

**WASPA appeals panel
Complaint 11153**

REPORT OF THE APPEALS PANEL

Date: November 2012
Appellant: ITouch Messaging Solutions
Complaint Numbers: 11153
Applicable version: 10.0

1 BACKGROUND TO THE APPEAL

- 1.1 This is an appeal against the sanction imposed on the Appellant by the adjudicator in [complaint 11153](#).
- 1.2 The appeal document in this matter was lodged by the IP, Fontera (Pty) Ltd, which had apparently used the services of the Appellant to send a commercial message to the complainant. Notwithstanding that the IP is itself an affiliate member of WASPA, it does not appear that the identity of the IP or the fact that it was a member of WASPA was disclosed to the WASPA Secretariat or the adjudicator, as a consequence of which the finding in the matter was made against the Appellant. Given that the IP has filed the appeal document, the Panel assumes that the obligation to pay the fine imposed has been passed on to the IP.
- 1.3 In essence, the appeal asserts that the sanction of a fine of R10 000 levied by the adjudicator in this matter was unfair, particularly when compared to sanctions imposed on other WASPA members for similar offences.

2 THE APPLICATION OF THE CODE AND RULES

The Code, v10.0

- 2.1 The adjudicator correctly applied version 10.0 of the WASPA Code of Conduct to this complaint, the relevant section of which is reproduced here for convenience:
 - 3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

3 THE DECISION OF THE ADJUDICATOR

- 3.1 The adjudicator found that the Appellant had breached clauses 4.1.12 (failure to provide the required link to the WASPA Code of Conduct) and 5.3.1 (sending of unsolicited commercial messages) of the Code.

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- 3.2 These decisions stemmed from a complaint lodged against the Appellant relating, inter alia, to the receipt of spam sent by the Appellant on behalf of the IP. The Appellant responded to this claim by stating that it had received the Complainant's details from a company that guaranteed it had the necessary consent.
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4 DECISION

- 4.1 The Panel does not deem it necessary to delve into the merits of the adjudication or the appeal.
- 4.2 The complaint was lodged on 22 November 2010.
- 4.3 The IP joined WASPA on 11 June 2009. It was directly bound by the Code of Conduct in its own capacity as a member from that date.
- 4.4 The provisions of the Code in general and clause 3.9.2 in particular make it clear that an SP is not directly responsible for breaches of the Code by an IP which is a member of WASPA.
- 4.5 There is no reason why the complaint should not have been directed to the IP originally (in addition to a notification to the SP).
- 4.6 The Panel is of the view that the Secretariat and/or the adjudicator should have investigated this aspect of the complaint and ensured that the complaint was directed to the correct member. It is evident from the correspondence in the case file that there was some confusion as to the identity of the SP in this matter. Further the IP was included in some of the correspondence forming part of the informal resolution process.
- 4.7 The finding and the sanction made by the adjudicator have been made against the incorrect party. The Appellant – the IP – is not in fact a party to the matter.
- 4.8 Neither the fact that the IP has lodged the appeal document in this matter nor the SP's participation in the complaints process makes any difference to this finding.
- 4.9 In the circumstances the Panel rules that the decision of the Adjudicator in complaint 11153 must be overturned.
- 4.10 The Secretariat is directed to determine whether to reinstitute the original complaint against the correct party, i.e. the IP.
- 4.11 The appeal fee is to be refunded.
- 4.12 The finding in this matter is unfortunate and does WASPA no credit in the eyes of consumers of WASP services. Adjudicators are urged to ensure that attention is paid to fundamental matters such as citing the correct member as the respondent to a complaint.