2.6 In the event that an appeal is successful any fines or compensation already paid shall be refunded to the party concerned (as per paragraph 6 of the adjudicator's sanctions).
- 3.7.2.7 Prior to the lifting of any suspension of services to the IP, the SP shall deliver to WASPA for written approval copies of all advertising and a detailed description of subscription mechanisms to be employed in the case of any subscription service (as per paragraph 7 of the adjudicator's sanctions).
- 3.7.2.8 In the event that the fine of R350 000 is not paid or the SP fails to comply with the provisions as stated in 3.7.2.4.1 and 3.7.2.4.3 above, then, for a period of 180 days or until such time as the aforementioned sanctions have been complied with, the SP's membership of WASPA shall be suspended and all network operators shall be requested to bar the SP access to its billing platforms and services as contemplated by section 13.4.3(d) of the Code (as per paragraph 8 of the adjudicator's sanctions).
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4. SPs GROUNDS OF APPEAL

- 4.1 The SP lodged detailed grounds of appeal. These grounds of appeal will for ease of reference be stated under the headings used by the SP in its appeal document. Although the panel has considered these grounds of appeal in detail they will for reasons of brevity not be repeated here in full.
- 4.2 *PROCEDURAL FAIRNESS*
- 4.2.1 Before addressing what the SP calls the '*main appeal*', the SP raises a '*preliminary issue relating to a defective procedure*' followed by the adjudicator.
- 4.2.2 In its appeal regarding procedural fairness the SP refers to a number of sections in the Code as the basis for its argument that the procedure followed by the adjudicator was procedurally unfair. These sections include:
- 4.2.2.1 Section 13.3.3 of the Code in terms of which the SP must be provided with a copy of the complaint together with any additional information relevant to the complaint.
- 4.2.2.2 Section 13.3.8 of the Code in terms of which the adjudicator may request that a member respond to any additional breaches of the Code discovered during the investigation of a complaint, but which were not specified in the original complaint.
- 4.2.2.3 Sections 13.3.9 and 13.3.10 in terms of which the adjudicator is empowered, on the basis of the evidence provided, to make a decision as

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to whether there has been a breach of the Code, and if so,
the appropriate sanction to be imposed.

4.2.3 In essence the SPs main argument regarding the issue of procedural fairness centers around the fact that the adjudicator found that the SP had breached certain sections of the Code not listed in the original complaint (and imposed sanctions for these breaches) without the SP being provided with the opportunity to respond to, or make presentations regarding, any of these potential additional breaches, nor was the SP provided with the opportunity to make presentations in mitigation. According to the SP the adjudicator therefore acted '*ultra vires*'.

4.2.4 In particular, regarding procedural fairness the adjudicator, according to the SP:

4.2.4.1 Failed to afford the SP just administrative action that is lawful, reasonable and procedurally fair as is required by section 33 of the South African Constitution.

4.2.4.2 Failed to adhere to the rules of natural justice, in particular the *Audi Alteram Partem* principle by not affording the SP the opportunity to be heard.

4.2.4.3 Failed to apply the provisions of the Code.

4.2.4.4 Based his decision and imposed severe sanctions without regard to possible mitigating or other factors relevant to the complaint.

4.2.4.5 Only reached a decision almost nine months '*after the infractions adjudicated upon took place*' thereby considering altered market trends which resulted in the '*overlapping and duplicating*' of sanctions.

4.2.4.6 Prematurely published the adjudication report on the WASPA website thereby causing potential harm to reputation and business practices of the SP.

4.3 THE COMPLAINT

4.3.1 In this ground of appeal the SP states the history of the complaint as set out in paragraph 1 and 2 above, and repeats its dissatisfaction that it was not afforded the opportunity to respond to the additional charges prior to the determinations being made by the adjudicator.

4.4 LEGALITY OF THE SERVICE

4.4.1 The crux of the SP's argument regarding the '*legality of the service*' is the fact that section 11.1.2 of version 7 of the Code was not clear enough on whether '*the use of quiz items*' as part of a subscription service constituted '*bundling*'.

