



Wireless Application Service Providers' Association

Report of the Appeals Panel

Complaint number	#36941
Cited WASPA members	Data SMS South Africa (Pty) Ltd (0151)
Notifiable WASPA members	n/a
Appeal lodged by	Data SMS South Africa (Pty) Ltd
Type of appeal	Written appeal
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	14.7
Clauses considered by the panel	15.12, 15.13, and 15.19
Related complaints considered	#34555 #34556 #34558
Amended sanctions	<ul style="list-style-type: none"> • R5,000.00 fine for breach of clause 15.12 set aside. • R5,000.00 fine for breach of clause 15.13 set aside • R10,000.00 fine for breach of clause 15.19 set aside
Appeal fee	Appeal fee to be refunded in full
Is this report notable?	Not notable
Summary of notability	n/a

Initial complaint

1. This complaint was lodged by WASPA against the appellant after a previous Appeals Panel, hearing an appeal regarding the adjudication findings in complaints #34555, #34556 and #34558, identified further potential breaches of the WASPA Code of Conduct by the appellant and referred those back to WASPA.
 2. The appellant was alleged to have breached clauses 4.2, 7.5, 15.3, 15.12, 15.13, 15.17, 15.18, 15.19, and 24.17 of the Code in respect of the subscription services which were the subject of complaints #34555, #34556 and #34558.
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Adjudicator's findings

3. After considering the appellant's reply to the new complaint, the adjudicator found that the appellant had breached clauses 4.2, 7.5, 15.3, 15.12, 15.13, 15.17, 15.18, 15.19 and 24.17 of the Code.
4. The appellant has only appealed the adjudicator's findings and sanctions for the breach of clauses 15.12, 15.13 and 15.19.
5. The adjudicator's findings with respect to the breach of clauses 15.12 and 15.13 can be summarised as follows:
 - 5.1 The adjudicator rejected the appellant's submission that the service in question was not initiated via SMS and was instead a WAP-based service. The adjudicator based their finding on the member's failure to provide any marketing material relating to the services or any further proof regarding the activation process for the services, which would have shown that the services were WAP-based.
 - 5.2 The adjudicator also found that the appellant had not provided any proof that the required confirmation step had been taken to activate the subscription.
 - 5.3 The adjudicator noted further that the appellant had not responded to the allegations made by the complainant in the initial complaints that a) the MSISDN was for a data SIM card that was placed in a Wi-Fi router and was not used for general browsing, and b) that, in respect of complaint # 34558, the complainant's MSISDN had been subscribed on two separate occasions to the same service.

- 5.4 The adjudicator therefore found that the appellant had breached clauses 15.12 and clause 15.13 of the Code and imposed a fine of R5000.00 for each breach (i.e. R10 000 in total).
6. The adjudicator's findings with respect to the breach of clause 15.19 can be summarised as follows:
- 6.1 The adjudicator rejected the appellant's submission that the subscription services, which were the subject of complaints #34555 and #34556, were not active for more than 30 days and it therefore did not need to send a reminder message to the complainant.
- 6.2 Instead, the adjudicator accepted the complainant's submission that they had obtained confirmation from their network operator that the subscription services had ran for more than a month.
- 6.3 For complaint #34558, the adjudicator accepted the complainant's further submission that the service had been activated on two separate occasions, namely on 21 April 2015 and on 30 July 2015 respectively, and that no reminder messages had been sent by the appellant after each activation.
- 6.4 The adjudicator held that the appellant had breached clause 15.19 and imposed a fine of R10 000.00.
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Appeal submissions

7. The appellant's submissions in support of its appeal against the adjudicator's findings and sanction relating to the alleged breach of clauses 15.12 and 15.13 can be summarised as follows:
- 7.1 The services in question were not initiated by SMS. The services are WAP-enabled and were activated by the customer visiting a webpage.
- 7.2 There is no presumption in the Code to the effect that subscription services are initiated via SMS in the absence of proof to the contrary.
- 7.3 This issue had not previously been raised. Had the appellant known that it was required to prove that the services in question were WAP-enabled, it would have done so before the complaint was adjudicated.

