

WASPA appeals panel
Complaint 25672

REPORT OF THE APPEALS PANEL

Date of report:

WASPA Member: MTN IWS

Complaint Number: 25672

Applicable versions: 13.1

Preliminary issues

1. All references to the Code are to version 13.1 the version that was binding on the parties at the time of the complaint.
2. As an additional point, the Appeals Panel was asked to rule on whether the version of the Code applicable to the actual Appeal proceedings would be the version of the Code applicable at the time of the offence or the version of the Code applicable at the date of the Appeal proceedings. The Appeals Panel finds that the version of the Code applicable at the date of the Appeal will govern the Appeals process itself.

Background

3. This matter involves a complaint by Unilever in relation to alleged false advertising by the IP using the SP's platform, marketing during unauthorised times, sending spam, refusing to provide information how customers details were obtained and the failure to provide an opt out in the message.
4. The SP was MTN IWS and the IP was Greater Spaces Trading Projects (Space Trading). The IP failed to respond to this matter and is not a party to this Appeal.

5. The following clauses were considered: 5.5, 5.15 and 5.16, 16.8, 16.3, 16.4, 16.5 and 18.

6. The adjudicator in these matters found with respect to the abovementioned clauses as follows:

6.1 In re 5.15 and 5.16 – no breach;

6.2 In re 5.5 – breach by the IP due to the fact that they knowingly mislead the public about the association of the Rama brand and trademark of Unilever as being associated with the message;

6.3 In re 16.3 - The IP failed to address the adjudicator on how the consumers' details were obtained and the adjudicator found that clause 16.3 had been breached by the IP;

6.4 In re 16.8 – The messages were sent on a Sunday and therefore during prohibited times for the sending of marketing messages. The adjudicator found that the IP and the SP were in breach of this clause. The IP due to the fact that they sent the messages during prohibited times and the SP as their platform allowed the sending of such messages at prohibited times.

6.5 In re 16.4 and 16.5 – The adjudicator found the IP to be in breach due to their failure to provide an opt-out or stop option to the messages.

6.6 In re 18 – The adjudicator dismissed this section of the complaint due to a lack of evidence before him/her.

7. The adjudicator ruled as follows:

7.1 The IP and SP jointly and severally pay a fine of R 50 000.00;

7.2 That the IP and SP produce a list of all affected consumers and that same be refunded within (7) seven days of this ruling.

Appeal

8. The WASP lodged an appeal to WASPA via the appeals panel mechanism in a letter, dated 9 July 2015.

9. This letter set out the following with regards to the ruled breach of 16.3, 16.4 and 16.8:
 - 9.1 In re 16.3 it did not upload the MSISDN numbers of consumers and as such cannot be held in breach;
 - 9.2 In re 16.4, 16.5 and 16.8 that the IP in question is a member of WASPA and is responsible itself for compliance with the code; and
 - 9.3 In terms of clause 3.4 of the Code they cannot be held jointly and severally liable for the acts of the IP when the IP is itself a member of WASPA.

10. The WASP also submitted that they were in the process of taking certain measures to be more efficient in dealing with WASPA complaints and to ensure better compliance with the Code. In particular the following items were listed:
 - 10.1 Implementation of system changes, processes and policies to ensure access to correct short codes and compliance with relevant legislation by IWS promotional campaign customers;
 - 10.2 Identify outgoing direct marketing messages so that automatic systems can be put into place to monitor and to proactively reduce reaction times to incorrect use of short codes;
 - 10.3 Putting measures in place to ensure messages are not sent outside of the allowed times; and
 - 10.4 Putting measures in place to monitor promotional messages for the inclusion of an opt-out message through a process whereby promotional messages without opt-out options or other information as required in terms of the Code can be alerted and stopped.

Deliberations and finding

11. The IP did not appeal the decision and as such the Appeals Panel is only dealing with the sections of the decision relating to the findings of the SP's breaches.
12. The Appeals Panel agrees with the WASP that they cannot be held responsible in terms of 16.3 as they neither provided nor inputted the MSISDN's in question.
13. The WASP argues that sections 16.4, 16.5 and 16.8 cannot and should not apply to them due to the fact that the IP is a member of WASPA and as such is responsible for compliance with the Code and further that they, the SP, cannot be held jointly and severally liable due to the provisions of clause 3.4 of the Code which states as follows (emphasis added):

3.4. A member is not liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that customer provides services in a manner consistent with the requirements of this Code of Conduct.
14. Whilst the Appeals Panel agrees that the IP, as a member of WASPA is responsible for its own compliance with the Code this is not an exculpatory provision which removes any potential for the SP to be liable for breaches of the Code resulting from the services of another member, particularly in relation to aspects of the services that fall with the SP's own control. The SP provides a platform for the sending of promotional campaign messages. This platform in our view, as a WASP service, must be configured to reasonably ensure compliance with the Code.
15. Clause 3.4 of the Code places a positive burden on the SP to demonstrate that it took reasonable steps to ensure compliance with the Code.
16. The SP, by its own admission under paragraphs 3.4.2.1, 3.4.2.2 and 3.4.2.3 of its appeals letter, states that it is *now* introducing changes and controls to its platform to ensure better compliance with the Code as set out above.

17. In the opinion of the Appeals Panel, the SP failed to discharge that burden placed on it in terms of clause 3.4.

18. The Appeals Panel accordingly upholds the decision of the adjudicator in respect of clause 16.4 and 16.8.

19. The appeal fee in respect of this matter is reduced by 50%.

Sanctions

20. For the appeal against the sanctions imposed by the adjudicator, the WASP believes that the sanctions are excessive. However, the seriousness of the contraventions and the potential harm to members of the public at large also needs to be taken into account, which was correctly done by the adjudicator.

21. The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services.

22. In mitigation, the appeal panel has taken into account the additional measures that the WASP is now taking to better screen and monitor the use of its platform. However, the panel is of the view that these measures should have been in place already to prevent the potential harm that could be caused to consumers where they are charged excessive amounts to enter a promotional competition such as the present one and provided with inaccurate information about the promotional competition with no mechanism for opting out and received unsolicited messages at times not allowed by the Code.

23. The fine of R150 000 that was ordered to be immediately payable, is replaced by the sanctions set out below in clause 25.

24. The WASP stated in its grounds of appeal that it was in the process of refunding all the participants in this competition, which refund may not only constitute a single billing event due to the number and or size of the messages in question.

25. The WASP is accordingly directed:

- 25.1 within 7 days of publication of this report, to issue a blanket refund to all persons who responded to the campaign by refunding all amounts debited against those persons' mobile or airtime accounts as a result of their entry or attempted entry (whether partial or completed) into the competition and to provide the WASPA Secretariat, within 14 (fourteen) days of receiving notice of this appeal ruling, with written confirmation of the total of all such amounts that were debited against all persons as a result of their responding to the campaign and confirmation of the total amount that it has been able to refund to all respondents within the 14-day period and proof that all such respondents have received their appropriate refund;
- 25.2 to make payment to WASPA of a fine equal to the greater of R50 000 or double the difference between the total amount debited from all persons responding to the campaign and the total amount refunded to all such persons;
- 25.3 If any complaints are upheld against the WASP in future for the same type of contravention of the Code, and after the new measures have been implemented by the WASP to prevent the abuse of its platform; the adjudicator hearing those complaints will be better placed to decide an appropriate sanction (if any).
- 25.4 The WASP is also ordered to make the changes outlined by them in their Appeal submission and to present same to the WASPA Media Monitor to approve in compliance with the Code and that campaigns in their current format remain suspended.