



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	36401
Cited WASPA members	airG worldwide Cooperatie U.A. (1526)
Notifiable WASPA members	n/a
Appeal lodged by	Public
Type of appeal	Panel
Scope of appeal	Review of the merits of the adjudicator's decision and sanctions imposed by the adjudicator.
Applicable version of the Code	14.6
Sections considered by the panel	1.5, 1.6, 3.1, 3.6, 3.7, 15.9, 15.10, 15.12, and 15.19.
Related complaints considered	36161
Amended sanctions	Adjudicator's rulings upheld. The fine imposed for the breach of clause 15.19 is reduced to R15 000.00.
Appeal fee	50% of the appeal fee is refunded to the Member.
Is this report notable?	Yes
Summary of notability	It should be noted that members cannot circumvent compliance with the Code by either trying to assert that they are a) not liable for their failure to comply with the Code due to a contractual arrangement that they have with Vodacom; or (b) that due to the fact that they use the

	Charge to Bill platform offered by Vodacom, their services fall outside of the scope of the Code.
--	---

Initial complaint

Complaint 36402 involved a subscription service. The Complainant denies subscribing. In addition, the Complainant alleges that he never received a message wherein he explicitly subscribed to that service, nor did he receive any message requiring his specific confirmation of subscription to the service prior to being billed. Finally he never received a monthly reminder message confirming subscription to the services as required by the Code.

Adjudicator's findings

The Adjudicator found as follows:

There was a discrepancy in the account of the Complainant and the Member in that their versions of what transpired were diametrically opposed and that although the account of the Complainant rang true, the logs provided by the Member seemed authentic.

Accordingly the Adjudicator could not making a positive finding on the infringement of sections 15.9 or 15.12 of the WASPA Code of Conduct.

The Adjudicator found that there is a clear obligation in terms of section 15.19 of the Code for the Member to provide the Complainant with monthly reminder notifications after a subscription has been initiated. In this case the Member failed to provide such notifications for a period of 8 months. The Member alleged that it used the services of a third party to send such messages. The Adjudicator found that the Member could not abdicate its responsibility for sending these notifications purely by relying on a third party service provider and that the Member offered no explanation of how it ensures that such notifications are delivered or of the contractual nature between it and such third party. Accordingly the Adjudicator found that there had been an infringement of section 15.19 of the WASPA Code of Conduct.

The Adjudicator fined the Member R25 000.00 (twenty five thousand rand) for a breach of 15.19.

Appeal submissions

The member appealed the Adjudicator's decision in respect of the finding of a breach of 15.19.

The Member raised three points on appeal. We won't go into the lengthy detail but will summarise the points as follows:

1. It is impossible for any member to comply with 15.19 if they use the Vodacom Charge to Bill platform as Vodacom is responsible for sending the monthly reminder SMS notification messages;
2. If they did send their own SMS notification messages they would be in breach of their contractual obligations to Vodacom. In addition, such messages would constitute spam and be a breach of both the Electronic Communications and Transactions Act (ECT Act) and the Protection of Personal Information Act (POPI); and
3. Vodacom was actually the service provider in this instance and the Member was merely the content provider.

Deliberations and findings

The panel reviewed the complaint files, the Adjudicator's report as well as the Member's appeal and the Complainant's response thereto. It is important to note at this stage that the Complainant's response to the appeal was out of time. The response was forwarded to the Member as a courtesy and the Member requested that the response not be provided to the appeals panel due to the fact it was not delivered within the time period stipulated by the Code.

The WASPA Secretariat consulted the WASPA Head of Complaints with regards to the Members request and was advised to include both the responses of the Complainant and the Member in the documentation sent to the appeals panel. After considering the Complainant's response which was delivered out of time, it is our view that even without having been forwarded such response, our decisions would be the same as the response provided no further value to the case.

The panel finds that there was a breach of section 15.19 of the WASPA Code.

The Member's arguments will be dealt with individually below.

1. It is impossible for any member to comply with 15.19 if they use the Vodacom Charge to Bill platform as Vodacom is responsible for sending the monthly reminder SMS notification messages.

