



**Wireless Application Service Providers' Association**

## Report of the Appeals Panel

Complaint number	#33582
Cited WASPA members	Freenet digital Gmbh (1515)
Notifiable WASPA members	All
Appeal lodged by	Freenet digital Gmbh (1515)
Type of appeal	Written appeal
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	14.6
Clauses considered by the panel	4.2., 5.4., 5.5., 8.2., 15.9., 15.10.(i,ii,iii), 15.11.(ae)
Related complaints considered	31002, 3097
Amended sanctions	The sanction of R100 000 is reduced to R50 000.
Appeal fee	Appeal fee must be refunded
Is this report notable?	Notable
Summary of notability	Aggravating and mitigating factors to be considered when deciding on the sanction to be imposed on a WASPA member who is not directly responsible for the breach of the WASPA Code of Conduct.

## Initial complaint and Members response

The Media Monitor lodged a complaint with WASPA in which a 'click-jacking' scenario occurred. 'Click-jacking' refers to a situation where a user clicks on an advertising banner and is then taken to a new page which auto-subscribes the user to a subscription service without the user being aware of this.

On receiving the complaint Freenet digital GmbH (1515) (the 'Member') confirmed that the service was fraudulent and that it had already removed the subscription service prior to the complaint being lodged. In short all parties were agreed that the service provided breached the WASPA Code of Conduct.

It should be noted that this is extremely short summary of the facts of the matter, mainly because there are very few (if any) disputes of fact in this matter.

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## Adjudicator's findings

The Adjudicator considered the complaint and acknowledged that the Member had removed the cause of the complaint before ordered to do so by a WASPA adjudicator / emergency panel. The adjudicator also found that the apparent pausing of the campaign by the Member on the 20<sup>th</sup> April 2017 did not stop the Media Monitor being auto-subscribed on the 21<sup>st</sup> April 2017.

Ultimately the adjudicator ordered:

- *'A fine in the amount of R100 000 in respect of the member's breaches of sections 4.2, 5.4, 5.5, 8.2, 15.9, 15.10 and 15.11 of the Code.'*
  - *'Full Refund to all affected subscribers/ customers within 24 hours of receipt of this adjudication report.'*
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## Appeal submissions

The Member then indicated that it wished to appeal the decision of the arbitrator on the 12<sup>th</sup> July 2017 and stated 'Please find today's Appeal of Freenet Digital in reference to the WASPA complaint #33582 attached.'

In its submission the Member states that the adjudicator based his/her decision on the incorrect dates and that it was no longer possible to sign up to the 'service' on the 21<sup>st</sup> April 2017 and the test screenshots show a signing up on the 20<sup>th</sup> April 2017, not the 21<sup>st</sup> April 2017.

The Member further states:

*'Contrary to the adjudicator's finding, the situation at issue was resolved by the Member independently from the efforts of the complainant immediately after becoming aware of it and days before the Member was notified about the complaint by WASPA. The campaign was stopped immediately and signups were disabled. All subscribers were unregistered the very day when the non-compliant campaign was detected and only hours after it had started. On that day, April 20, 2017, the Member also already offered refunds to all who had already been billed.'*

The Member further referred to page 5 of the adjudication where the adjudicator approves the compliance program of the Member. The Member submits that these factors indicate that the compliance program is effective and did not fail in this case.

The Member indicated that the primary reason for the sanctions was based on the (flawed) assumption that its compliance program did not work. The Member further submitted that:

*'- when a breach of section 4.2 of the Code is ascertained, the gravity of the Member's infringement is lower if a Member can prove to have effectively resolved the situation by itself as opposed to the adjudicator's assumption that the efforts of the Member were ineffective;*

*- a breach of section 5.5 of the Code as ascertained by the adjudicator is doubtful since the Member had no knowledge of the non-compliant practice. There is a difference between being held responsible for the actions of a third party versus "knowingly" committing actions as defined in section 5.5 of the Code;'*

The Media Monitor and the Member then had additional submissions which confirmed that the testing occurred on the 20<sup>th</sup> April 2017, but did not add to the original submissions.

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## Deliberations and findings

There is little doubt that the breach of the WASPA Code of Conduct by the Billy Performance Network SLU ('Billy') (the Member's customer) was flagrant and completely unacceptable. The Member itself concedes this. However Billy Performance Network SLU is not a WASPA member and so the responsibility for the breach of the WASPA Code of Conduct falls on the Member.