4.4.1.1 The SP states that clause 11.1.2 of version 7 of the Code did not prohibit the use of quiz items and that the wording '*and may not be an entry into a competition or quiz*' was only later added to version 7.4 of the Code.

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- 4.4.1.2 The SP admits that the service was not fully compliant at the time of the adjudication but avers that this was due to the fact that version 7 of the Code was potentially confusing – even on WASPA’s own admission. Again the SP makes mention of the fact that it was not given the opportunity to bring this fact to the attention of the adjudicator.
- 4.4.2 The SP continues by pointing to the fact that the adjudicator referred to complaint 4868 in which it was noted that the combination of subscription services and IQ tests were ‘*potentially confusing*’ and that it is uncertain what ‘*potentially confusing*’ entails. The SP further states that this complaint was adjudicated in terms of version 7.4 of the Code and that varying responses from adjudicators made it impossible for the IP to understand what was expected of it.
- 4.4.3 According to the SP the adjudicator also takes into account, with reference to section 6.2.5 of the Code, that the service does not comply with the provisions related to premium-rated services and avers however that the service did not constitute a premium-rated service but a subscription service.
- 4.5 *DELAY IN ADJUDICATION BIAS TO SP, AND LACK OF CONSISTENCY*
- 4.5.1 In this ground of appeal the SP brings to the attention of the panel to the fact that the same service was the subject of an earlier complaint (complaint 7197) and that sanctions had been imposed twice in respect of the same infraction. The SP argues that the sanctions imposed by the adjudicator would have been ‘*less aggressive*’ if the complaint was adjudicated earlier, therefore ‘*for the same infraction*’ as complaint 7197 and that the adjudicator had as a result failed to take into account the adjudication of complaint 7197 in determining the sanction for the complaint at hand.
- 4.5.2 The SP also notes how the adjudicator in complaint 7197 imposed the sanction on the IP when it was a member of WASPA whereas the adjudicator in complaint 4868 saw it fit to impose the sanction on the IP while the IP was not a member of WASPA. The adjudication of complaint 7197 therefore makes the adjudication of this complaint (6708) ‘*null and void*’. The SP argues that because the adjudicator saw fit to ‘*address*’ (impose sanctions on) the IP directly in complaint 4868 when the IP was not a member of WASPA, it cannot be claimed that ‘*the complaints are admissible*’ due to the fact that the IP was not a member when this complaint (6708) was lodged and indeed a member when complaint 7197 was lodged.
- 4.6 *DISTINCTION BETWEEN THE SP (MEMBER) AND THE IP (NON-MEMBER) LIABILITY*

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- 4.6.1 The SP points to the fact that the IP was not a member of WASPA at the time the complaint was lodged but that the IP became a full member of WASPA immediately after the complaint was lodged.
- 4.6.2 The SP states that the adjudicator made an incorrect assumption by noting in the report that the service complained of had been offered by the IP *'in conjunction'* with the SP because the SP does not offer any services *'in conjunction'* with the IP but that it rather renders *'aggregation services'* to the IP in accordance with an Aggregation Service Agreement with the IP.

4.7 *DUE DILIGENCE OF IP AND THE SP MEMBER*

- 4.7.1 The SP refers the panel to various interactions between the SP and IP and between the IP and WASPA, aimed at ensuring compliance with the Code (presented as attachments to its grounds of appeal) which it alleges, indicate the *bona fides* of the SP and IP.
- 4.7.2 According to the SP the IP also changed its services due to the *'misrepresentation of and/or the vagueness of the Code of Conduct'*. WASPA further admits, states the SP, that the Code was ambiguous at the time of the complaint and that the IP went to great lengths to comply with the Code and that the IP further acted strictly on what they perceived as a correct interpretation of the Code.
- 4.7.3 The SP admits that the IP may have interpreted the Code *'incorrectly/too loosely'* regarding the issue of bundling at the time the complaint was lodged – yet too *'strictly'* with regards the *'pin method'*. The SP continues by attributing the fact that the IP did not comply with the Code, to the Code's ambiguity. The fact that the Code was changed is considered by the SP to indicate that WASPA admits to the fact that the Code was ambiguous in this regard.