The Member is responsible for ensuring that their services comply with the Code of Conduct. They cannot abdicate responsibility by using a third party service provider that renders it impossible for them to comply.

Clause 3.1 of the Code states that if a supplier or sub-contractor of a member provides services covered by the Code, those services are subject to the relevant provisions of this Code, as if the party providing them was a member.

The provisions of clause 3.1 would apply equally to specific aspects of a service regulated by the Code which are provided by a supplier or sub-contractor.

Clause 3.6 of the Code states that members must ensure that a supplier or sub-contractor who is not a member of WASPA, but is providing services covered by the Code, provides those services in a manner consistent with the requirements of the Code.

Clause 3.7 of the Code goes further and states that a member is liable for any breaches of the Code resulting from services offered by a supplier or sub-contractor if that party is not also a member of WASPA. If the member can demonstrate that they have taken reasonable steps to ensure that that party provides services in a manner consistent with the requirements of the Code, this must be considered as a mitigating factor when determining the extent of the member's liability for any breaches.

The Member failed to make any submissions or provide any proof that it had taken any steps to ensure that the Vodacom Live Charge to Bill platform functioned in accordance with the requirements of the Code, including by transmitting reminder messages to the Member's subscribers as required in terms of clause 15.19 of the Code.

The provision of the content service to the Vodacom Live Charge to Bill platform is a service which falls within the scope of the Code of Conduct, and accordingly the Member is obligated to ensure the compliance of all of the service to the standards entrenched in the Code of Conduct.

The Panel therefore rejects the Member's submission in this regard.

2. If they did send their own SMS notification messages they would be in breach of their contractual obligations to Vodacom. In addition, such messages would constitute spam and be a breach of both the Electronic Communications and Transactions Act ("ECT Act") and the Protection of Personal Information Act ("POPI").

The Panel rejects the Member's submissions in this regard for the following reasons:

1. POPI has not, in its entirety, come into force as yet and is therefore not applicable to the services in question.
2. The reminder messages required to be sent to a subscriber in terms of clause 15.19 of the Code do not, by their nature, constitute unsolicited commercial messages. Instead, these messages are operational in nature and form a necessary part of a subscription service which is compliant with the Code.
3. Vodacom was actually the service provider in this instance and the Member was merely the content provider.

The Panel also rejects the Member's submission in this regard.

The Member is the service provider. The fact that they use the Vodacom Live Charge to Bill platform does not change their status as such.

Vodacom is not a WASPA member and is to be regarded as a supplier or subcontractor in this instance.

Members do not abdicate their responsibility for complying with the requirements of the Code through their use of a third party service or platform such as the Vodacom Live Charge to Bill platform.

The following provisions of the Code are applicable in this instance:

1.5. The WASPA Code of Conduct is binding on all WASPA members.

1.6. Unless otherwise specified, this Code of Conduct applies to all mobile application services offered by WASPA members to customers in South Africa.'

The Member is a member of WASPA and as such the Code of Conduct is binding on them. The Member offers mobile application services to customers in South Africa and as such the Code applies to those services irrespective of whether the Member is using the Vodacom Live Charge to Bill platform.

Additional Issues

N/A

Amendment of decision and sanctions

The Member appealed on both the merits and sanction imposed by the Adjudicator and in accordance with the reasoning applied above, the Panel finds as follows:

1. The appeal against the merit of the Adjudicators decision is dismissed; and
2. The appeal against the sanction imposed for the breach of clause 15.9 of the Code, is partially upheld in that the Panel reduces the sanction from an amount of R 25 000,00 (twenty five thousand rand) to that of an amount of R 15 000,00 (fifteen thousand rand).

The Panel, in consideration of a reduction of the sanction imposed finds as follows:

The Member's failure to send any reminder messages during the period that the subscription remained in place (i.e. 8 months), is viewed by the Panel as an aggravating factor, however, the Member has no previous complaints upheld against it and we do not believe that the breach of clause 15.19 by the Member in this instance warrants the size of the fine imposed by the Adjudicator.

Appeal fee

The member has been partially successful in the Appeal and the Panel finds that 50% of the Appeal fee should be refunded to the Member.
