

REPORT OF THE APPEALS PANEL

Date: 3 August 2011
Appellants: W2mobile GmbH (Germany)
Complaint Number: 8200
Code version: 8.0

1 INTRODUCTION TO THIS APPEAL

- 1.1 Although the SP itself is not a South African company, as an affiliate member of WASPA it appears to have submitted to WASPA's jurisdiction.
 - 1.2 We note from the SP's appeal that the WASPA Monitor had apparently investigated the SP prior of the date of the complaint and found that the SP's services were, in that person's opinion, compliant.
 - 1.3 This is, however, irrelevant to the complaint and therefore to our consideration of the appeal because the complaint stands on its own feet.
 - 1.4 Please also note that although the appellant relies on version 9.0 of the Code, the applicable version at the time of the complaint was 8.0.
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2 THE HISTORY OF THE MATTER

- 2.1 The complainant claimed to have been subscribed to a service that he did not wish to subscribe to and had not, to his knowledge, subscribed to it. He attempted to unsubscribe on several occasions without using the word STOP or any recognised equivalent and became frustrated. His frustration increased further when he was not able to contact anyone with authority regarding debits to his cellphone account, or to obtain more information about the service.
- 2.2 The complainant required full disclosure (through WASPA) of:
 - 2.2.1 How the SP operates and their method of charging and billing;
 - 2.2.2 Their physical address and bank details in SA;
 - 2.2.3 Proof of his subscription to the SP's "Totally Embarrassing Club"; and
 - 2.2.4 How funds were deducted from his account without confirmation from him or any communication to him that this would be done.
- 2.3 When contacted by WASPA the SP indicated that the complainant's number was entered on a website (www.mobile-africa.net/total-embarrassing). He was then sent a WAP push invitation for the SP's

service to which he replied by accessing a link to subscribe to the service, on the SP's version (confirmed by the logs) and they sent him a welcome message on the same day. The SP advised that it had refunded the complainant in full as a gesture of good faith and replied to all of his queries in various pieces of correspondence.

- 2.4 The complainant denied having ever subscribed to the service despite indications to the contrary on the SP's logs, copies of which were submitted to WASPA.

3 DECISIONS OF THE ADJUDICATOR

3.1 *Findings of the adjudicator*

- 3.1.1 The adjudicator considered the possible breaches of numerous sections of the Code which are set out in full in the adjudicator's report. We have not repeated them all as the adjudicator did not make a finding of breach of all of them, and the appeal relates only to the findings made in relation to sections 4.1.3 and 6.2.12.

- 3.1.2 Section 4.1.3 provides that "*Each member must provide their full contact details on the member's website, including the registered company name, telephone and fax numbers, email address and physical address*".

- 3.1.3 The adjudicator found that when accessing the SP's URL on 10 March 2010, the link directed the user to a promotional page for an "Extreme TV" content subscription service run by the SP and did not contain any information regarding the SP's registered company name and physical address. The SP was therefore in breach of section 4.1.3.

- 3.1.4 Section 6.2.12 provides that "*For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:*

(a) *If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation;*

(b) *If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction and must be visible on the same screen as the link;*

(c) *If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link."*

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- 3.1.5 The adjudicator understands the SP's version to be that the complainant or someone using his phone accessed a link on a WAP message in October 2009 and thereby opted in to a service and was subscribed and billed for WAP push messages to access content items for 5 days during the period 23 October to 17 November 2009, which is confirmed by the SP's log. The adjudicator found that the SP did not obtain specific confirmation from the complainant as required by section 6.2.12 and did not keep a record of the transaction, and was therefore in breach of section 6.2.12.
- 3.2 *Sanctions*
- 3.2.1.1 Although the adjudicator noted that the SP had not previously been complained about or found against by WASPA, on the basis that the SP's URL did not link to a page with adequate information about the SP, the adjudicator held that there was a "lack of transparency".
- 3.2.1.2 The adjudicator also noted that WAP-initiated transactions were strictly regulated to protect users from being subscribed to services unwittingly.
- 3.2.1.3 The adjudicator imposed a fine of R75,000; required the SP to provide the Secretariat with an alternative URL for a website with all relevant information under section 4.1.3 of the Code; and ordered the SP to suspend its Total Embarrassing Club subscription service until it could prove compliance with section 6.2.12 of the Code.