4.8 *DUE DILIGENCE OF THE SP MEMBER*

- 4.8.1 The SP refers the panel to a number of emails which according to the SP serve as proof of the SP's active involvement with regards to compliance and the Code itself.

4.9 *SEVERITY OF THE SANCTIONS*

- 4.9.1 In this ground of appeal the SP points out that the service in question is *'run off[] numerous URLs'* or *'advertised on various different URLs'* and that the fact that no mention is made of this in the adjudicator's report indicates that the adjudicator; had no apparent knowledge of the existence of the other URLs; did not see the screen shots pertaining to the other URLs; did not review all of the other URLs and that the adjudicator could therefore not have imposed sanctions, such as the sanction that all subscribers for *'similar*

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services' should also be refunded, with regards to the other URLs. According to the SP a number of changes were made by the IP to a number of its services *'throughout the last 9 months'* (it is presumed that this 9-month period the SP refers is the period between the lodgment of the complaint and the publication of the adjudicator's report) and that the service which forms the basis of this appeal as well as the *'other similar services'* were *'not non-compliant'* for the period of 9 months. *'In light of the efforts on the part of the IP'* the SP argues that the sanctions imposed are both prejudicial and grossly unfair.

- 4.9.2 The SP takes serious exception to the adjudicator's reference to section 4.1.1 of the Code (honest and fair dealings) which according to the SP implies that the adjudicator attributes an element of *'mala fides on the part of the IP'* for failing to comply with the Code. The fact that the adjudicator *'failed to allude to the fact that the only evidence upon which he adjudicated and was ultimately found to be non-compliant was the screen shots provided by the IP itself'* is an illustration of this according to the SP which argues that it is unlikely that the IP would have been forthcoming with *'the very evidence which proved to be its downfall'* had the IP been aware that it was acting in a manner inconsistent with the Code, or indeed intended to act in such a manner. The SP submits that there was never any indication of *'any malicious intent'* on the part of either the IP nor the SP and that the *'bona fide'* manner in which the IP dealt with this complaint must be considered in determining an appropriate sanction.
- 4.9.3 Furthermore, the SP yet again contends that it was not afforded the opportunity to present *'the considerable documentary evidence to demonstrate the IP's attempts to render a fully compliant service'* which would have corroborated its submission that the IP was at all times acting in a fair and honest manner.
- 4.10 Based on these grounds of appeal the SP submits that the appeal be upheld and the complaint be dismissed.
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5. DECISION OF THE APPEALS PANEL

- 5.1 It seems fair to deduce from the SP's grounds of appeal that the SP does not in essence contest the fact that the IP's service was technically in breach of section 11.1.2 of the Code. The SP rather chooses to bring to the panel's attention a number of reasons in mitigation of the breach. Very importantly, the SP takes serious issue with not only the process employed by the adjudicator in reaching his/or her decision but also with the sanctions imposed by the adjudicator and the reasons provided by the adjudicator for imposing the sanctions.

