



REPORT OF THE ADJUDICATOR

WASPA Member (SP): Via Media (Pty) Ltd

Information Provider

(IP): Xcite Mobile
(if applicable)

Service Type: Subscription service

Complainant: Gavin Penkin, competitor company representative, director of eXactmobile

Complaint Number: 0077

Adjudicator: Kerron Edmunson

Complaint

In summary, a complaint was received from the complainant in which he states that the advertisement for downloads published in You and Huisgenoot magazines dated 3 November 2005 and in Huisgenoot dated 17 November 2005 by Xcite Mobile contravenes section 1.1.2 (manner of subscription) (we assume this is intended to refer to section 11.1.2 of the Code), section 6.2 (pricing of services) and specifically section 6.2.5 (pricing must not be misleading) of the WASPA Code in that:

- “Section 11.1.2: this section clearly states that a request to join a subscription service must be an independent transaction, with the specific intent of subscribing to a service. It further states that a request to join a subscription service may not be bundled with a request for specific content.
- Pricing: the advertisement prominently states that content costs R1.00 yet in the fineprint it says you must join the club for R5.00 per week.”

SP Response

The SP has responded by stating that the claim that there is a breach of section 11.1.2 (bundling) was addressed in the response to complaint 0052, and the claim that there is a breach of section 6.2.5 (pricing clarity) has been addressed in the response to complaint 0062. The SP also notes that all 3 advertisements are identical with respect to the elements at issue.

Consideration of the WASPA Code

Section 6.2.4:

This section of the Code provides that pricing contained in an advertisement must not be misleading, and if multiple communications are required to obtain consent, then

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the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.

The adjudication of complaint 0052 considered various aspects of the complaint, including whether the formal process should apply or not, but ultimately found that there was no breach of the Code in relation to subscription services.

I have also considered complaint 0062. In that complaint I considered the provisions of section 6.2.4 on which the complaint in relation to an advertisement published in the Huisgenoot dated 3 November 2005 was then based, and found that the SP did not contravene section 6.2.4 of the Code in the manner alleged.

Having taken all relevant facts into account in this matter, I do not uphold the complaint in this matter for the following reasons:

Substance of the complaint	Advertisement
The advertisement states only R1.00 for members	True, but it also states that non-members, MTN and Cell C subscribers pay R5.00, both in the area of the code (where R5.00 appears in a star), in the section headed "Join a club", and in the terms and conditions
A typical user will not know what the membership is and will request an item per the codes supplied for the content	The advertisement refers the reader to a section marked "Join a club"; and the reference to the R5.00 subscription fee appears 5 times within the advertisement with reference to the club membership, cost of subscription and entitlement
The user will expect to pay R1.00 but in the fineprint it states that if you are not a member you pay R5.00	An obvious and substantial portion of the advertisement states that non-members pay R5.00 as set out in the two blocks above, this is not stated only in the terms and conditions, and this is repeated several times in the text.

Section 6.2.5:

This section provides that the price for a premium rated service must be clearly and easily visible in all advertisements. The price should appear with all instances of the premium number display.

The advertisement is set out in a rectangle with the top section divided into 2 parts, one on the left which refers to the R1.00 fee for access to services, and the part on the right referring to the premium rate number, divided by the name "Xcite Mobile". Below this border the text is divided into 4 parts, a column down each side on the exterior of the rectangle which describes various content, and 2 columns in the centre. The left hand inner column deals in detail with club membership and the cost, and the innermost right hand column states that "non-members and MTN, Cell C R5.00 SMS code to 31314". This is the R5.00 which is pictured in a star.

For purposes of this complaint I found it useful to consider this section in its 2 parts:

- Price to be clearly and easily visible
- Price to appear *with* all instances of the premium number display

The price for the premium rated service is clearly visible being incorporated into a star, highlighted and repeated in text on several occasions. Whether or not it is displayed "with" the premium number is more complex.

To understand the term "with" I considered the WASPA Advertising rules which state that for magazine advertisements "for each unique access number, the full cost of access must be displayed *immediately below or above or adjacent to* the unique

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access number or content access code...". For completeness I also considered a dictionary definition of "with" which indicated that it could mean "having as a possession, attribute or character" or "an accompanying detail".

In my view, whilst the first part of section 6.2.5 has been complied with, the second part could be improved upon since the reference to R5.00, albeit incorporated in a star, appears below the access number and not in the same border as the R1.00 appears in on the left hand side. The right hand border described above only contains the access number with a suggestion that the reader send an sms to the premium number.

I therefore find that the complaint in relation to an alleged breach of section 6.2.5 should be upheld.

Section 11.1.2:

At the outset, I note that the complainant has not quoted this section correctly in that section 11.1.2 of the Code does not state that a request to join a subscription service may not be bundled with a request for specific content, but merely that any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service.

In any event, it is clear that on its ordinary interpretation, an offer to a customer to sign up for a subscription service should not mislead that customer so that they believe they are subscribing to anything other than a subscription service. In this case, subscription entitles the user to 5 downloads from 1 of a number of different clubs, but presumably if no downloads are made then the R5.00 is paid regardless. This is analogous in my view, to signing up with a gym or even Telkom – go or don't go, use it or don't use it – the act of signing up is an independent action from choosing to download content, and indicates an intention to seek the opportunity to download content at a cheaper price by subscribing, and is not in and of itself an action to download content.

I do not find that this advertisement contravenes section 11.1.2.

Decision

I do not uphold the complaints in relation to sections 6.2.4 and 11.1.2, but uphold the complaint under section 6.2.5.

Sanction

In view of the time that has passed since the making of the complaint, and the other similar complaints made by the same complainant, which were dismissed, the SP is directed to take note of this finding and to comply with the Code in future advertisements. The SP is required to pay R1,000 to WASPA within 5 days of the date of publication of this finding, payment being suspended for a period of 6 months from the date of the complaint, provided that no similar complaints are received by WASPA in that period.