

**REPORT OF THE APPEALS PANEL**

**Date:** March 2013

**Appellant:** HR Computek

**Complaint Numbers:** 10944, 11288, 12035

**Applicable versions:** 9.0, 10.0

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**1 BACKGROUND TO THE APPEAL**

- 1.1 This is an appeal against the finding against and sanction imposed on the Appellant by the adjudicators in complaints [10944](#), [11288](#) and [12035](#).
  - 1.2 In complaint 10944, lodged on 27 October 2010, the adjudicator fined the Appellant R50 000 for breaches of clauses 5.3.1, 11.2.1 and 4.2.1 of version 10 of the WASPA Code of Conduct (“the Code”). The adjudicator imposed a further fine of R100 000 for breaching clauses 5.1.7 and 11.10.2 of the Code, with the obligation to pay R80 000 of this amount “suspended for 6 months”. Finally, the Appellant was ordered to refund the complainant.
  - 1.3 In complaint 11288, lodged on 1 December 2010, the adjudicator fined the Appellant R30 000 for breaches of clauses 5.3.1 and 4.2.1 of version 10 of the Code. The adjudicator imposed a further fine of R50 000 for breaching clause 5.1.7 of the Code, with the obligation to pay R40 000 of this amount “suspended for 6 months”. Finally, the Appellant was ordered to refund the complainant “for any charges levied in connection with the unsolicited message”. The sanction imposed in this matter was a consolidated sanction which also applied in respect of complaints 11748 and 11892, delivered on the same date by the same adjudicator. No reason was given by the adjudicator for the consolidation of sanctions in this manner. These matters are also therefore indirectly subject to this appeal.
  - 1.4 In complaint 12035, lodged on 24 January 2011, the Appellant was fined R50 000 for breaching clauses 11.2.1 and 11.9.12 of the Code and ordered to refund the complainant all monies which it had deducted from the complainant’s account pursuant to the subscription.
  - 1.5 The Appellant did not file a formal response to any of the above complaints.
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**2 THE APPLICATION OF THE CODE AND AD RULES**

*The Code, v10*

- 2.1 The following provisions were considered:

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None

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**3 GROUND OF APPEAL**

**3.1 The Appellant lodged an appeal against the findings in complaints 10944 and 11288 in the following terms:**

We would like to appeal our case with regards to complaints #10944 and #11288 due to the fact that they beyond our measure and our control.

As a new WASP (Aggregator), we have faced challenges which we had seen as good business opportunities only to find that we were a target or a victim of unsolicited billing in the industry. We had clients who connected to our systems billing gates that ran their own services to conduct unsolicited billing on end users.

As a WASP, we do not have access to our clients systems and couldn't see what they were doing or type of services that they run. This made our lives as a WASP difficult to monitor our clients and always got in the firing line for their actions.

We however have found a remedy for this and the process has been implemented. We have hired resources to monitor such activities and have improved our system to eliminate unsolicited billing.

We are busy testing with the networks to ensure that nothing of this nature ever happens again.

Further to this, as an Aggregator we have ensured that no further services from our clients will be launched commercially without prior testing and compliance checks. As a rule, all clients that connect to our systems will also have to be WASPA Affiliates. It must be noted that we have also suspended our accounts with the networks for this clean up in order to avoid the same scenario repeating itself which has resulted in us not making any revenue over the past 3 months and that we are in no position of benefit. With all the irregularities around our client's activities we have ensured that all end users were refunded where unsolicited billing did take place.

**3.2 The covering email for the appeal document is also relevant:**

As discussed yesterday we would like to appeal complaints #10944 and #11288. The attached should be used as our response to the appeals. Further to the attached, I acknowledge that the code has been breached and cannot be disputed. All I ask is for the appeals panel to review what measures we have put in place and consider these factors before making a decision. Apart from the third part (IP) issue that we faced, it should also be note that the breach in code was not intentional and was due to resources with lack of understanding of the code which was clearly evident on responses to WASPA relating to these cases.

I have been appointed as General Manager and my core focus will be to ensure that the code of conduct is respected as it should and that none of these issues befall us.

This is also to confirm that HR Computek has complied fully with the sanctions specified by the adjudicator in the report for complaint #10743, #10550, #10968 and 11370.

Kindly send me the banking details, fine amounts and reference that need to be used when making payment for above case.

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3.3 A separate appeal was lodged in respect of complaint 12035.

