Adjudicator's Report

Complaint number	30961, 30994, 31004
Cited WASPA members	Infobip Africa (0143) – First respondent Amtell Wireless LLC (1502) – Second respondent
Notifiable WASPA members	All
Source of the complaint	Media monitor
Complaint short description	Non compliant process for adult subscription service.
Date complaint lodged	6 July 2016, 11 July 2016
Date of alleged breach	13 June 2016, 21 June 2016, 27 June 2016
Applicable version of the Code	14.4
Clauses of the Code cited	4.2, 5.4, 5.5, 8.2, 12.1, 12.2, 15.9, 22.3, 22.5

Related complaints considered	26211, 26240

Fines imposed	First Respondent R5000 for breach of Clause 4.2. Second Respondent R10 000 for breach of Clause 4.2.
Is this report notable?	*Notable*
Summary of notability	*This matter gives precedent on liability of both the SP and the aggregator when an affiliate marketer is used.* *Note should also be taken so that repeat offences can be harshly sanctioned given the lenient approach in this matter.* .

Background

Matter 30961, 30994 and 31004 are, for all intents and purposes, the same complaint. The only difference in the matters appears to be the manner in which the Monitor accessed the material. These matters should rightly have been treated as one complaint *ab initio*, and I will do so for this ruling to avoid issues of so-called double jeopardy.

Matters 30994 and 31004 were referred jointly to an emergency panel. At this stage, there had been no response before the Panel. The Panel were therefore under the impression that the First Respondent was the service provider, and were unimpressed by their failure to address the extremely serious breaches. The First Respondent's membership of WASPA was suspended.

It should be noted that the First Respondent (who is the aggregator) had, in fact, at this stage responded in matter 30961 which involved the same issues but was not before the Panel, and also responded in matter 30994 and 31004, but a few hours after the matter had been referred to and considered by the Panel.

Complaints

The complaints included a great deal of background as to the Media Monitor's new evidence collection process, and acceptable standards as well as possible breaches.

What is relevant is the actual potential breaches picked up in these matters. The Media Monitor identifies:

- Banner advertisement is non-compliant;
- Pricing: R35/week (not clear and legible, requires closer examination);
- No subscription reference;
- No 18+ reference

After some difficulty, the Monitor managed to download this page and noted:

- The landing page is non-compliant
- No 18+ reference;
- No subscription reference immediately adjacent to the call to action button - as this is a landing page (terms and conditions stated at the bottom), the green 'Play videos now!' clickable button below the video is a call to action button;
- No pricing and frequency of billing reference immediately adjacent to the call to action button;
- the terms and conditions appear to intentionally not be displayed within the initial screen visible to the user – only if you scroll down will you see the terms and conditions.

On pushing the call to action, the Monitor did not proceed to a confirmation step, but was redirected to the homepage and received a welcome sms and was subscribed.

Member's response

The First Respondent was the aggregator and submitted, *inter alia*, as follows:

•We will not use the affiliate network in future

•This affiliate network had been used in a limited time frame we identified that around 1500 subscribers might have been affected. We can't be sure of the exact number of subscribers affected by the problematic/fraudulent flow.

•Our suggestion is to unsubscribe all those users just to be sure.

•If any of those users contact our support team (from any reason) we will refund them without any additional investigation.

•To introduce auto subscription blocker which should prevent that network affiliates influence the flow. Obviously auto subscription blocker that Vodacom introduced is not working as expected.

The First Respondent also suspended services for the service in question, Ultra Joy.

The Second Respondent submitted, *inter alia*, as follows:

> Unfortunately this issue was caused by an affiliate ReachEffect, you can see this on page 8 of the supplied documentation, specifically here:
>
> (02:00 – 02:03) – Redirect to blank page: o Information shown in address bar: 'track.reacheffec…'
>
> We narrowed all their possible acquisitions because we began working with them on the 10th of June, and stopped working with them on the 29th of June when we found about these issues. Attached is the document with all users acquired through their services. Which recommend these users should be refunded.

Clauses

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

5.5. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

8.2. For a subscription service, the "pricing information" consists of the word "subscription" and the cost to the customer and frequency of the billing for the service. The cost and frequency portion of the pricing information must follow the following format, with no abbreviations allowed: "RX/day", "RX/week", or "RX/month" (or RX.XX if the price includes cents). For services billed at an interval other than daily, weekly or monthly, the required format is "RX every [time period]", with no abbreviations permitted when specifying the time period. Examples of pricing information: "Subscription R5/week", "R1.50/day subscription", "RX every three days", "RX every two weeks".

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.

15.9. The confirmation step for any subscription service must require an explicit response from the customer of that service. The confirmation step may not be performed in an automated manner in such a way that the process is hidden from the customer.

15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways: (i) The customer's mobile carrier may implement the confirmation step. (ii) The

member can provide the customer with a "confirmation page". (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.

22.3. Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words "18+ only".

22.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

Decision

This matter is an interesting one in that, despite the negative impression made on the emergency panel:

- Neither respondent denies the breaches;
- Both respondents have immediately taken appropriate steps against the affiliate marketer.

Given this, I am not charged with the question of whether the cited clauses relating to the content and process are breached – it is common cause that this is the case.
It is also now a well-established principle in WASPA decisions that WASPA members are responsible for the actions of affiliate marketers.