4 GROUNDS OF APPEAL

- 4.1 In a short appeal, the SP notes that it has no office in SA and therefore was not able to give the complainant these details, its offices are in Germany. We note that this would certainly have accounted for the complainant's difficulty in contacting anyone regarding his concerns and urge WASPA members and most particularly international members to establish mechanisms that will enable consumers in South Africa to easily contact them. The Code at section 4.1.9 requires members to provide telephonic support on a South African telephone number which must function properly.
- 4.2 The SP referred then to the adjudicator's inspection of its website at www.mobile-africa.net in March 2010 and noted that the finding made against it by the adjudicator on the basis of the promotion for a different subscription service from the one complained of and therefore the adjudicator's finding of breach of section 4.1.3 was erroneous in that the adjudicator had considered the wrong page. The panel notes at this point that the SP does not deny that even the new promotional page does not meet the requirements of section 4.1.3 although in truth when the panel

considered this (which is obviously more recent than when the complaint was filed), only the fax number was missing. We note that the fax number is still missing.

- 4.3 In addition, the SP notes that the Monitor had approved certain content of the site in September 2009. We have already noted in our introduction that this is irrelevant to the complaint and do not consider this ground of appeal further.
- 4.4 The SP then refers to its slide presentations dated August 2010 in support of the fact that it has amended its WAP subscription flow, and states *“Please also be advised that the service flow described above [by the adjudicator] is no longer current.”* However, the adjudicator and therefore the panel must make a finding on the basis of the facts as they were at the time of the complaint. Subsequent changes made by the SP may be valuable and render their service compliant at a later date, but the complaint was made based on the level of compliance or absence of it, at the time the complaint was made. The slide presentation is therefore of no bearing on this matter except as we indicate below in part 5 of this report.
- 4.5 The SP denies, however, that even at the time of the complaint the simple act of accessing a WAP link would have subscribed the complainant. The SP avers that *“The complainant was sent a WAP link to a promotional page, which he accessed using his mobile device. Simply accessing this page does not enter the user into a subscription service”*. The SP goes on to say that *“To enter a subscription, a user – including in this instance, the complainant – must click further on one of the screen shots and download it to his handset, when the make and model of the handset used to subscribe is recorded by our system (in this case, a Nokia 6680.”* The SP confirms that the complainant took all of these actions by furnishing the logs for the complainant’s MSISDN.
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5 FINDINGS OF APPEALS PANEL

- 5.1 We note that the SP submitted with its appeal 2 slide presentations indicating how subscribers would access WAP services and subscribe. The one presentation is titled “Subscription Service Flow ZA PRE-Code of Conduct 9.0” and dated August 2010. The second is called “Subscription Service Flow ZA POST-Code of Conduct 9.0”, with the same date. We assume the PRE-Code slides must apply in this case since we are dealing with a complaint under v8.0 of the Code.
- 5.2 On the last page of these slides, we note that the description of subscription initiation reads *“By clicking on video subscription, customer initiates **both** a download of the selected video **as well as a subscription**, which allows unlimited downloads during the subscription period”*. The emboldening and underlining of the words is our’s.

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- 5.3 We confess to being slightly confused by the wording of the appeal in relation to the act of subscription given the explanation on the slides presented by the SP in support of its appeal, and its own words in the appeal itself. It would seem that it was, at the time of the complaint, sufficient to click on a video link to download **and** subscribe. This is certainly not how the Code requires subscription to take place. It is however very difficult to assess compliance without proper records having been furnished to ourselves or the adjudicator which records detail the procedure as it was.
- 5.4 We are less confused about compliance with section 4.1.3. It is clear that at the time of the complaint the SP was not compliant and the SP it admits as much. We endorse the finding of the adjudicator in relation to the breach by the SP of section 4.1.3.
- 5.5 Given the confusion surrounding the actual method of subscription and the lack of evidence provided by the SP to substantiate compliance, we have taken into account the fact that the SP has, since the complaint, made several changes to the method of subscription which would appear to eradicate the possibility of subscribing a user at the same time as providing them with content, in other words, the process of subscribing in future is likely to be compliant with the requirements of the Code on the basis of what the SP has set out in its appeal. We cannot say often enough how important it is that SPs keep proper records.
- 5.6 In all the circumstances however, we find the level of fine to be high.
- 5.7 Accordingly:
- 5.7.1 we reduce the fine from R75,000 to R20,000 which must be paid by the SP to WASPA within 5 (five) days of the date of this report;
- 5.7.2 we require the SP to furnish WASPA with confirmation that all details for contact and complaints appear on its site in accordance with the requirements of the Code; and
- 5.7.3 the SP is directed to note and comply with the requirements of the Code in relation to both subscription and the use of WAP.
- 5.8 The appeal is dismissed. The appeals fee is not refundable.