We would like to appeal this case. The below is my response for the appeal.

I have done a track on this issue and have made the following findings:

1. The MSISDN was automatically subscribed to our UK IP's service.
2. No refund could be processed since the client refused to accept an airtime voucher as refund or alternatively give us his banking.
3. A total amount of R9.00 was only billed to subscriber's account by Computek.

As discussed in my previous appeals, "SEE ATTACHED", the individual responsible for WASPA responses was not familiar with the WCOC and how to deal with complaints since adequate processes like our refund processes were not in place to respond appropriately. Once again it must also be noted that the UK IP abused our platform and coupled with poor oversight by my predecessor, people were spammed and auto-subscribed. HR Computek have become more aware of these issues and my predecessor has been replaced with someone more familiar with the industry and the company processes have been reviewed and improved.

Attached is the proof of refund which was done today. The amount of R20 was paid into the MTN SP account from where the subscriber's account will be credited.

We trust that the above information will be substantial for our case and kindly request that the fines be reduced on basis that past inefficiencies and problems have been addressed and that HR Computek is sincere about doing the right thing.

3.4 Proof of the refund of the complainant in that matter in the amount of R20 and stamped 6 July 2011 was provided.

3.5 The Appellant requested that the appeals be treated together "since all the complaints are linked to the same issue".

We want move forward on clean slate with running as smooth and efficient business and do not want the issues of the past to keep coming back in terms of further fines since these matters have already been addressed.

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#### **4 FINDINGS OF APPEALS PANEL**

4.1 The panel reviewed the record of the Appellant.

4.1.1 The first complaint against the Appellant listed on the WASPA complaints database is complaint [10550](#) (this matter is not under appeal). This complaint was lodged on 15 September 2010 and the report issued on 31 March 2011. In this matter the Appellant was fined R30 000 by an adjudicator who found it to have breached sections 3.9.1, 5.1.7 and 11.2.1. The defence raised by the Appellant in this matter was that the automatic subscription had occurred as a result of the actions of an information provider which had signed up for a test account to use the Appellant aggregation services. This

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defence was raised in or about November 2010, the Appellant noting that at that time it did not have any agreement in place with the allegedly problematic information provider and had suspended its service provision. The Appellant had noted that attempts to obtain information as to the source of the MSISDN which had been automatically subscribed had been unsuccessful. The adjudicator explicitly noted the following:

“On review of the Code of Conduct, specifically section 3.9, I tend to agree with the complainant regarding the necessity for diligent practices on the part of the SP vis-à-vis its relationship with the Information Provider

The SP’s submission pertaining to a “test account” does not, in my view detract from the SP’s responsibilities in respect of its relationships with Information Providers as set out in 3.9 of the Code of Conduct or excuse a violation of the Code of Conduct. The SP is required to: (i) bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct; and (ii) 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.

Further the SP, as per 3.9.2 of the Code of Conduct remains responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider

Whilst I note that the Information Provider’s engagement with the SP was duly suspended, the SP, by his own admission did not enter into a WASPA template agreement, a measure which would have considered a “diligent measure” and contrary to the complainant’s contention otherwise.”

The fine in this matter remains unpaid.

4.1.2 Complaint [10944](#) (under appeal) was lodged on 27 October 2010 and the report published on 29 April 2011. The adjudicator fined the Appellant R50 000 for breaches of clauses 5.3.1, 11.2.1 and 4.2.1 of version 10 of the WASPA Code of Conduct (“the Code”). The adjudicator imposed a further fine of R100 000 for breaching clauses 5.1.7 and 11.10.2 of the Code, with the obligation to pay R80 000 of this amount “suspended for 6 months”. Finally, the Appellant was ordered to refund the complainant.

4.1.3 Complaint [10968](#) (not under appeal) was lodged on 29 October 2010 and related to alleged unsolicited SMS messages. In a report published on 31 March 2011, an adjudicator found the Appellant to have breached sections 3.9, 5.2 and 5.3 of version 10.0 of the Code and imposed a fine of R30 000. The same defence was raised by the Appellant – not addressed at the merits – but rather based on its lack of control of the actions of an overseas IP using a test account, and it was rejected for the same reasons.

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This fine remains unpaid.

