WASPA appeals panel
Complaint 23637

REPORT OF THE APPEALS PANEL

Date of report:

WASPA Member: Flexiba

Complaint Number: 23637

Applicable versions: 12.4

Preliminary issues

1. All references to the Code are to version 12.4 the version that was binding on the parties at the time of the complaints.

Background

2. This matter involves a complaint by a member of the Public in relation to subscription services. The terms and conditions of the WASP's service describes the service as "Private Pic Share" service that "allows subscribed users to create albums and share with other users".

3. The essence of the complaint was that there was automatic subscription.

4. The following clauses were considered: 11.2.1 and 11.3.1.

5. The adjudicator in these matters found with respect to the abovementioned clauses that they were breached. A lot seemed to turn on the fact that the SIM in question was a data SIM and as such the adjudicator, based on the Complainant's arguments posed and his/her own deliberations found that there

had to have been automatic subscription and a breach of the abovementioned clauses.

Appeal

6. The WASP lodged an appeal to WASPA via the appeals panel mechanism in a letter, dated 17 July 2014.

7. This letter set out the following with regards to the ruled breach of 11.2.1, that a breach was impossible due to the fact that the WASP:

   7.1 follows the Vodacom double opt-in process whenever a subscription is initiated by the method contemplated in section 11.2.5 of the Code (where the subscription is initiated by the customer sending an SMS to the service provider) and as such does not feel that they could be held to be in breach of clause 11.2.1 of the Code; and

   7.2 that it does not receive a consumer's mobile number on a web page or web site in any manner contemplated by section 11.3.1 of the Code.

8. The WASP also submitted revised screenshots of the relevant subscription process screens that would have been displayed to the consumer and requested that these be considered, notwithstanding that these screens were not made available to the original adjudicator.

9. With regards to a breach of 11.3.1, the WASP sets out once again why they feel that they should not be in breach of the Code due to the fact that the Complainant was not required to enter their MSISDN as MSISDN Pass Through was involved and as such the Vodacom Network recognised the MSISDN and automatically completed same.

10. The WASP also set out the fact that there is currently a working group in progress with WASPA to try and avoid the fact that data SIM cards are currently able to be subscribed to services without using the double opt-in process and

MSISDN pass-through on the Vodacom Network. This however does not determine whether the "Pass Through" process is in contravention of the Code.

Deliberations and finding

11. There seems little doubt that one of the key purposes of the Code is to ensure that consumers are not subscribed to subscription services that they don't actually intend to be subscribed to, as has been alleged by the complainant in this matter. The Code introduces both general and specific provisions to mitigate against this potential. The Code does not expressly cater for subscription by the "Pass Through" method. The question arises whether such a method is allowed or disallowed in terms of the Code.

12. The WASP argues that section 11.3.1 contemplates the situation where a consumer is responsible for "entering" his or her number on a web or wap site and that because the "Pass Through" method detects a consumer's number without any such action needing to be taken by a consumer, then the requirement to send a confirmation message with additional validation steps is not applicable to the "Pass Through" method.

13. Section 11.3.4 contemplates a situation where a consumer's MSISDN number is made available to an application and provides that:

"Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page:

[Application name] has requested that your mobile number be made available."

14. The language of section 11.3.4 is not peremptory and the section does not prescribe when it should be necessary to obtain a consumer's confirmation that their MSISDN may be made available to an application. It is also not clear how this requirement for confirmation might apply to non-WAP applications. In any event the detailed terms and conditions screenshot submitted by the WASP does

appear to mention that "flexyville.com has requested that your mobile number b made available".

15. For the reasons that are set out below, the Panel does not propose considering the above questions further.

16. In the view of the Panel, this Appeal can be disposed of with reference to other aspects of the additional screenshots submitted by the WASP. In particular, the invitation from "@user939" on the subscription page states that the aforesaid user has "sent you a private photo invite". The consumer has to subscribe to access the private photo. This contravenes section 11.2.2 of the Code which provides that a subscription transaction must be an independent transaction and "may not be a request for a specific content item". Quite clearly, the private photo shared by @user939 is a specific item of content.

17. As such the appeal is dismissed, although in light of the substituted screenshots submitted by the WASP during the Appeal process for the first time, the Adjudicator's finding of breach of sections 11.2.1 and 11.3.1 is substituted by a finding of breach of section 11.2.2.

18. The appeal fee in respect of this matters is forfeited.

Sanctions

19. The breach of section 11.2.2 is an egregious one and the Appeals Panel finds no compelling basis to interfere with the sanctions imposed by the Adjudicator.

Referral to WASPA Secretariat and Code Committee

20. We refer this report to the WASPA Secretariat and Code Committee in relation to the potential lacuna in the Code pertaining to "Pass Through" services and other services where an application obtains a consumer's MSISDN number without that number being manually entered by a consumer.