It is trite by this time that the WASPA member is responsible for the actions of its customers and it is equally trite that WASPA members are expected to protect themselves from liability for the breach of the WASPA code of conduct by their customers. The manner in which Members protect themselves is meant to consist of several steps, rather than simply contractual terms between the Member and its customer.

What this matter raises is not whether the WASPA Code of Conduct has been breached – this is accepted by all sides – but rather what degree of liability should the Member carry for this breach by its customer and what factors should be considered in aggravation / mitigation?

This question is particularly apposite when we consider clause 3.7 of the WASPA Code of Conduct which states:

*3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA. **If the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of this Code of Conduct, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches. (our emphasis)***

As a result this appeal turns on the question of what 'reasonable steps' did the Member take and further to what degree should this mitigate the sanction that is imposed on the Member?

The Member submitted that it took the following steps:

- 1) It required that Billy agree to abide by the WASPA Code of Conduct,
- 2) Billy was required to indemnify the Member should it breach the WASPA Code of Conduct,
- 3) It has its own systems to detect and prevent fraud,
- 4) Those systems allowed the Member to detect and stop the abuse of their systems by Billy, which they duly did,
- 5) They immediately wrote to Billy informing them of the breach of the WASPA Code of Conduct.

Other factors that should be considered are:

- 1) It is always difficult to impose a sanction on a Member rather than on the guilty party (who is not a WASPA member), but the alternative of allowing end-users (the consumer) to carry the cost of the breach is even less acceptable.

- 2) The WASPA member has the ability to legally protect itself (by means of a contract as well as insurance) from liability for these incidents, whereas the consumer does not.
- 3) A failure to sanction a Member appropriately for this type of conduct by its customer could well result in the unintended consequence of it being very commercially viable for such customers to conduct fraudulent campaigns.
- 4) To what degree was the campaign financially lucrative for the Member?
- 5) To what degree was the campaign financially lucrative for the Member's customer?

It is worth noting that the sanction of refunding all customers who were subscribed to the 'service' is an onerous sanction which should guarantee that neither the Member, not its customer were able to make a profit from the 'service provided'. The effort required to refund the consumers is no small matter and the administrative cost of this can exceed the amount of money obtained from the service. As a result of this, it is clear that the implementation of the sanction of refunding the consumers should ensure that this type of conduct is not commercially profitable for either the Member or its customer.

Of particular importance in these types of situations is the Member's past history. Specifically does the Member have a history of wilfully ignoring the possibility of these types of 'services' being offered through its systems? No such history exists with this particular Member – indeed this is the very first WASPA adjudication for this Member.

The adjudicator does refer to complaints 31002 (which dealt with a complaint against Uptown Media LLC) and complaint 30975 (which dealt with a complaint against Takeo Limited).

In the case of complaint 30975 the WASPA member attempted to justify the auto-subscription service and did not conduct a reasonable investigation. In this matter the WASPA member was fined a combined amount of R150 000.

In complaint 31002 a harsher sanction was imposed in that:

- All the subscribers must be refunded (where possible)
- The service must be terminated
- Proof of un-subscription must be provided to WASPA
- A combined fine of R200 000 was imposed

The facts of this complaint were very similar to complaint 30975 but the Member's conduct was quite different to the Member's conduct in this complaint.

Bearing the above factors in mind the appeal panel finds that there are sufficient mitigating factors in this particular case to justify the reduction of the fine against the Member, but not the order to refund all the consumers.

We should also note that the factors we have listed above are not an exhaustive list of all the factors that would be relevant in similar matters, particularly when the types of fraudulent conduct is constantly evolving. For this reason these factors should be considered by other

WASPs as being a guideline, rather than an exhaustive list of factors which all adjudicators must consider.

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### **Amendment of sanctions**

After considering this matter, and in particular the mitigating factors, this appeal panel finds that the sanction imposed on the WASPA member in this case was unduly harsh and should be amended to read as follows:

A fine in the amount of R50 000 in respect of the member's breaches of sections 4.2, 5.4, 5.5, 8.2, 15.9, 15.10 and 15.11 of the Code.

The amount of R 50 000, 00 is payable by the Respondent within 7 (seven) days of receipt of this Adjudication.

Other Sanctions:

1. The Member is directed to provide a full refund to all affected subscribers / customers within 7 days of receipt of this appeal panel result.

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### **Appeal fee**

The appeal fee is refunded to the Member as it was substantially successful.

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