



Telecommunications &
Radiocommunications
Regulator

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Decision 04 of 2014

Revision of the decision relating to the four (4) months period for removing any misleading or likely to misleading advertisement

1. Introduction

- 1.1 This Decision (Decision 04 of 2014) was made by the Regulator following a request from Digicel for the Regulator to reconsider its decision pertaining its letter of 12th November 2014 to TVL which gave TVL, and other licensees by way of Memo of Advice on 19th November 2014, including Digicel, four (4) months grace period ("grace period") to rectify any misleading advertisements that currently exist in the market.
- 1.2 The grace period permitted for advertising mainly relating to TVL's WAO Service, TVL's Gift pack (behind the Immigration Card), and any Digicel advertising that uses the word "free". It was intended to address the use of the word so it did not mislead or likely to mislead.
- 1.3 The Regulator made the decision, outlined in the Memo of Advice on 19th November 2014, in good faith and decided on the longer period because of the advice received from TVL about the time that might be involved in removing or amending some forms of advertising that contained reference to 'free' services. Although the test is whether the advertisements have a capacity to mislead or deceive, the absence of actual consumer complaints about the use of the word "free" was noted by the Regulator.
- 1.4 Digicel was aggrieved by that decision, and requested the Regulator to reconsider by way of reviewing the grace period, claiming the period for rectifying any misleading advertisements was too long, especially given the potential that the advertisements had to mislead consumers in the meantime, and to create an unfair commercial advantage for the same period for TVL.

2. Issues

Whether the TRR decision of giving a grace period of 4 months to TVL (and other licensees as applicable) to rectify all of its advertisements using the term “free” should be reviewed?

3. The law

3.1 TRR Power to review decision under the Telecommunications and Radiocommunications Regulation Act of 2009 (TRRA)

52. Internal review

(1). Any person aggrieved by a decision of the Regulator may invite the Regulator to reconsider such decision.

(2). The Regulator is to reconsider a decision when invited under subsection (1) if the invitation is received within 30 days of the decision being notified or published, as the case may be.

(3). The Regulator may reconsider a decision when invited under subsection (1) if the invitation is received after 30 days of the decision being notified or published, as the case may be.

(4). An invitation under subsection (1) must be in writing and must contain all the material upon which the invitation is based.

(5). In reconsidering a decision the Regulator may:

(a). confirm the decision; or

(b). vary the decision; or

(c). revoke the decision; or

(d). if the decision is revoked, make a new decision.

(6). The regulator must not reconsider any decision in respect to which a person has applied to the Supreme Court for judicial review.

3.2 Misleading or deceptive service forbidden under the TRRA

39(5). A service provider must not, in relation to the supply or proposed supply of any telecommunications service, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.

4. Analysis of facts and laws

4.1 Use of term "free"

- 4.1.1 It is apparent to TRR that no official complaint was received from any telecom end-users, with regard to the advertisements made by TVL using the term "free", as being either misleading or deceptive, or both. However, this is, strictly speaking, irrelevant, because it is the capacity to mislead or likelihood of misleading that is important, not actual instances of consumers that have been misled.
- 4.1.2 TRR, however, reminds both Digicel and TVL that TRR has the power to intervene in any operation of both telecom companies which "*is likely to mislead or deceive*" telecom customers (s.39 (5) of TRRA).
- 4.1.3 The service that is in question in this matter is TVL's WAO service and TVL's information on the back of the Immigration Card that uses the word "free".
- 4.1.4 When reviewing the terms and conditions of the WAO service offered by TVL, TRR was of the opinion that the use of the term "free" in that service was likely to mislead since TVL had used the term "free", but did not provide details to specify the exact portion of the service that is actually free.
- 4.1.5 TRR further advised TVL to insert those details in its advertisements and clearly provided examples to help TVL understand TRR's view, for example, "buy 1 hour for 300VT and get 2 hours of free calling".
- 4.1.6 Digicel, however, raised allegations that the use of the term "free" by TVL is misleading and has led to damage to competition and permanent harm in the market. However, no evidence was produced by Digicel to support such allegations.
- 4.1.7 Exchanges (written and verbal) were made between TVL and TRR on the issue of using the term "free" in the advertisement of TVL's services, and TRR came to understand and acknowledged that a practical and fair resolution would be in the form of two requirements to be complied with by TVL: (1) that for future advertisements, TVL has to ensure that such detail be inserted in advertisements using the term "free" in a misleading manner and (2) that TVL has to rectify all current advertisements using the term "free" in a misleading manner.
- 4.1.8 TVL clearly understood and accepted its obligation on rectifying the advertisements using the term "free" in a misleading manner.
- 4.1.9 Accordingly, a common approach agreed to by both TRR and TVL, and approved by TRR, was that a grace period of four months be given to TVL to rectify all its advertisements using the term "free", considering the time required to change billboard advertising.

4.1.10 TRR acknowledged and recognized that TVL had cooperated and was well aware of its obligation to rectify its advertisement going forward. Based on fairness, practicability, equity, TRR gave TVL and other service providers the 4 months grace period.

4.2 Four-month Grace period

4.2.1 Digicel contended that the 4 months period was too long for any rectification, and urged TRR to promptly reconsider its decision and, to instead, impose requirements with immediate effect.

4.2.2 After assessing Digicel's request and the rationale it provided, TRR accepted the need to review the 4 months period. To assist the Regulator in its review, the Regulator requested both TVL and Digicel to answer to the following questions:

- (1) *What is, in your view, a reasonable time frame for any licensee to amend or withdraw any advertising?;*
- (2) *Please separate your view of reasonable times in answer to question 1 by media for, at least the following:*
 - a) *Outdoor billboard advertising?*
 - b) *Broadcast media?*
 - c) *Daily newspapers?*
 - d) *Other print media?; and*
- (3) *Are there any other relevant factors the TRR needs to consider in relation to this matter before concluding the review of its decision?*

4.2.3 The questions were posed to assist TRR in considering whether or not the decision on the four-month grace period should be reviewed and/or modified, or stand.

