



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Exactmobile
Information Provider (IP) (if any)	s/a
Service Type	SMS offers
Source of Complaints	Adjudicator's report 0626
Complaint Number	1019
Date received	15 February 2007
Code of Conduct version	4.8

Complaint

This complaint was instituted by the Secretariat pursuant to an instruction from the WASPA Adjudicator who adjudicated on complaint no. 0626. The Service Provider was the complainant in complaint 0626. In its response to complaint 0626, Xcite Mobile raised a number of contraventions of the same sections of the code which formed the subject matter of that complaint by the Service Provider.

The details of the complaint are as follows:

"The Secretariat is instructed to institute a complaint against the complainant in respect of a breach of clause 11.1.1 of the WASPA Code of Conduct with regard to the example SMS advertisement dated 10 August 2006 provided by the IP and emanating from the complainant."

"The Secretariat is instructed to institute a complaint against the complainant with regards a breach of Clause 11.2.4 of the WASPA Advertising Rules in respect of the three SMS messages dated 10 August, 19 August and 17 October 2006, provided by the IP and emanating from the complainant."

SP Response

The Service Provider responded to the allegation that it had committed a breach of 11.1.1 of the Code of Conduct in respect of an SMS offer sent on 10 August 2006 as follows:

“Firstly, if Xcite Mobile had been aware that the SMS sent was in breach of the code then Xcite should have lodged a complaint directly. To use Exactmobile’s breaches as a justification for it to breach the rules is not acceptable. Two wrongs do not make a right. Exactmobile lodged this complaint against Xcite Mobile as Xcite Mobile was infringing on the code when Exactmobile had just been ruled on.

Secondly, this specific SMS was ruled against in complaint number 408. This ruling was received on the 23rd October 2006. The complaint was lodged on the 7th September 2006. On receipt of the ruling, Exactmobile’s SMS messages were changed to conform to the code. Therefore had Xcite Mobile lodged this complaint when they received the SMS, then this complaint would have been dealt with in complaint 408.”

The Service Provider responded to the allegation that it had committed a breach of 11.2.4 of the Advertising Rules in respect of SMS offers sent on 10 and 19 August 2006 and 17 October 2006 as follows:

“Section 11.2.4 of the Advertising guidelines states “Contact details of the sender are obligatory. The contact details must not use any Premium rated fax, PSMS, USSD, WAP or IVR lines. A Web site address is the preferred method.

The SMS in question are as follows:

SMS 1

Reply YES to this SMS for a new Alarm Tone. Eg Traffic Cop, Kom Nou Frikkie) or weird Sound (Groen Knoppie, Ticking Bomb) from eXactmobile.

SMS 2

Open up a new world by going to www.exactmobile.co.za/now on yr phone. Get instant access to the latest content, Full Track Downloads, Chat NOW! And so much more.

SMS 3

Kry die Robbie Wessels Leeuloop Polyphonic (R5), True Tone (R15) of Full Track Download (R20) deur Leeu to SMS na hierdie nommer. Slegs by eXactmobile

As can be seen from each of these SMS the name Exactmobile is present and in the second SMS the full web site address is given.

Exactmobile owns the domain Exactmobile and therefore any user either searching for Exactmobile or going to www.exactmobile.co.za or www.exactmobile.com will find Exactmobile.

Exactmobile therefore believes that it is providing the contact details of the sender as the name of the company is provided.”

Sections of the Code considered

The Code

11.1.1 Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”.

The Advertising Rules

11.2.4 Contact details of the sender are obligatory. The contact details must not use any premium rated fax, PSMS, USSD, WAP or IVR lines. A web site address is the preferred method.

Decision

Regarding the first ground of the complaint in respect of section 11.1.1 of the Code, I accept the Service Provider's argument that the breach of this section of the code in relation to the SMS sent on 10 August 2006 has already been dealt with in a previous complaint. In the absence of any evidence that the Service Provider has committed a further breach of this section of the code after the date of receiving notification of that ruling, i.e. 23 October 2006, I cannot adjudicate on the same issue again according to the principle of *res judicata*.

With reference to the second ground of complaint, i.e. contravention of 11.2.4 of the advertising rules, I wish to make the following preliminary point. Although the section does not prescribe what contact details are to be furnished by the Service Provider, I am of the view that more than just a name must be given. The purpose of the section is to ensure that users and consumers are able to contact service providers without too much difficulty and at little or no cost.

Section 11.2.4 of the advertising rules recommends that a website address should be given in the SMS and if this section is read with section 4.1.3 of the Code, which provides that each member must provide the following information on its website:

- registered company name
- telephone and fax numbers
- e-mail addresses; and
- physical address,

then it would appear that a user or consumer would be given a reasonable opportunity to be able to contact the service provider.

In the present complaint, 3 SMS messages have been referred to wherein only the name of the Service Provider appears in 2 and its web site address appears in the 3rd. I am of the view that the use of a name alone is not sufficient for the purposes of section 11.2.4 and the Service Provider has therefore failed to provide contact details in respect of the messages sent on 10 August 2006 and 17 October 2006.

It is sufficient for the Service Provider to list its website address in the body of the message.

I therefore find as follows:

- 1) the complaint against the Service Provider regarding a breach of section 11.1.1 of the Code is not upheld;
 - 2) the complaint against the Service Provider regarding a breach of section 11.2.4 of the Code is upheld in respect of the SMS messages sent by the Service Provider on 10 August 2006 and 17 October 2006.
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Sanction

The Service Provider is issued with a formal reprimand and is required to remedy its breach of section 11.2.4 of the Advertising Rules by including either its website address or a contact telephone number or e-mail address in the body of all SMS offers sent by the Service Provider and/or any Information Provider using its services.