

REPORT OF THE APPEALS PANEL

Date: 5 May 2013
Appellant (SP): TIMWE
IP: MIRA NETWORKS
Complaint Numbers: 12751 & 13397
Code of Conduct Versions: 9.0

1. INTRODUCTION TO THIS APPEAL

- 1.1 This appeal report concerns the adjudication of two complaints; numbers 12751 and 13397.
- 1.2 The panel deals with the appeals against the findings of the adjudicator in these two complaints in one report because both the complaints were lodged against the same service provided by the same SP. The findings of the adjudicator and the appeals filed by the SP are in all material aspects close to identical.
- 1.3 Both the complaints were lodged against the SP's 'Top Music Club' service by complainants who were both subscribed to the SP's service. Complaint 12751 was lodged on 2 May 2011 and complaint 13397 on 17 June 2011.
- 1.4 The crux of the complaints was that both complainants denied that they had subscribed to the SP's service. They were also not satisfied with the responses from and evidence provided by the SP. The complainants were unsubscribed from the SP's service but decided to escalate the complaints to the formal system for adjudication after the SP denied both of their requests for a refund.
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2. THE ADJUDICATOR'S DECISION

- 2.1 The panel would like to point out that we find the adjudicator's reports for both the complaints to be very short and lacking the necessary detail we feel is required to properly explain the adjudicator's thinking in reaching the decisions that the SP had breached certain provisions of the Code.
- 2.2 In both the adjudicator's reports the adjudicator quotes a number of clauses of the Code namely clause 11.2 (subscription process), clause 11.3 (subscription initiated via web or wap), clause 11.5 (welcome message), clause 11.6 (reminder messages), clause 11.8 (reminder

message for wap services), clause 11.9 (termination of the service) and clause 11.10 (subscription service directory and logs).

2.3 It is unclear why the adjudicator chose to quote all of these clauses in full (all subsections included) without proceeding to explain why the adjudicator is of the opinion that these clauses and sub-clauses are considered relevant. No insight is provided into which specific clauses were considered to have been breached, or not, and for what reasons. After quoting the above-mentioned clauses of the Code the adjudicator merely concludes with the following identical phrases under the 'decision' heading of the reports:

2.3.1 Complaint report 12751:

'The SP has not provided any evidence that a confirmation page was displayed to the complainant after the relevant pin code was entered on the web page.'

"The SP's welcome message also does not contain the word 'welcome'.

The complaint is accordingly upheld."

2.3.2 Complaint report 13397:

"The SP has not provided any evidence that a confirmation page was displayed to the complainant after the relevant pin code was entered on the web page.

The SP's welcome message also does not contain the word 'welcome'.

The complaint is accordingly upheld."

2.4 The adjudicator imposed the following sanctions with regard to complaints 12751 and 13397 respectively:

2.4.1 Complaint 12751:

"The SP is ordered to refund all amounts charged to the complainant in respect of the subscription service in question.

A previous complaint (10379) was upheld regarding this same service (Top Music Club) as a result of the SP's non-compliance with the provisions of clause 11 of the WASPA Code of Conduct. The SP is therefore fined the sum of R50 000."

2.4.2 Complaint 13397:

"The SP is ordered to refund all amounts charged to the complainant in respect of the subscription service in question.

Previous complaints (10379; 12751) were upheld regarding this same service (Top Music Club) as a result of the SP's non-compliance with the provisions of clause 11 of the WASPA Code of Conduct. The SP is therefore fined the sum of R50 000."

3. SP's GROUNDS OF APPEAL

3.1 It should be noted that the SP lodged the same grounds of appeal in respect of both the adjudications appealed against. The grounds of appeal which follow are therefore in respect of the adjudications of both complaints 12751 and 13397.

3.2 The SP explains by way of introduction that it uses 'Club NATTA' - a service that offers entertainment content, such as music, games and images 'downloadable to mobile devices'. In order to receive the content a customer needs to register (subscribe) to the service and pay a subscription fee.

