

REPORT OF THE APPEALS PANEL

Date: 10 October 2014
Appellant: Sprint Media (IP) (1168)
Complaint Numbers: 17264, 17394, 17481, 17495
Applicable versions: 11.6

1. BACKGROUND TO THE APPEAL

- 1.1. This is an appeal against only the sanctions imposed on the Appellant by the adjudicator in complaints 17264, 17394, 17481 and 17495. The appeals against the sanctions in each of these complaints are dealt with together in this appeal as the defence raised against the four sanctions together is that they relate to essentially the same conduct by the Appellant - the use of non-compliant welcome messages and reminder messages - occurring within the same time frame, namely June 2011 to May 2012 when the complaints were first lodged.
- 1.2. The Appellant appeals only against the sanctions imposed and therefore abides by the findings of the adjudicator in regard to the infringements by it of sections 11.5.2 and 11.5.6 in each of these complaints.
- 1.3. In all of the complaints the complainants complained that they were subscribed to a subscription service without their knowledge, but the adjudicator on the available evidence had to dismiss these main complaints about fraudulent conduct as the logs provided by the Appellant tended to prove that a valid subscription process had taken place. The Adjudicator did indicate his/her unease about the fact that there were so many similar complaints about the same service from independent complainants.
- 1.4. The Adjudicator then focused on the less serious, more technical complaints, namely that the welcome and reminder messages sent out by the Appellant were non-compliant. By way of example, in Complaint 17481 the Appellant sent out the following welcome and reminder messages:

WELCOME:COLLECT COINS 4 PRODUCTS 24/7 Visit mobmatic.com Password: 71882696. help@mobmatic.com subscriptionR7/day 16plus 2 unsub sms stop 31923. 0213002334
REMINDER: UR HOROSCOPE HERE <http://ems.cx/s/1124565547> Help 0213002334. u r subscribed 2 S/Media Mobmatic.com/ cost R7/day 2 unsub, SMS stop 31923. free msg

- 1.5. The Appellant acknowledges that these messages were non-compliant. In its appeal document the Appellant points out that in the light of a previous adjudication issued on 1 August 2012 (Complaint 16735) it had been working in close co-operation with the WASPA Media Monitor to approve their messages. The Appellant does however not indicate that the sanctions in that ruling should be taken into account in regard to the sanctions imposed in these rulings.

- 1.6. The Appellant has a long history of contraventions some technical and some more serious, even involving dishonesty (Complaint 16735). There are also a number of complaints that have been adjudicated that relate to conduct from more or less the same period:

Complaint	Period covered Start	Period Covered End	Date of WASPA Report
11033	4 Aug 2010	1 Nov 2010	29 Jul 2011
12465	26 Jun 2010	23 Mar 2011	30 Apr 2012
12527	1 Mar 2011	30 Mar 2011	22 Jun 2011
17264*	15 Jul 2010	25 Jun 2011	16 Nov 2011
17394*	3 Apr 2012	25 Apr 2012	13 Dec 2012
17481*	18 Nov 2011	5 Jun 2012	16 Nov 2012
17495*	9 Mar 2012	18 Jun 2012	16 Nov 2012
16735	15 Sep 2010	15 Mar 2012	1 Aug 2012

*Current appeal cases

- 1.7. From this chronology it is apparent that the Appellant contravened the Code of Conduct on numerous occasions in the period 2010 to 2012. As indicated above some of these contraventions were of a more technical nature as in the cases under consideration here, but some were more serious as in the case of Complaint 16735.

2. THE APPLICATION OF THE CODE AND RULES

The Code, v11.6

- 2.1. The adjudicator correctly applied version 11.6 of the WASPA Code of Conduct to this complaint. The following sections of the WASPA Code of Conduct have relevance here:

11.5. Welcome message

...

11.5.2. The welcome message must start with the text "Welcome: " and must also be a clear

notification of the following information, in the following order:

(a) The name of the subscription service;

(b) The cost of the subscription service and the frequency of the charges;

11.6. Reminder messages

...