- 4.1.4 Complaint [11288](#) (under appeal) was lodged on 1 December 2010 and the report published on 29 April 2011. The adjudicator fined the Appellant R30 000 for breaches of clauses 5.3.1 and 4.2.1 of version 10 of the Code. The adjudicator imposed a further fine of R50 000 for breaching clause 5.1.7 of the Code, with the obligation to pay R40 000 of this amount “suspended for 6 months”. Finally, the Appellant was ordered to refund the complainant “for any charges levied in connection with the unsolicited message”.
- 4.1.5 Complaint [11370](#) (not under appeal) was lodged on 9 December 2010 and relates to a competition service which appears to have been provided by the Appellant itself, and not the IP cited as the source of its misfortune in prior complaints (and this appeal). The adjudicator in that matter found multiple breaches of the code relating to required pricing and other information which was not present and imposed a fine of R50 000, of which the obligation to pay R40 000 was suspended for 12 months on condition that the Appellant did not breach any provision of Chapter 9 of the Code during that time.
- The Appellant filed a short response to the complaint which did not deny the breaches but noted certain corrective action taken.
- 4.1.6 Complaint [11748](#) (not directly under appeal – see 1.3 above) was lodged on 16 January 2011 and also related to an unwanted subscription. On this occasion no response was filed by the Appellant and the adjudicator found, in a report published on 29 April 2011, the Appellant to have breached sections 4.2.1, 5.3.1 read with 5.2.1 and 11.2.1. The sanction in this matter was combined with that in complaint 11288.
- 4.1.7 Complaint [12035](#) (under appeal) was lodged on 24 January 2011 and the report published on 7 June 2012. The Appellant was fined R50 000 for breaching clauses 11.2.1 and 11.9.12 of the Code and ordered to refund the complainant all monies which it had deducted from the complainant’s account pursuant to the subscription.
- 4.1.8 Complaint [11892](#) (not directly under appeal – see 1.3 above) was lodged on 7 February 2011 and follows the same pattern. The report published on 29 April 2011 by the same adjudicator as 11288 and 11748 finds the Appellant to have breached sections 4.2.1, 5.3.1 read with 5.2.1 and 11.2.1 and the sanction in this matter was combined with that in complaint 11288. No response was filed by the Appellant.
- 4.1.9 Complaint 15531 (not under appeal) was lodged on 11 November 2011 by the WASPA Secretariat as a result of the failure any of the fines imposed on it as set out above. The Appellant had originally

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requested a payment plan be agreed upon but subsequently did not respond to further communications. The member was suspended from WASPA effective from the date of publication of the report (28 August 2012) until such time as all sanctions have been complied with and any outstanding membership fees settled.

- 4.2 The Panel accepts that the matters under appeal all relate to the difficulty experienced by the Appellant with a particular IP. The Appellant furthermore accepts that the Code has been breached in these matters: the reason underlying the breaches was its failure to ensure that it was able to conduct business in accordance with the WASPA Code as at the time it commenced service provision as a WASPA member in South Africa. The Appellant is correct insofar as it acknowledges that the factors which it is raising in its appeal are relevant to mitigation of sanction and not to the question as to whether the Code was breached in the first place. It is incorrect when it asserts that these breaches were beyond its “measure and control”.
- 4.3 The Panel has noted the remedial action taken by the Appellant as also the drop in the number of complaints received against it.
- 4.4 The Panel has also noted the lengthy period of time for which services have been suspended and regards the inability of the Appellant to earn revenue during this period as a significant sanction in and of itself.
- 4.5 In the circumstances the Panel is of the view that it would be equitable to review and consolidate the sanctions imposed in the three matters under appeal (which will also per force involve an examination of complaints 11748 and 11892 – see 1.3 above). The Panel’s task is not made easier by the fact that the adjudicators have not, in the Panel’s view, provided proper reasoning in support of the sanctions imposed.
- 4.5.1 With regard to the sanction imposed in complaint 10944 the Panel notes that the adjudicator imposed a fine of R100 000, with payment of R80 000 being suspended for six months, in respect of breaches of clauses 5.1.7 and 11.10.2 of the Code. The Panel regards this fine as excessive on the basis that the two breaches stem from the same conduct – the sending of an unsolicited SMS and subsequent failure to provide the source of the MSISDN (5.1.7) and logs showing subscription (11.10.2) respectively. The Panel notes that in complaint 11288 the same adjudicator imposed a fine of R50 000, with payment of R40 000 suspended for six months, for a breach of clause 5.1.7. It therefore appears equitable in the first instance to reduce the sanction imposed for the breaches of clauses 5.1.7 and 11.10.2 in complaint 10944 by 50%.
- 4.5.2 In the same matter a fine of R50 000 was imposed in respect of breaches of 5.3.1, 11.2.1 and 4.2.1 of the Code. The finding in