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- 5.2 A number of the critical issues raised by the SP in its grounds of appeal have already been dealt with by this panel in numerous previous appeal reports in which we have made our position regarding these issues clear. We will however address these issues again. As we see it, they are:
- (a) whether or not the subscription to the service was “an independent transaction”;
 - (b) whether in fact all the necessary information advising potential subscribers was present on the site;
 - (c) whether that information was clearly and visibly displayed;
 - (d) whether any other breaches might have taken place that had not been complained of; and
 - (e) whether, if so, the remedies imposed were appropriate and within the ambit of the adjudicator’s authority.
- 5.3 The SP repeated a number of its most essential grounds of appeal a number of times. We considered the SP’s grounds of appeal with care and in detail but we will not refer to and discuss each and every individual instance or ground of appeal that was forwarded by the SP separately and in detail. We will address all the SP’s concerns but we will do so by rendering our opinion regarding a specific issue in one detailed discussion regarding that issue without reference to every instance or the context in which the issue was mentioned in the SP’s grounds of appeal.
- 5.4 The issue with which the SP appears to be most aggrieved, is the fact that the SP was not given the opportunity to make presentations, or respond to, the additional breaches of the Code identified by the adjudicator and for which the adjudicator ultimately imposed the sanctions.
- 5.4.1 The adjudicator in our view acted within the parameters of the Code in considering any and all sections of the Code that according to the adjudicator could possibly have been breached. We do not agree with the SP’s interpretation of section 13.3.8 of the Code. There is no positive obligation on adjudicators to request that members respond to any additional breaches of the Code as the SP seems to suggest. It is standard practice for adjudicators to consider sections of the Code not mentioned in the original complaint. Adjudicators are obliged by the Code (section 13.3.7 a – d) to carefully review the complaint, any response made by a member, the Code and importantly ‘any other material relevant to the complaint’. (Complainants are often members of the public which can not be expected to know the sections of the Code pertaining to a specific complaint.) Moreover, what can be perceived as a possible breach can very easily also result in contraventions of more than one section of the Code on further and more detailed investigation. The ambit of the Code and any reasonable interpretation thereof, allows adjudicators (and this panel for that matter) to make findings as to general behavior, conduct and compliance when presented with a particular

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complaint. The preamble to, and introductory sections of the Code make this clear.

5.4.2 It is also not entirely true that the SP had no opportunity to make representations regarding the service which forms the basis of the complaint. The adjudicator in fact requested further information including a description of how the subscription service operated. The IP submitted a reply to the adjudicator's request in which the IP addressed the various elements of its service that could potentially have been in breach of the Code such as the subscription method and the pricing of the service – as it turns out the same elements of the IP's service which the adjudicator ultimately found were in breach of the Code. Although we agree that the specific sections of the Code considered by the adjudicator were not mentioned by the adjudicator in his/her request for further information and that the SP did not have the further opportunity to respond to the specific breaches of the Code ultimately found by the adjudicator to have been breached, it is clear, as set out above, that the adjudicator is not obliged by the Code to do so. Although we encourage adjudicators to obtain as much information and feedback from members as possible, the adjudicators of WASPA are entitled to make findings based on the information before them (and those not before them that they consider relevant; section 13.3.7 (d) of the Code).

5.4.3 The Code furthermore, makes provision for an appeal process and allows certain sanctions to be suspended pending an appeal. The SP therefore had the opportunity to respond to all allegations made against it by way of this appeals process. The SP furthermore did not suffer any “*harm*” as a result of the process because all sanctions were suspended pending the appeal. In this regard we specifically dismiss the SP's argument that ‘*potential harm to the reputation and business practices*’ of the SP resulted from the fact that the adjudicator's report was published on the WASPA website. It is standard practice for WASPA to publish adjudication reports on its website and it is a practice which has been applied consistently from the inception of the adjudication process and has applied equally for all members. It is also an important way of ensuring transparency, and creating certainty and a body of precedent.

5.4.4 Although the Code of Conduct exists within the broader context of law, WASPA complaints are determined within the very narrow and strict context of the Code of Conduct. Emergency panels, adjudicators and this panel apply and base decisions on an industry Code of Conduct, which forms the very basis of the self-regulating industry in order to protect special and specific industry needs and principles (such as consumer confidence) to which every member of the industry has committed its self. This panel does not agree with the SP that any of the SP's rights to either due process or natural justice mentioned in its grounds of appeal were violated

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and nor do we believe breaches of the Code should be justified or defended with arguments based on the broader context of the law not specifically relevant to the specific breaches of the Code. The ground of appeal regarding the violation of the SP's rights to proper administrative procedure and due process are therefore not upheld. (See in this regard the comments made by this panel in the appeal report for complaint 5564. See also the detailed discussion on this and related matters in appeal 6858 and 6879.)