- 7.4 The adjudicator could also have called for this proof in terms of clause 24.31 of the Code if they had any doubt about how the services in question were initiated.
- 7.5 According to the appellant, since the services were WAP-enabled, the relevant clauses of the Code to be applied were clauses 15.10 and 15.11. These clauses deal with subscription services initiated via a web page. Clauses 15.12 and 15.13, which relate to subscriptions initiated via SMS, were incorrectly applied.
- 7.6 The appellant alleges that it has fully complied with the requirements of clauses 15.10 and 15.11.
- 7.7 The appellant also denied that the subscription service for complaint #34558 had been activated on two separate instances. The appellant alleges that it had already been confirmed that the service, which was activated in and billed for since 2015, was by a different service provider.
8. The appellant therefore requests the Panel to set aside the adjudicator's findings and the corresponding sanctions for the alleged breach of clauses 15.12 and 15.13.
9. With regard to the alleged breach of clause 15.19 of the Code, the appellant's submissions can be summarised as follows:
- 9.1 The adjudicator incorrectly assumed, despite the appellant's submissions to the contrary, that the services for complaints #34555 and #34556 ran for more than a month and that the service for complaint # 34558 was first activated on 30-07-2015.
- 9.2 The appellant argues that there was no evidence to support the assumptions made by the adjudicator.
- 9.3 Based on the logs provided, the service for complaint #34555 was active from 01-05-2017 to 21-05-2017 and the service for complaint #34556 was active from 29-05-2017 to 26-06-2017.
- 9.4 The appellant maintains that no reminder messages were required for these services.
- 9.5 For complaint #34558, the service in question was activated on 30-07-2015 by a different service provider.
- 9.6 The appellant's service was only activated on 21-04-2017 and ran for more than 1 month. However the required reminder message was sent at 10:19:04 on 21-05-2017 with the text: *"REMINDER Hotsquare Service. Cost of service R7/day. CustomerCare phone: 011 5680951. Unsubscription? Send STOP to 30002"*.

10. The appellant requests that both the findings of the adjudicator and the corresponding sanction for the alleged breach of clause 15.19 are set aside.
 11. Finally, the appellant submits that the specific merits relevant to this case justified an appeal, so it respectfully requests that the appeal fee be refunded.
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Deliberations and findings

12. The Panel has considered the evidence provided to the adjudicator by both the complainant and the appellant in the initial complaint, the adjudicator's report, the appellant's appeal submissions, and further information that has been provided on request.
13. Our findings are as follows:
 - 13.1 *Appeal in respect of breach of clauses 15.12 and 15.13*
 - 13.1.1 There was no evidence before the adjudicator to indicate that the services in question were initiated by SMS.
 - 13.1.2 The appellant has provided the relevant URLs for the services in question as proof that the services were WAP-enabled. There is no reason why we should not accept the appellant's version in this regard.
 - 13.1.3 For subscription services initiated via a web page, the correct clauses of the Code to be considered are clauses 15.10 and 15.11.
 - 13.1.4 Clauses 15.12 and 15.13 are not applicable to this complaint and were incorrectly applied.
 - 13.1.5 The appeal in this regard is therefore upheld and the adjudicator's findings and the respective fines of R5000.00 for each breach are set aside.
 - 13.1.6 The appellant's submissions that it has complied with the requirements of clauses 15.10 and 15.11, and that the required confirmation step was carried out via the network operator, have not been challenged by the respondent. The Panel has no reason, based

on the evidence before us, to reject the appellant's version in this regard.

13.2 *Appeal in respect of breach of clause 15.19*

- 13.2.1 The appellant has stated that the service for complaint #34555 was active from 01-05-2017 to 21-05-2017 and that the service for complaint #34556 was active from 29-05-2017 to 26-06-2017.
- 13.2.2 No proof was provided by the complainant in the initial complaint, or by WASPA in the current complaint, to contradict the appellant's version in this regard.
- 13.2.3 The appellant's version is also supported by the information contained in the logs provided.
- 13.2.4 Although it has been previously found that the logs provided by the appellant are incomplete and did not comply with the requirements of the Code, this does not mean that they have no evidential weight.
- 13.2.5 The Panel accepts the appellant's version that the services for both these complaints were active for less than 30 days.
- 13.2.6 It follows that it was not necessary for the appellant to send a reminder message as required in terms of clause 15.19.
- 13.2.7 With regard to the subscription service for complaint #34558, the appellant provided logs showing that the service was active from 21-04-2017 to 02-06-2017.
- 13.2.8 The appellant has also provided proof that the following reminder message was sent to the relevant MSIDN at 10:19:04 on 21-05-2017:
- "REMINDER Hotsquare Service. Cost of service R7/day.
CustomerCare phone: 011 5680951. Unsubscription? Send STOP to 30002."*
- 13.2.9 Based on the evidence placed before us, the Panel is satisfied that the appellant has complied with the requirements of clause 15.19 for this service.
- 13.2.10 Regarding the further allegation that a subscription was activated previously on 30-07-2015, two possible service providers were

identified when the initial unsubscribe request was logged, one of whom was the appellant. However, it could not be conclusively shown which service provider was ultimately responsible for these charges.

13.2.11 More importantly, there was no evidence placed before the adjudicator (and before this Panel) to substantiate a finding that the service activated in 2015 was the same service that was again activated on 21-04-2017, and/or that the appellant had been billing the customer since 2015 without sending the required reminder messages.

13.2.12 Based on the foregoing, the appeal against the adjudicator's finding in respect of the breach of clause 15.19 for each of the relevant services is accordingly upheld and the further fine of R10 000 imposed by the adjudicator is set aside.

Appeal fee

14. The appellant has been successful in its appeal and the full appeal fee should be refunded to the appellant.
