

**WASPA appeals panel
Complaint 9751**

REPORT OF THE APPEALS PANEL

Date: 28 June 2011

Appellant and Service Provider: Exactmobile

Information Provider (IP): /

Complaint Number: 9751

Applicable versions: 9.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns an anonymous complaint lodged on 18 June 2010.

1.2 The SP is a full member of WASPA. The SP is only appealing against the sanctions imposed.

1.3 The complaint relate to subscription services, more particularly, alleged breaches of clause 11.2.2 of the WASPA Code of Conduct (Code) which seeks to prevent “bundling” of content with a subscription service.

1.4 The complaints, the findings of the Adjudicator, the SP’s response to and appeal against the complaint, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel’s report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The complaint relates to alleged breaches of section 11.2.2 of the Code, which reads:

2.1.1 Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR

3.1 Finding of the Adjudicator

As it is only the sanctions that are appealed, we note only the findings on sanctions:

- The SP is directed to pay a fine of R80 000 to WASPA within 7 days of the publication of this report.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 9751

4.1.1 The grounds for appeal are recorded (that is copied exactly as submitted, errors included) and paragraphed as follow:

Promotional competitions and the mechanics around them have always been regarded as a controversial and arguable point with many WASPA members. Indeed the Code of Conduct has recently been updated and under the latest version of the Code (Version 10) this advert would have been allowed as per this clause:

11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

Given that in the advert in question the competition was ancillary to the subscription service, Exactmobile is compliant with the new clause 11.2.3, as a review of the advert would show.

Hence we believe that the quantum of the fine is excessive and should be reviewed as the change to the Code indicates that our 'crime' is no longer even considered as such.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The complaint was made on 18 June 2010. Version 9.0 of the Code, in use from 31 March 2010 to 13 October 2010, applies.

5.2 Finding

5.2.1 It is noted that the Appellant is only appealing the penalty of R 80 000.00 imposed by the Adjudicator. It is therefore not contending its guilt, and subsequent breach of section 11.2.2. as it stood at that time.

5.2.2 The Appeals Panel therefore only deliberates on the penalty imposed.

5.2.3 The gist of the appeal is that the Appellant believes that under Version 10 of the Code it would not have been guilty of an offence, and the sanction is therefore too severe.

5.2.4 The reality is that the advertising was done, and the matter adjudicated, at a time when Version 9 of the Code was in force.

5.2.5 It is therefore largely irrelevant that the Appellant might not have been found guilty now, as it was found guilty of a serious offence at the time.

5.2.6 If the transgression was now more severe under Version 10 of the Code, the Appellant would be justifiably outraged if its sanction was increased as a result.

5.2.7 Amendments to the Code do not apply retrospectively, and nothing in this decision should be read to imply otherwise. We will therefore not be considering whether or not this matter falls within the ambit of version 10 of the Code.

5.2.8 This having been said, the panel has revisited the merits of the decision. These merits are not the subject of an appeal and as such we cannot overturn

them. We can merely ask if mitigating factors exist that should decrease the sanction.

5.2.9 We are of the opinion that this is not a “classic” breach of Clause 11.2.2 in that it does not use a competition to lure an unsuspecting entrant into a subscription. It is very clearly a subscription service with an added benefit of a competition.

5.2.10 We therefore do not agree with the Adjudicator that this was a flagrant breach of Clause 11.2.2.

5.2.11 **As such, we reduce the sanction to R 10 000,00.**

5.2.12 The cost of appeal is non-refundable.