11.6.2. The reminder messages specified in 11.6.1 must adhere exactly to the following format, flow, wording and spacing:

Reminder: You are subscribed to [name of service provider] [content/service description].Cost [cost of service and frequency of billing]. SMS HELP [optional keyword] to [short code]/call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword]to [short code].

or

Reminder: You are subscribed to [name of service provider] [content/service description].Cost [cost of service and frequency of billing]. For help call [call centre number + "(VAS)" if applicable]. To unsub, sms STOP [service keyword] to [short code].

3. The Decision of the Adjudicator

- 3.1. The adjudicator in these matters ruled that the primary complaints by the various complainants, namely that they did not knowingly subscribe to a subscription service, could not be upheld in the light of the available evidence.
- 3.2. The adjudicator did find, however, that the Appellant infringed sections 11.5.2 and 11.6.2 in each of these cases in that the welcome and reminder messages did not comply with the format prescribed by the Code.
- 3.3. The adjudicator was well aware that the various complaints and infringements related to the same conduct by the Appellant, as he/she refers to the other complaints and the fact that the rulings in each of these cases are basically a repetition of the others.
- 3.4. The adjudicator issued a fine of R10,000 in each of the cases in regard to the technical infringements committed by the Appellant, of which R5,000 was payable immediately and R5,000 suspended provided that the Appellant provided proof to WASPA that it rectified its messages in accordance with the Code within seven days of the ruling..

4. Grounds of appeal

- 4.1. As indicated above, the Appellant abides by the findings on the infringements in each of the case and appeals only against the sanctions.
- 4.2. The Appellant argues that sanctions imposed on the adjudications above are the same and constitutes so-called double jeopardy, i.e. multiple sanctions imposed for essentially the same conduct.

5. Findings of the Appeals Panel

- 5.1. The double jeopardy defence has been considered in a number of adjudication rulings as well as appeal rulings (see Complaints numbers 0985, 13038, 15202 and Appeals numbers 6708, 10896, 13038 and 15477).

5.2. As indicated in many of these rulings WASPA finds itself in a somewhat unenviable position in regards to the handling of multiple complaints relating to the same or similar infringements by a member. A case number is allocated to each complaint received and the complaint is then allocated to an adjudicator. It is only in cases where multiple complaints for the same conduct are received within a relatively short period of time, that the secretariat is in a position to refer the similar complaints to the same adjudicator in order that the complaints can be adjudicated at the same time and in order that the adjudicator can take the so-called double jeopardy into account in his/her rulings.

5.3. Presumably the four complaints and appeals being considered here were referred to the same adjudicator for that very reason. The adjudicator indicated awareness of the similarity of the complaints but did not address the double jeopardy issue in the rulings, although this may have played a role in the sanctions imposed. It is unclear from the wording of the sanctions in the various rulings ("*Due to the number of complaints against the IP which are of the same nature I am going to order the IP to:*") whether the adjudicator regarded this as an aggravating circumstance or as a reason to impose a more lenient fine.

5.4. In the TIMwe Appeals Ruling of 22 August 2012 the appeals panel states:

3.5.2 Ideally as many complaints as possible lodged against the same service within a particular period of time should be considered together, by the same adjudicator. The number of complaints can then be viewed by the adjudicator as an aggravating circumstance in consideration of sanction, rather than numerous sanctions being imposed by two or more adjudicators for what is in essence the same breach. This according to the WASPA Secretariat, is done where possible, but is practically speaking very difficult to do and not only places an enormous administrative burden on the WASPA secretariat but it also has a substantial delaying effect on the adjudication of disputes. Complaints are administered, and assigned to adjudicators, on a case-by-case basis. It can surely not be expected of the WASPA secretariat to have the gift of foresight in order to know whether or when two or more complaints will be lodged against the same service in a certain period of time. ... The delay in the adjudication of complaints generally, but especially where the adjudication of a complaint is urgent (for example, where serious breaches of the Code are committed) in any event makes the bundling together of complaints for adjudication a very difficult thing to do, and in certain circumstances an undesirable practice to implement.

