

Decision of the ADVERTISING REGULATORY BOARD

Complainant	Lourens De Jongh
Advertiser	Mind the Speed (Pty) Ltd
Consumer/Competitor	Consumer
File reference	Mind the Speed – de Jongh
Outcome	Upheld
Date	27 September 2019

The Directorate of the Advertising Regulatory Board has been called upon to consider a complaint by Lourens de Jongh against the Advertiser’s online advertising promoting its recently launched Fibre-To-The-Home (FTTH) services with the claims “South Africa’s … lowest prices” and “LOWEST FIBRE-TO-THE-HOME PRICES IN SA!”

Description of the advertising

The banner advertisements appearing on www.mybroadband.co.za alternated between the following images:



The Advertiser’s Facebook page carried the following image:



Complaint

The Complainant submitted that the Advertiser's claim of offering the "lowest" prices is inaccurate. He explained that FTTH offerings depend on which Fibre Network Provider is utilised, and as such, advertisers should include information about which provider's infrastructure is used so that interested consumers can make an accurate comparison.

The Complainant provided examples of a few different configurations whereby different Fibre Network Providers and Internet Service Providers ("ISPs") provide FTTH services of varying speeds at different costs. Comparing these variations, the Complainant provided several examples where other Internet Service Providers offer cheaper Uncapped FTTH packages, albeit via different Fibre Network Providers than those relied on by the Advertiser. Specifically, the Complainant provided four different examples for 10Mbps (Download) / 5Mbps (Upload) lines, and 10Mbps (Download) / 10Mbps (Upload) to illustrate his point.

Response

The Advertiser argued that the Complainant was not conducting a fair comparison, and that his examples compare FTTH offerings which are subject to Fair Use Policies ("FUPs") with FTTH offerings which are not subject to such FUPs. The Advertiser addressed the specific examples submitted by the Complainant, pointing out that those examples where Fair use Policies applied were significantly cheaper than those where Fair Use Policies were not enforced.

When comparing the Advertiser's product, which is not subject to a Fair Use Policy, against competing products where Fair Use Policies are also not enforced, the Advertiser's product is consistently cheaper.

Application of the Code of Advertising Practice

The following clause was considered in this matter:

Misleading claims - Clause 4.2.1 of Section II

Decision

Having considered the material before it, the Directorate issues the following finding.

Clause 4.2.1 of Section II stipulates that advertisers should refrain from misleading consumers by means of, *inter alia*, ambiguity, inaccuracy, exaggeration, or omission of material information.

The Complainant contends that FTTH offerings and pricing varies considerably depending on which providers are chosen. The Advertiser's pricing superiority claim should be qualified in order to allow for fair comparison.

The Directorate acknowledges that FTTH product offerings have expanded exponentially in recent years, leaving many consumers spoilt for choice. However, this variety means that the choice might be more complicated than anticipated. When choosing to subscribe to FTTH packages, consumers are generally confronted with several variables to consider. These include, *inter alia*, the following factors:

- Which Fibre Network Provider and Internet Service Provider combinations are available (certain areas have a wider variety of choices in this regard, while others might only have one Fibre Network Provider).

The Fibre Network Provider effectively provides the fibre optic cable infrastructure used to transmit data, while the Internet Service Provider (usually a separate

commercial entity) provides access to the Internet via the chosen fibre optic cable infrastructure. Unlike years ago, when Telkom owned both infrastructure and Internet access, the current South African market has several Fibre Network Providers and Internet Service Providers vying for customers, meaning that South African consumers are confronted with many more alternatives.

- In addition, customers should consider the connection speed required. This allows potential customers to determine the Download / Upload speed configuration they prefer. Depending on which Fibre Network Provider and Internet Service Provider configuration one has selected, available options can vary dramatically, as some packages may provide many more alternative speed configurations than others.
- Consumers also need to elect a Capped or an Uncapped connection. Both variants offer different benefits and limitations. For the purpose of this particular decision, Capped packages are not relevant. The Complainant's objection related specifically to Uncapped packages.

Once these issues have been considered and a selection has been made, customers tend to be confronted with more nuanced decisions pertaining to the nature of the connection.

Specifically, certain Uncapped packages are limited by so-called Fair Use Policies, or "FUPs", which impose predetermined limitations on how much data customers are permitted to consume before certain restrictions might be imposed. Certain customers attach greater value to services which do not impose FUPs and are therefore happy to pay more for such connections. Other customers, however, might not have reservations about selecting a service with an FUP, as affordability is their top priority.

It is exactly this complicated progression of decisions which gave rise to the complaint.

The Advertiser correctly noted that several Uncapped products (including some of the examples submitted by the Complainant) have two variations; one Uncapped alternative

where an FUP applies, and one where it does not. Generally speaking, the Uncapped alternatives where FUPs are imposed tend to be significantly cheaper, presumably because consumer data use is ultimately curbed at certain volumes. The Advertiser further contends that the Complainant should only compare its Uncapped and non-FUP product with other Uncapped and non-FUP products.

The Directorate, however, is not convinced by this argument.

The Advertiser's point of departure appears to reflect this subjective value proposition (i.e. the absence of an FUP) as more important than price. However, its advertising claim "... Uncapped fibre, lowest prices" and "LOWEST FIBRE-TO-THE-HOME PRICES IN SA!" communicates absolute superiority in terms of only one variable; price.

The Advertiser is correct in noting that comparative non-FUP Uncapped packages appear to be more expensive than its own. The problem, however, is that this technical limitation is neither communicated in its advertising, nor likely to be top of mind when comparing options based on the "lowest price" claim alone. In fact, the only limitations communicated by the advertising claims are "Uncapped" Fibre, and "Lowest price". The current advertising communicates that there are no Uncapped FTTH products on the market that cost less than those offered by the respondent. This does not appear to be the case.

Hypothetically speaking, customers who obtain, for instance, a cheaper 10Mbps (Download) / 5Mbps (Upload) Uncapped connection, which imposes an FUP, still have an "Uncapped" Fibre connection, thus matching the qualifying criteria communicated in the advertising.

This renders the Advertiser's broad, unqualified claim untrue, which is exactly where the Complainant's concerns lie. It is for this reason that the Complainant argued that the Advertiser "... need[s] to qualify [its] statement".

Because the Advertiser's claim communicates outright pricing superiority, the more subjective concerns over, *inter alia*, the imposition or exclusion of FUPs are largely irrelevant. The Directorate is not convinced that a hypothetical reasonable customer would automatically assume such a limitation to apply in the absence of any suggestion that it should.

Accordingly, the unqualified reference to offering Uncapped FTTH at the "Lowest" price in South Africa is misleading and in contravention of Clause 4.2.1 of Section II of the Code.

Sanctions

In light of the decision, the Advertiser is instructed to withdraw or amend its advertising in accordance with the deadlines set out in Clause 15.3 of the Procedural Guide. In the case of Internet advertising, the deadline prescribed is "... two weeks or as determined otherwise ...".

The Directorate is of the opinion that this two week allowance is outdated in the context of internet advertising and imposes a deadline of one week from receipt of this decision, with the Advertiser being required to show, if challenged, that it took immediate steps on receipt of this decision.