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respect of a breach of section 4.2.1 is overturned on the basis that this alleged breach was not presented to the Appellant for response, i.e. the audi alteram principle of natural justice was not followed and the ruling cannot stand. The Panel orders the substitution of the sanction imposed by the adjudicator in complaint 10944 with the following:

“In determining an appropriate sanction, the following factors were considered:

- That the source of the breaches under Chapter 5 and Chapter 11 of the Code was the same unsolicited SMS.
- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;
- The fact that a breach of section 11.2.1 of the Code is a serious matter which negatively impacts on the reputation of the industry;
- The desirability of consolidating the sanctions given that the circumstances leading to certain breaches were substantially similar and arose from the same IP
- Sanctions imposed in comparable complaints; and
- The SP's subsequent failure to respond.

The SP is fined R25 000 for its collective breaches of sections 5.1.7 and 11.10.2 of the Code.

The SP is fined R10 000 for its breach of section 5.3.1 of the Code. This specific sanction shall also apply as a consolidated sanction in respect of complaint 11288.

The SP is fined R50 000-00 for its breaches of section 11.2.1 of the Code. This specific sanction shall also apply as a consolidated sanction in respect of complaints 11288 and 12035.

These fines must be paid to the WASPA Secretariat within five (5) working days after receiving notice hereof.

The SP is further instructed to refund the Complainant in full for the disputed subscription.”

4.5.3

With regard to the sanction imposed in complaint 11288, the Panel, for the reasons stated above, overturns the finding that the Appellant

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breached section 4.2.1 of the Code. The Panel orders the substitution of the sanction imposed by the adjudicator in complaint 11288 with the following:

“In determining an appropriate sanction, the following factors were considered:

- That the source of the breaches under Chapter 5 and Chapter 11 of the Code was the same unsolicited SMS.
- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;
- The desirability of consolidating the sanctions given that the circumstances leading to certain breaches were substantially similar and arose from the same IP;
- Sanctions imposed in comparable complaints; and
- The SP’s subsequent failure to respond.

The sanction imposed in respect of the breach of section 5.1.7 is consolidated with and subsumed within the sanction imposed in respect of the breach of sections 5.1.7 and 11.10.2 of the Code under complaint 10944.

The sanction imposed in respect of the breach of section 5.3.1 is consolidated with and subsumed within the sanction imposed in respect of the breach of section 5.3.1 of the Code under complaint 10944.

The SP is further instructed to refund the Complainant in full for the disputed subscription.”

4.5.4 With regard to the sanction imposed in complaint 12035, the Panel faces the difficulty that the sanctions were not itemised or reasoned. Nevertheless the Panel, following the approach adopted in respect of the other matter under appeal, orders the substitution of the sanction imposed by the adjudicator in complaint 12035 with the following

“In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;
- The fact that a breach of section 11.2.1 of the Code is a serious matter which negatively impacts on the reputation of the industry;



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- The desirability of consolidating the sanctions given that the circumstances leading to certain breaches were substantially similar and arose from the same IP;
- Sanctions imposed in comparable complaints, in particular complaint 11417 which is the only complaint in which a breach of section 11.9.12 of the Code has been determined; and
- The SP's subsequent failure to respond.

The sanction imposed in respect of the breach of section 11.2.1 is consolidated with and subsumed within the sanction imposed in respect of the breach of section 11.2.1 of the Code under complaint 10944.

The SP is fined R5 000 for its breach of section 11.9.12 of the Code.

This fine must be paid to the WASPA Secretariat within five (5) working days after receiving notice hereof.

The SP is further ordered to refund all monies deducted from the Complainant's account in respect of this subscription service.

- 4.6 As regards the appeal fee, the Panel, having regard to the substantial reductions in the sanctions imposed which are listed above, orders that the appeal fee be refunded.
- 4.7 The Panel has also had regard to the history of the Appellant's engagement with WASPA with particular regard to its adherence to sanctions imposed. The Panel accordingly orders that if the member fails to make payment of the sanctions set out above in accordance with the time periods specified or to make alternative payment arrangements with the WASPA Secretariat, then the member shall be suspended from WASPA until such time as all outstanding sanctions are complied with by the member.
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