3.3 The SP continues its appeal by referring to 'records' (logs) kept by both the SP, and its IP, Mira Networks, (attached as annexures B to the appeals) as proof that:

3.3.1 In complaint 12751: "*the complainant subscribed one (1) club from one (1) campaign on December, 14th 2010 at 08h03 from the IP address 196.25.255.194.*"

3.3.2 In complaint 113397: "*the complainant subscribed one (1) club from one (1) campaign on February, 2nd 2011 at 17h33 from the IP address 198.54.202.194.*"

3.4 The SP further states that information provided to potential subscribers on the 'webspot' explains that "*from the time the user enters his phone number and confirms his request by inserting a PIN Code he has entered into a subscription*". This is then followed by a quote of the wording provided on the 'webspot' as substantiated by Annexure C, which includes screenshots of the 'webspot' of the campaign which forms the subject of the complaints.

3.5 According to the SP the *subscription is only possible through a voluntary request of the user, once you enter your mobile number in the webspot. Later due to its application, the user receives a message with a PIN Code or password on his phone.*

3.6 The SP then provides a step by step exposition of the process and the steps undertaken during the subscription process as well as all the information provided to the subscriber in the terms and conditions available to the subscriber displayed on the webspot.

3.7 The SP consequently avers that "*In this sense, the user had access to all information of the terms and conditions of the contract directly on your mobile voluntary after inserting the password in the webspot.*

It is therefore abundantly clear to the client from the moment they enter the PIN Code, that they were subscribing to a subscription service with downloadable content, which had a cost of R4,99 per day, and also has at its disposal all information necessary to terminate and cancel the subscription."

- 3.8 Turning to the questions of how and when the complainants were unsubscribed from the service the SP states that *“The same user unsubscribed all service... (on February 22nd 2011 in complaint 12751 and April 19th 2011 in complaint 13397) by following the instructions above by using the help line services. In this case the claimant had at his disposal the information indicated since he received the confirmation message, and also in the webspot, which contains the message ‘To unsubscribe at any time service must dial *120*33535 and follow the menu at 0.01c/sec.’”*
- 3.9 After again reiterating that the ‘users’ of the SP’s services are subscribed voluntarily, the SP claims that weekly ‘warning messages’ (meaning reminder messages we presume) are sent to subscribers stating that *“the user will be able to cancel all their subscriptions.”*
- 3.10 The SP then explains that the short period of time *“between the message sent with the password and the message confirming the subscription is perfectly normal since the users are in front of their computer waiting to receive the password which is a short word that they immediately insert in the webspot and submit, therefore a few seconds is deemed to be more than enough.”*
- 3.11 After summarising its arguments as stated above, the SP is of the opinion that it *“did everything to be compliant”* the SP states that it is of the opinion that the decision reached by the adjudicator is ‘excessive’ and the SP therefore asks that the SP be *“acquitted of any and all sanctions or that the values of the sanctions be reduced.”*
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4. FINDINGS OF THE APPEALS PANEL

- 4.1 The panel finds it necessary to encourage service providers not only to keep proper and detailed records such as logs and screenshots of all the services they provide but also to supply as much relevant information as early as possible in the complaint process. We also encourage adjudicators to ask for additional information (for which the process allows) if enough information is not supplied by service providers when considering a complaint. This will certainly assist in complaints being resolved at an earlier stage and will allow adjudicators to reach informed, consistent and objective decisions.
- 4.2 This panel has no reason to doubt the authenticity or the factual correctness of the logs provided by the SP (which according to the SP’s appeal document correspond with those of its IP, Mira Networks) and must therefore take these logs at face value. According to the logs provided, the complainants did in fact subscribe to the SP’s subscription service, and did so in a manner not inconsistent with, or in breach of the Code.
- 4.3 Unfortunately the adjudicator did not specify exactly which sub-clauses of clause 11 he or she considered to have been breached. However, we cannot find on the evidence before us, that as averred by the complainants in lodging the complaints, the complainants were unaware that they were subscribed to the subscription service of the SP and that the SP’s service was therefore in terms of its subscription method in breach of the Code.