- 5.5 The period of close to nine months which it took to have the complaint adjudicated is admittedly less than ideal. This panel is not aware of the reasons it took nine months for the complaint to be adjudicated and we are not in position to make judgments in this regard but presume that reasons existed. This in any event has no influence on our decision apart from the fact that the delay informed our decision regarding the sanctions imposed as discussed below. We do not believe, as the SP would like us to believe, that the delay resulted in the adjudicator not only, considering altered market trends but also duplicating '*penalties*' pertaining to identical infractions. The adjudicator reached a decision in terms of a particular version of the Code in force at the time the complaint was lodged (version 7) and not in terms of '*market trends*' relevant at the time the adjudicator published the report. Furthermore – the adjudicator did not take note of '*infractions*' after the complaint was submitted but did take note of similar earlier (before this complaint was lodged) '*infractions*' of the Code by the SP which the adjudicator is quite entitled to do.
- 5.6 Regarding the '*legality of the service*' the SP admits that the service was '*not fully compliant*'. The reason the service was '*not fully compliant*' put forward by the SP in its grounds of appeal is that section 11.1.2 of version 7.0 of the Code was '*potentially confusing*' and that this section was consequently amended in version 7.4 of the Code. Section 11.1.2 of the Code deals with the issue of 'bundling' and the SP argues that version 7.0 of the Code was not sufficiently clear in that the use of competition or quiz items as part of a subscription service were not specifically prohibited - whereas these items were consequently specifically prohibited in version 7.4 of the Code. This, the SP argues is a clear indication that WASPA admitted the ambiguity of the section 11.1.2 in version 7.0 of the Code by subsequently amending the section.
- 5.6.1 It is true that WASPA constantly reviews and amends the Code. This is necessary for various reasons – including, to keep the Code up to date with evolving market trends and to make the Code as clear and unambiguous as possible not only for the benefit of service providers but importantly also, for consumers. What is however not true, as the SP suggests, is that a change in the Code necessarily points to the fact that WASPA admits that the previous version of the Code was '*confusing*'. An amendment of the Code surely does not make the previous version (version applicable to the complaint) of the Code invalid. Section 11.1.2 of version 7.0 of the Code is very clear as to its intention and the action it serves to

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address, in that the section clearly states '**Any request from a customer to join a subscription service *must be an independent transaction*, with the specific intention of subscribing to a service...**'. The service provided by the SP's IP clearly did not comply with this section irrespective of the fact that the words '*and may not be an entry into a competition or quiz*' were added in a subsequent section of the Code.

5.6.2 The SP relies on wordplay in an effort to convince this panel that the wording of the Code is '*potentially confusing*' and that this should serve as an excuse for breaching the Code. The wording '*potentially confusing*' used by the SP as an excuse and referred to by the SP in reference to complaint 4868 which contributed to the SP's '*confusion*' was used by the adjudicator in reference to the effect that the IP's services may have on 'consumers' and was not made in reference to section 11.1.2 of Code. To the extent that the SP considered the wording "*confusing*" it ought to have been more circumspect in applying the provisions. The SP also incorrectly states that complaint 4868 was adjudicated in terms of version 7.4 of the Code when it was in fact adjudicated in terms of version 6.2 of the Code.

5.6.3 This panel regards the wording of section 11.1.2 of version 7.0 of the Code to have been sufficiently clear as to the actions (bundling) it prohibits (other SP's have managed to comply) and we consequently do not accept the SP's ground of appeal that the Code was unclear or ambiguous as sufficient in order to be able to conclude that the IP's services were not in breach of this section of the Code.

5.6.4 The SP points out that the adjudicator takes into account that the service concerned does not comply with the pricing provisions of the Code with specific reference to section 6.2.5 of the Code. This section of the Code the SP argues, relates to premium-rated services and not to subscription services. In the view of the panel, section 6.2.5 of the Code should be considered together with Rule 9.2.1 of the Advertising Rules which deals with the pricing display requirements of subscription services advertised on websites and this should, in our view, have been referred to by the adjudicator. It is the case that on the facts, the pricing display of the IP's services is in contravention of section 9.2.1 of the Advertising Rules, specifically clauses 9.2.1.1 and 9.2.1.2, in that the access cost display in the IP's advertisement of its service did not comply with the requirements as stated in the Advertising Rules.