3.5.3 Our answer to the tricky question posed by this appeal as stated in 3.5.1 above is that complaints lodged against the same service should ideally be considered together, by the same adjudicator, which could then view the number of complaints as an aggravating circumstance in consideration of sanction. The strict proviso to this principle that this is not a right in terms of the Code on which members can insist, however, applies. Practical circumstance and industry needs do not allow for this

5.5. In the Appeals Ruling on Complaint no 15477 and various other matters dated 31 October 2013 the appeal panel aligns itself with the reasoning adopted in the TIMwe case cited above. It goes on to say:

This particular issue is a challenging one for various reasons. One reason is that seemingly similar complaints are distinguishable on the specific facts of the particular complaints and do not lend themselves to similar determinations by adjudicators considering them. Another challenge is that adjudicators' reports are not necessarily binding on adjudicators in a similar sense to court decisions being binding on other courts. Adjudicators are encouraged to consider similar decisions and to deliver more

consistent decisions than not, where there are sufficient similarities between complaints. That said, adjudicators may have differing interpretations of similar circumstances and provisions of the Code and this may influence their decisions too.

- 5.6. In an appeal in Complaint no 13038 dated 23 May 2013 the appeals panel states:

There should therefore be only one sanction per breach (offence). Adjudicators should, where possible, review the timelines for complaints relating to the breach under consideration, and if there is an overlap, the complaints which overlap should in theory be considered the same breach. The number of complaints can then be considered only in so far as it may be an aggravating factor in determining the severity of the sanction.

- 5.7. The approach to double jeopardy in these appeal cases are consistent and provides the guidelines which we intend to follow in this appeal.

- 5.8. The non-compliant messages used by the Appellant in the various complaints are essentially the same and relate to the same period of time, ie May 2011 to June 2012 when the first complaints were lodged. It also is the same period dealt with in some of the other adjudications referred to in the chronology above. The essence of the complaints lodged in May and June 2012 however related to other conduct than the conduct under consideration here, namely the fact the consumers were subscribed to the services concerned without their consent. The Appellant became aware of the fact that its messages were non-compliant as early as July 2011 (Complaint 11033) but continued to infringe the Code of Conduct, more particularly sections 11.5.2 and 11.6.2. The conduct for which the Appellant is being sanctioned now is therefore the same conduct for which it had been sanctioned earlier, namely the use of non-compliant messages during this period of time.

- 5.9. The various complaints in this matter should have been treated as one infringement by the adjudicator who was aware that the conduct being sanctioned was the same in all of the complaints. There were therefore only two infringements, namely an infringement of section 11.5.2 due to the non-compliant welcome message and an infringement of section 11.6.2 due to the non-compliant reminder message. Accordingly only one sanction should have been imposed.

- 5.10. In Complaint 16735, published on 1 August 2012, the Appellant was severely sanctioned for a number of different complaints, some of which were of a more technical nature as in these cases before us and some of which were considered serious enough to suspend the Appellants membership for a period of 6 months. In that case the adjudicator did not impose any specific sanctions on the Appellant for the more technical breaches as the other penalties imposed were regarded as sufficient.

- 5.11. The two infringements in the cases before us are very similar in nature, i.e. not strictly following the clear instructions laid down in sections 11.5.2 and 11.6.2. These are technical infringements and have been rectified by the Appellant subsequent to the ruling in August 2012.

6. In our view it would amount to double jeopardy or an accumulation of sanctions for the same conduct if the Appellant were to be fined for the breaches under consideration here as it has already been sanctioned for this conduct in Complaint 16735. It would serve little purpose to impose fresh penalties on the Appellant for

conduct that preceded the adjudication of 1 August 2012. Should there be similar conduct after that date that would of course be an entirely different matter.

The appeal is upheld as far as the sanctions imposed are concerned. Although the finding of breaches in each of these cases will stand no further sanction in addition to those imposed in Complaint 16735 are imposed now.

- 6.1. The Appeal has been successful, and accordingly the appeal fee should be refunded in full.