- 4.4 The 'double opt-in' process which includes the insertion of a pin code as employed by the SP is consistent with the subscription provisions of the Code.
- 4.5 The SP's grounds of appeal which dispute the fact that the complainants were subscribed to the SP's service without their knowledge, and therefore in contravention of the Code, are therefore upheld.
- 4.6 As mentioned above, the adjudicator unfortunately and confusingly did not specify exactly which sub-clauses of clause 11 were deemed to have been breached. The adjudicator only refers to the fact the SP did "*not provide any evidence that a confirmation page was displayed to the complainant after the relevant pin code was entered on the web page*" and that the '*SP's welcome message also does not contain the word welcome.*'"
- 4.6.1 The SP did provide the panel with a screen shot of the 'welcome message' or 'confirmation page' in its '*South Africa Campaigns*' diagram contained in annexure C to its appeal, that was it seems, not provided to the adjudicator. This 'welcome message' or 'confirmation page', does not, however, contain the information as required by clause 11.5 of the Code and in this regard, is in breach of the Code.
- 4.6.2 The logs provided by the SP also do not include or reflect any welcome messages sent to the complainants. In complaint 12751 the only message sent to the complainant after the complainant entered the pin code to confirm the subscription reflected on the logs provided to the panel reads: "*Click to get the coolest games now!*".
- 4.6.3 In complaint 13397 the only two messages sent to the complaint after entering the pin code to confirm the subscription reflected on the logs provided to the panel read: '*33535 & follow the menu (1c/sec). Helpline (0) 861106472!*'. It is therefore not possible for the panel to reach a different conclusion than that reached by the adjudicator in that the SP's 'welcome message' did not comply with section 11.5 of the Code considering that the screen shot of the 'welcome message' or 'confirmation page' in its '*South Africa Campaigns*' diagram (attached as annexure C to its appeal) similarly does not comply with clause 11.5 of the Code. The welcome screenshot provides none of the prescribed information but merely consists of the word 'welcome'. The 'welcome message' as provided to us in the SP's annexure C, also does not, as stated above, comply with the provisions of the Code.
- 4.6.4 The SP's grounds of appeal with regards to the 'welcome message' are therefore dismissed.
- 4.7 It is within the ambit of the Code (clauses 14.6.7, 14.6.9 and 14.6.11) and within the powers of this panel to consider the facts before it and find breaches apart from those possible breaches for which the complaints were lodged or those found by the adjudicator. On the evidence before us, including the logs and the '*South Africa Campaigns*' diagram attached as annexures B and C to the SP's appeal, it is our opinion that it is entirely possible that adjudicator may have considered other clauses of the Code to have been breached and have taken these breaches into consideration in determining the sanctions.

- 4.8 We have, however, taken into consideration the fact that the adjudicator's decision was not specific enough regarding the sub-clauses of clause 11 which the adjudicator may have found to have been breached, and accordingly may have taken into consideration in determining the quantum of the sanction. As a result of the less than detailed and non-specific decision reached by the adjudicator, the SP did not have the opportunity to respond and present grounds of appeal in defence of other perceived breaches of the Code that the adjudicator only very generally described as "non-compliance with the provisions of clause 11 of the WASPA Code of Conduct". We have consequently not taken any other possible breaches into consideration in reaching our decision regarding sanction in paragraph 4.11 below.
- 4.9 It is unclear from the adjudicator's reports exactly which breaches (of which clauses of the Code) and the exact number of breaches the adjudicator has taken into consideration in determining the quantum of the sanction and therefore, difficult for this panel to establish whether it regards the sanctions imposed by the adjudicator to be fair.
- 4.10 We are further of the opinion – considering that both these complaints were lodged in terms of the same service and were considered by the same adjudicator – that the sanctions imposed by the adjudicator in the individual complaints effectively boils down to a duplication of sanctions. We therefore consider the combined monetary sanction of R100 000 to be severe and unfair in the circumstances.
- 4.11 The SP's appeal regarding the quantum of the sanction is therefore upheld.
- 4.12 We impose a sanction of a total amount of R20 000 (combined sanction in respect of each of complaint 12751 and 13397 which we have considered together in this appeal) because the SP's welcome message in each case was, on the facts, in breach of clause 11.5 of the Code.
- 4.13 The appeal fee should not be refunded.