5.7 We have already addressed the SP's argument that the delay in the determination of the complaint was detrimental to the SP – see our comments in 5.5 above. In addition to the fact that the SP argues that the delay caused the adjudicator to apply '*the latest market trends*' as discussed in 5.5 above, the SP further argues that the delay was the cause that the sanctions imposed in the adjudication of complaint 7197

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were not taken into account by the adjudicator and that this has resulted in the SP and IP being penalised twice '*for the same infraction*'. According to the SP the adjudication of complaint 7197 makes the adjudication of this complaint (6708) 'null and void'.

5.7.1 It might be appropriate that 'a set of sanctions' be imposed if the same breach of the Code is addressed in more than one complaint – with multiple complaints to be viewed as a possible aggravating circumstance, although several obvious practical (timing) issues arise here. This is what is troubling in this case, and which to a large extent counters the SP's argument. The exact same service formed the basis of three complaints which were lodged over a period of roughly 10 months (complaint 4868 was lodged 18 September 2008; complaint 6708 on 1 June 2009 and complaint 7197 on 29 July 2009 – this period of 10 months is not the period of 9 months referred to by SP in its ground of appeal 8.2). The question can rightly be asked why the IP and the SP continued to provide a service in terms of which at least two previous complaints had been lodged? Is it not reasonable to assume that the IP and the SP should have at least attempted to ensure the compliance of a service during a ten month period – being aware of its possible shortcomings? Can the SP in such circumstances still argue that the principle of 'double jeopardy' applies? No complaint can be regarded as 'null and void' and according to this panel, every complaint is capable of adjudication in terms of the Code. Whether such a complaint is considered simultaneously with other similar complaints or separately is a matter of circumstance. Even so – we have taken the sanctions imposed in complaint 7197 into account in the determination of the sanctions as set out in 5.10 below.

5.8 This panel has stated its position regarding the relationship between IP's and SP's and the question of SP liability in terms of the Code on numerous occasions. In essence SP's are ultimately responsible for the services provided by their IPs. SPs cannot rid themselves of the responsibility for the services provided by their IPs by arguing that they are mere 'aggregators'. Such an argument is irrelevant. The Code applies whether the SP simply 'aggregates' or actually provides the services which are advertised and in terms of which revenue is earned. If an IP is a member of WASPA the IP can be addressed directly in a complaint lodged against its services. A number of circumstances such as the fact that the IP is not a member of WASPA, the fact that the SP played an active role in the adjudication or the fact that certain sanctions are imposed which requires the cooperation of the SP (such as suspension of services) can however warrant that the sanctions in a complaint be imposed on the IP and the SP member, or the SP member alone. The agreements concluded between SPs and their IPs should regulate their relationship in this regard. The statement by the SP that the adjudicator addressed the IP directly in complaint 4868 when the IP was not a member of WASPA is not an accurate reflection of the adjudication. The adjudicator addressed

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both the IP and the SP where appropriate in the adjudication and did not impose the sanctions on any one of the parties alone and definitely not on the IP alone. The IP was not a member of WASPA when the complaint was lodged. It was the SP that filed a response on behalf of the IP when the complaint was lodged. The sanctions imposed in the adjudication, such as the suspension of services and the detailing of revenue paid to the IP also required the direct cooperation of the SP. It is therefore reasonable that the sanctions were imposed on the SP.