In matter 26211, the Appeal Panel was charged with a situation where an affiliate marketer has committed an act that the WASP immediately acknowledges as wrong, but seeks to mitigate because of the fact that it was an affiliate marketer. In that matter, the Panel said:

> *At the core of this complaint is the very pertinent question of how much supervision and control a WASP is expected to exercise where it chooses to advertise and promote its websites and services using third parties and affiliate advertising networks in light of the overarching requirements of clauses 4.2, 5.4 and 5.5 of the Code.*
>
> *In outsourcing advertising and promotion for its services to an affiliate who, it would appear, was either expressly or tacitly permitted by the member to use further third parties without needing to run either the identity of those parties by the member or the content of the material being used to promote the member's websites and services, the Appellant took a risk of the advertising for its services being misleading, deceptive and unfair. The Appellant itself states that, "Often, in these cases, the promotions are delivered on blind networks, and Advertisers are unaware of who the publishers are to maintain business interests". In other words, because the affiliate*

"delivers" the advertising, the WASP does not concern itself with the details of the actual advertising itself.

Clause 1.2 of the Code makes it clear that an objective of the Code is to ensure that members operate in accordance with ethical and reasonable business practices. This objective is codified into express obligations in clauses 4.2 and 5.4 of the Code which stipulate that:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.4. Members must have honest and fair dealings with their customers.

Misleading and deceptive advertising is not fair. It appears that in this matter it is not contested that the actions of Payripo.com were not acceptable, were grossly misleading and prejudicial to members of the public.

This Panel does not consider that it is professional to simply allow unchecked use of advertising by unidentified affiliates who the member appears to know often publishes advertising using "blind" networks consisting of other persons who do not comply with the Code and who do not need to seek the Principal's approval on campaigns and strategies.

This Panel therefore upholds the finding that the Appellant has breached clauses 4.2 and 5.4 of the Code.

In matter 26420, the Appeal panel reached the same conclusion via a slightly different route:

The Panel notes that it is common cause that the material in question, alerting consumers to a virus, was unacceptably misleading.

On the question of liability, the Panel notes that one need look no further than the Code, which states:

3.6. Members must ensure that any customer who is not a member of WASPA, but is providing services covered by this Code of Conduct, provides those services in a manner consistent with the requirements of this Code of Conduct.

3.7. A member is liable for any breaches of this Code of Conduct resulting from services offered by a customer, if that customer is not also a member of WASPA. If 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, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

We can therefore accept that the Appellant is liable for the conduct of its affiliates, whether directly or indirectly employed.

The only remaining question is whether the Appellant took reasonable steps to ensure that the affiliates complied with the Code. The Appellant set out a number of processes that it has in place, all of which indicate a concern around this type of behaviour and a monitoring thereof.

However, it remains that the Appellant allows affiliates to run campaigns that are not signed off and are by unidentified publishers. In contracting to an affiliate who it would appear used further third parties without needing to run either the identity of the party by the Appellant or the content of the material by the Appellant, the Appellant took a risk. It would appear in these cases that because the Advertiser "delivers", the WASP does not concern itself with the details of the transaction.

This Panel is of the opinion that this is not the reasonable level of care envisaged by Clause 3.7. More pertinently, this is not behaviour that is consistent with the following clause:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

The Panel notes for the guidance of the Appellant and other WASP's that it considers the contractual resolution of these issues – which appear to be the current trend in both complaints and appeals – to be simple. If a WASP requires all campaigns to be signed off, and an Affiliate fails to do so, that affiliate is in breach of contract. In the current environment, it is simply not reasonable for a WASP to allow unapproved campaigns to run. It is simply unacceptable for WASPs to hide behind the unauthorised behaviour of unidentified affiliates.

The Panel also notes that, as the Adjudicator pointed out, if the Appellant has indeed put good contractual protections in place, the fine will be recoverable from the Affiliate who appears to be the party most directly responsible for the campaign.

As in matter 26211, Clauses 4.2 and 5.4 are currently before me.

The parties before me are the aggregator, who at a late stage in proceeding referred the matter to the service provider (Second Respondent). The Second Respondent submitted

that the breaches resulted from the actions of an affiliate marketer, and that they terminated their relationship thereafter.

While I find myself impressed by the actions that the two respondents have taken upon becoming aware of the complaint, the issue remains this: The First Respondent allowed their services to be used for unapproved campaigns that include, *inter alia*, the very egregious breach of auto subscription, and the Second Respondent allowed an affiliate marketer to run unapproved campaigns.

The precedent above is crystal clear that the Second Respondent cannot simply "blame" the affiliate marketer. In allowing an affiliate marketer to run unapproved campaigns, they took a risk and must be liable for the fallout of that risk. **I find that the behaviour of the Second Respondent was therefore in breach of Clause 4.2 in that such behaviour is unprofessional.** That being said, I remain impressed with their quick and pro-active response of terminating the service and refunding the subscribers.

In respect of the Second Respondent the sanction is therefore:

- **To effect cancellations and refunds to affected subscribers if not already done;**
- **A fine of R10 000, a lower fine than is usually applied in these cases.**

The question of the First Respondent, the aggregator, is less trite. On one hand I must consider that in most cases the aggregator simply passes on responsibility for this type of breach *ab initio* to the service provider and in so doing simply evade any consideration. In this case, the First Respondent (possibly through inexperience, but I will give them the benefit of the doubt) took responsibility and appropriate steps. On the other hand, the role of the aggregator in breaches by non-member affiliate marketers is important – if both service providers and aggregators take responsibility for ensuring that only compliant material is sent out to consumers, the current challenge to the professionalism of the industry in the form of rogue affliates will be better addressed.

I find that, in allowing its channels to be used for *ex facie* unapproved, unchecked and non-compliant material, the First Respondent was similarly acting unprofessionally and in breach of Clause 4.2. Just as service providers should have checks, balances and contractual protections in place, so should aggregators.

That being said, I do not want to overly penalise THIS aggregator for taking action and responsibility where other aggregators have, in most cases, passed the buck. It is my intention that this ruling serve as precedent and warning on this point.

I therefore limit the First Respondent's fine to R 5000,00.
The First Respondent's suspension under the emergency panel ruling is lifted.