4.2.4 In response to the request, TVL was of the opinion that TRR should not review its decision unless there is change in the circumstances related to the facts involved, and chose not to give its opinion on the "reasonable times" for change or withdrawal of advertising for each type of media.

4.2.5 On the other hand, Digicel gave a firm view that:

- (1) "[A]ny offending advertising should be amended or removed immediately" and corrective advertising should be put in place as quickly as possible and that customers who have been misled should be given an opportunity to terminate without penalty;
- (2) Billboard advertisements can be amended within "a few days" and removal quicker;
- (3) Media broadcast advertisement can be discontinued with immediate effect;
- (4) "...advertisements in daily print media can be withdrawn within 24 hours"; and
- (5) TVL should reprint the Vanuatu immigration cards within 5 working days at its expense with advertising corrected.

4.3 Whether TRR should review the grace period given to TVL?

- 4.3.1 Section 52 of the TRR Act gives power to the Regulator to review any decision where a person is not satisfied with such decision.
- 4.3.2 Digicel claimed that TRR should require TVL to make rectification of its advertisements and requested it to take immediate action. Its allegations were that such TVL's advertisements are damaging competition and are harming the market.
- 4.3.3 Digicel further contended that "offending" advertisements should be amended and revoked, and the grace period of 4 months should be reviewed given that:
- a. TRR has already made a decision that the advertising is misleading;
 - b. TRR has, by its letter, issued a requirement that effectively prevents other licensees from engaging in similar advertising and thereby competing with TVL on an equal footing;
 - c. the 4 months grace period that has been granted to TVL covers the busiest promotional period in the calendar year; and
 - d. the cost of changing the billboard advertising is relatively small, and could easily be effected within only a few days.
- 4.3.4 Although Digicel did not produce any evidence to support the statements it made about the quantum of actual damage sustained, Digicel made the point that once the decision had been made that the advertisements were misleading then it would stand to reason that there was a strong prospect of commercial disadvantage and damage to TVL's competitors while the advertisement remained in the marketplace. This was especially likely in a relatively small market.

5. Reasons

- 5.1 After assessing the submissions made by both TVL and Digicel, the Regulator agrees to review and revise 4 months grace period based on the following reasons:
1. TRR recognizes that the Christmas-New Year period is very critical for competition to gain tourist usage and thus immediate action is required;
 2. There is a strong possibility that leaving the offending advertisement in place would cause commercial disadvantage to other competitors in the market; and
 3. The additional uncontested estimates of the time to amend or withdraw advertising, which were not available to TRR when the original decision was made, suggest that a much shorter period should be allowed.
- 5.2 In the case of the Immigration Card the medium is controlled by another party, the Government of Vanuatu's Immigration Service, and some additional leeway must be afforded to TVL for amendment and re-printing of the cards. It is not an option to simply withdraw the cards because they are needed to facilitate tourist and other inbound

migration to Vanuatu. The cards need to be amended and replaced and TVL will need to negotiate with the Immigration authorities for that to occur at the earliest possible time. For that reason, the period allowed will be stated in the decision as "within 60 days".

6. Complaints by TVL against Digicel

6.1 TVL made two different allegations against Digicel in the process of this review, that Digicel:

- i. also has misleading advertisements in relation to a package offered to customers for the sale of handsets stating "free mobile internet"; and
- ii. is acting anti-competitively when offering a service whereby 100vt is charged for 100 SMS.

6.2 TRR will not address these two complaints, in this decision and it will become a separate matter to be dealt with by TRR separately from this reconsideration, if TVL wishes to proceed.

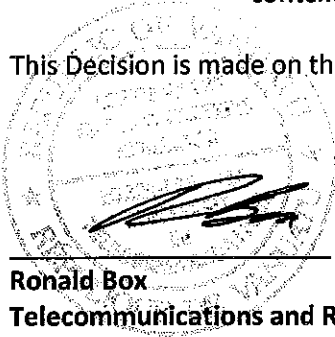
7. Decision

7.1 Having considered the facts, the law and all relevant elements in this matter, including our discussions and correspondence with both TVL and Digicel, TRR is satisfied that its decision on the four-month grace period requires to be reviewed and, therefore, makes the following Orders through this Decision:

- i. THAT TVL must rectify by removal or amendment all of its outdoor billboard advertisements, in particular the advertising relating to WAO Services and Visitor free pack using the term "free" be amended by removing the word free, within 4 working days from the date of this Decision;
- ii. THAT TVL must ensure that all broadcast media advertisements on its WAO services using the term "free" are rectified immediately from the date of this Decision;
- iii. THAT TVL must not publish any WAO service advertisement using the word "free" unless the key terms and conditions of "free" were printed along with the advertisement, from the date of this Decision;
- iv. THAT any TVL and Digicel future advertisements and promotions must take into account TRR Advertising Guidelines and ensure that such advertisements are not misleading or likely to mislead in that context.
- v. THAT TVL may formally file a separate complaint against Digicel if TVL wishes to pursue the complaints mentioned in paragraph 6 of the analysis in this Decision.

- vi. THAT TVL shall, within 60 days of this Decision, amend its Immigration Card for the Visitor's pack, given the word 'free' used would likely to mislead in that context.

This Decision is made on this 17th Day of December 2014.



Ronald Box
Telecommunications and Radiocommunications Regulator

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