

REPORT OF THE ADJUDICATOR

Complaint reference number:	17908
WASPA member(s):	Mira Networks (Pty) Ltd (SP) (0011) / US Cellcom LLC (IP) (1046)
Membership number(s):	0011 (SP) / 1046 (IP)
Complainant:	WASPA Monitor
Type of complaint:	Subscription Service
Date complaint was lodged:	2012-07-19
Date of the alleged offence:	2012-07-19
Relevant version of the Code:	12.0
Clauses considered:	14
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable
Related cases considered:	None

Complaint & Response

1. This complaint relates to an allegation of non-compliant SMS marketing. The subscription service in question is operated by US Cellcom LLC (the "IP" or the "member"), which is an affiliate member of WASPA. Mira Networks (Pty) Ltd (the "SP") acts as the aggregator for the IP's services, and is also a member of WASPA.
2. It is apparent from the record that the member's marketing and subscription service methodology had been the subject of the Monitor's attentions for some time, and that this complaint stemmed from the member's being apparently unwilling or unable to comply with the Monitor's warnings of non-compliance.

Complaints Process

3. On 19 July 2012 the WASPA Monitor lodged a complaint against the SP. The complaint was subsequently re-directed against the IP, which is the subject of this complaint.
4. It appears that the SP prevailed upon the member to stop its SMS marketing campaign on the 20th of July 2012, but as set out below, it is unclear whether this was in fact happened.

5. The record in this complaint runs to some 45 documents. The initial complaint is followed by an admission by the member that certain of its practices appear to contravene the WASPA Code of Conduct, and then an extended discussion per email with the Monitor and WASPA Secretariat as to how the member's campaign can be made compliant. This discussion continues through the record until the 12th of September. It is clear that the member was concerned that its marketing material should be cleared for compliance as soon as possible, presumably because it had suspended its marketing operations pending clarity on the point.
6. The Monitor requested in the original complaint that the matter be put before an emergency panel for urgent remedy. This was apparently not done.
7. On the 23rd of July the Monitor restated the alleged infringements of the WASPA Code of Conduct, and requested the WASPA complaints team to proceed to adjudication. This was also not done. What in fact happened was that further correspondence was entered into between the WASPA Monitor and the member (with the WASPA Secretariat acting as an intermediary) on how the member could comply with the WASPA Code of Conduct. This continued up until the 12th of September.
8. In the meantime, on the 30th of August, the member, through its attorneys, sent a letter of demand to WASPA. The letter dealt largely with procedural matters that are not germane to the issues complained of, in particular the allegation that WASPA had effectively required the SP to suspend the member's service without the member having the opportunity to engage with the complaint as set out in the WASPA Code of Conduct.
9. On the 17th of September the WASPA Monitor responded to the letter of demand as set out below, and the response was forwarded to the member by the WASPA Secretariat on the 18th:

Dear Complaints team

Please can you forward my response to the US Cellcom attorneys (and US Cellcom).

Following the filing of complaint 17908 on 19 July 2012, the media monitoring team have been in constant contact with US Cellcom (via email and a teleconference call) advising and assisting the team with the wording of compliant SMS marketing messages. The founder of WASPA was included in this process and exact SMS wording was supplied.

My last email to US Cellcom suggested US Cellcom's confirmation of the proposed messaging format, in order to close the complaint. Alex Hind replied to this email thanking the monitoring team for all their assistance. At that stage, we were happy to close the complaint, upon confirmation of the new messaging formats. Since then, we have not received any correspondence from US Cellcom, leaving the complaint open, but not proceeding to adjudication.

We are now surprised at the action that has been taken, as the monitoring team never suggested, nor demanded, nor intimidated Mira Networks (as suggested by US Cellcom attorneys) to suspend the US Cellcom service. In fact, Mira networks have supplied, in writing, confirmation that this service was never suspended. (see email below)

The next step would be for US Cellcom to confirm using the new messages in SA, and not the non-compliant SMS marketing they were making use of. Upon receipt of this confirmation, we are more than happy to close this complaint. If these formats are not adopted, we will have no choice but to proceed to adjudication. We look forward to receiving the US Cellcom decision.

10. The member's attorney responded the same day to the effect that he would take instructions and revert if necessary.
11. No response was forthcoming, and on the 18th of October the WASPA Secretariat notified the member's attorney that the matter was proceeding to adjudication, and that further submissions should be provided within the next 5 days. The attorney advised that the member intended to oppose the adjudication and would be making submissions; however no submissions were forthcoming.

Substance of Complaint

12. For the reasons set out below it is not necessary to set out the substance of the complaint.
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Sections of the Code considered

13. The conduct complained of took place between 8 June 2012 and 27 July 2012. As a result, version 12.0 of the WASPA Code of Conduct is applicable. In the circumstances, it is not necessary to cite any aspect of the WASPA Code of Conduct other than Chapter 14 which sets out the complaints procedure.
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Decision

14. I experienced great difficulty in distilling the issues from the record. The Monitor made several statements of what she considered to be the member's infringements, as part of an ongoing exchange with the member.
15. It was moreover often unclear whether the member was making a response to the complaint, or whether it was engaging with the Monitor to find a way to ensure compliance.
16. I am very uncomfortable with adjudicating in a matter where communications that would normally be considered to be "off the record" negotiations or requests for clarification between the parties are included in the record put before the adjudicator.
17. I attempted to limit the ambit of the issues at stake in this complaint to those raised in the initial complaint of the 19th of July, but I found that the member's responses to these were not made as responses to a complaint but as clarifications or requests for clarification from WASPA. In other words the member seemed to be under the impression that it was negotiating with the Monitor, or that the Monitor was somehow assisting it in reaching compliance. Indeed my impression is that the Monitor was also acting under this assumption.
18. Unfortunately one cannot assist with compliance and press a complaint at the same time. One must follow the other. It is impossible for me to separate the pleadings from the compliance assistance, and it would be grossly unfair for me to attempt to do so.

19. It appears from the Monitor's letter of the 17th of September 2012 that the Monitor was prepared to drop the complaint on confirmation of new message formats. If the Monitor was uncertain as to whether the member was prepared to drop the matter on such flimsy grounds, why would the member have taken the complaint seriously at that stage?
20. The procedure that should have been followed would have been to deal with this complaint under the informal resolution process, or at least to resolve the "check my homework" aspect of the matter before proceeding. When the WASPA Secretariat found that no resolution was possible, the Monitor should have made a formal statement of the complaint for the member to respond to. In that way it would have been clear to the member that is was being subjected to a disciplinary procedure, and not a running negotiation.
21. In short, this complaint was not properly put before the member, and the member did not give a proper response to it as a consequence. As a result it would be unfair for me to adjudicate on this matter, and I am certainly unable to find against the member.
22. The complaint is dismissed.