- 5.9 We have taken note of the interactions between the SP and IP and between the SP, the IP and WASPA - which according to the SP indicates the bona fides on the part of the IP and the SP. Such interaction is to be encouraged and goes a long way to ensuring that services comply with the Code. We do however also note that these interactions only took place after the complaint had been lodged (and a long time after complaint 4868) and we can't help but wonder, why these interactions didn't take place before the service which included a number of breaches of the Code was advertised. We do not however, find it necessary to make a value judgment regarding the SP's bona fides and we will therefore not comment on the SP's allegation that the adjudicator *'implies an element of mala fides on the part of the IP'*.
- 5.10 The fact remains that the IP's service was in breach of the Code. These breaches can also be considered as serious and have resulted in numerous complaints and possible harm caused to consumers. We in principle, therefore agree with the adjudicator that a *'light sanction'* was inappropriate in the circumstances. This panel however needs to consider all the circumstances relevant to the appeal, including the circumstances brought to our attention by the SP in its grounds of appeal in reaching a decision that is fair. Considering that rather substantial sanctions were imposed on the IP in complaint 7197 (which according to WASPA were complied with in an exemplary manner) for essentially the same breaches, we find the sanctions imposed by the adjudicator to be unduly harsh. The sanctions imposed by the adjudicator are amended as follows:
- 5.10.1 As per adjudicator's sanction 1: This sanction becomes moot considering our decision regarding the other sanctions discussed below.
- 5.10.2 As per adjudicator's sanction 2: Sanction 2.1 is dismissed. We do not consider the payment of compensation to the complainant in an amount of R 1000 to be an appropriate sanction in the circumstances. Sanction 2.2 is overturned. Nothing in the Code empowers an adjudicator to impose a damages type award.
- 5.10.3 As per adjudicator's sanction 3: Considering the sanctions imposed in the adjudication of complaint 7197 sanction 3 is overturned.
- 5.10.4 As per adjudicator's sanction 4: The payment of the amount of R350 000 (by implication therefore also sanctions 4.1 – 4.5) is overturned. Considering that the fine in adjudication 7197 was suspended, the

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IP did not need to pay a fine. We are of the opinion that the breaches of the Code warrants the imposition of a fine and we hereby impose a fine on the SP in the amount R150 000 of which R75 000 is payable by the SP to WASPA within 5 days of the publication of this report. The other R75 000 of the fine is suspended for a period of six months. Should the IP or SP provide services which are in breach of the same sections of the Code the IP and SP are found to have breached in the complaint forming the basis of this appeal within a period of six months from the date of this appeal report – the suspended fine of R75 000 becomes payable to WASPA immediately.

5.10.5 Sanctions 5 – 8 as per the adjudicator's report are also overturned.

5.10.6 Both the IP and SP are issued with a formal reprimand for providing services in breach of the Code long after being aware that services provided by them may be in breach of the Code.

5.10.7 The appeal fee is not to be refunded.

5.11 Additional Comment

5.11.1 In its initial reply to the complaint the IP made the following statement:

'This service was operating over 6 months ago and any site has long since been deleted due to our policy of only having live sites present on our systems to ensure that we do not have non-compliant 'old' sites accessible by customers (we are currently marketing mind50y)....Thankfully, I have managed to find some screenshots of a site that was connected to mind50w...'

5.11.2 Although this had no bearing on our finding in this appeal on the facts, we do consider it necessary to mention that a number of IPs and SPs have used poor or no record keeping as an excuse for not properly responding to a complaint in a timely way or at all. Proper record keeping is not only required by law (for example revenue laws and company laws) but can also be of critical importance when evidence is required in the process of adjudicating a complaint. Service providers are warned that they run the risk of a negative inference being drawn from the fact that proper records cannot be provided if they are requested to do so, and that failure to keep or be able to produce records will not be considered to be a mitigating factor. The panel will recommend to WASPA that the Code be amended to suggest that records in relation to wireless application services of all kinds, be kept for a minimum period.

By way of example, the Promotion of Access to Information Act, 2 of 2000, as amended, which purpose is to facilitate access to

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information (records) to any person entitled to institute or defend a claim, has penalties of up to R2m in instances where a public or private body (such as a WASP), destroys, alters or fails to keep records following a request for informationⁱ.

As such, while services offered might be taken off line, it may be prudent to keep records, screenshots and proper version control on all terms and conditions and related documentation.

ⁱ **Offences**

90. A person who with intent to deny a right of access in terms of this Act—

(a) destroys, damages or alters a record;

(b) conceals a record; or

(c) falsifies a record or makes a false record,

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.