



Report of the Adjudicator

Complaint number	#42182
Cited WASPA members	MTN Internal WASP Service (IWS)
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Dissemination of deceptive or false information and failure to display pricing information clearly and prominently.
Date complaint lodged	2019-11-19
Date of alleged breach	2019-11-19
Applicable version of the Code	v16.8
Clauses of the Code cited	5.4, 5.5, 11.2
Related complaints considered	n/a
Fines imposed	n/a
Other sanctions	n/a
Is this report notable?	n/a

Summary of notability	n/a
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Complaint

1. This complaint relates to a roadside advertising billboard, which advertised the products or services of a third party, African Rainbow Life. The billboard included the following call to action: "SMS LEGACY to 42751". No pricing information was provided for SMS's sent to the advertised short code.
 2. After further investigation by the Complainant, it was found that an SMS sent by a user on the Vodacom network to the advertised short code was charged at R30.00.
 3. The Complainant lodged a complaint against the Member and alleged that the Member had breached clauses 5.4., 5.5., 11.2 of the WASPA Code of Conduct.
 4. Due to the potential harm to consumers, the complaint was initially referred to an emergency panel hearing in terms of clause 24 of the WASPA Code of Conduct.
 5. The Emergency Panel ruled that the advertisement was non-compliant with the requirements of the WASPA Code and ordered that the relevant short code advertised be suspended immediately until such time as the Member had resolved the rating issue for the short code with Vodacom.
 6. The Complainant re-tested the short code on 25 November 2019 and confirmed that the Member had implemented the remedial actions as instructed by the Emergency Panel.
 7. The complaint has now been referred to adjudication in terms of the formal complaint procedure set out in the WASPA Code of Conduct.
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Member's response

8. The Member stated in response to the complaint that African Rainbow Life had not been on-boarded as a customer of the Member at the time the complaint was lodged.
9. The Member advised that it had received the necessary documentation from African Rainbow Life but that it had not yet opened a service account for African Rainbow Life. The Member also advised that it had not yet allocated the short code to African Rainbow Life or given any authorisation for the relevant short code to be used by African Rainbow Life.
10. The Member confirmed that it had started the process of securing the requested short code at the standard rate on all the networks, but that it was still waiting for confirmation from some of the networks.
11. In response to the allegation that it had breached clause 5.4 of the WASPA Code of Conduct, the Member submitted that before allocating a short code to a customer, it would wait for confirmation from all the networks that the code has been assigned to the Member and that it had been rated correctly before then testing and creating a customer service account and assigning the short code to that account.
12. In this instance, African Rainbow Life's customer account had not been created by the Member and the short code had not been assigned to African Rainbow Life.
13. In response to the allegation that it had breached clause 5.5 of the WASPA Code of Conduct, the Member reiterated that, at the time that the billboard was advertised, it had not assigned the relevant short code to African Rainbow Life, nor had a customer account been created.
14. The Member stated further that even if African Rainbow Life had been assigned the relevant short code, Vodacom had confirmed that it had activated the short code to the Member at the standard rate and the Complainant should have been billed at this rate. The Member did not know why the Complainant had been charged R30.00 per SMS.

15. In response to the allegation that it had breached clause 11.2 of the WASPA Code of Conduct, the Member submitted that it had requested all networks to activate the relevant short code at the standard rate. So although African Rainbow Life advertised the short code without consent from or notification to the Member, once the networks had fulfilled the Member's request to standard rate the short code, the pricing information would not need to be advertised.
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Complainant's further response

16. In a further response, the Complainant argued that since the Member had submitted a request to the network operators during October 2019 to assign the relevant short code to the Member, it could be assumed that the Member intended to take ownership of this numbering resource at the time of its request and that at the time that the complaint was lodged, the short code was within the Member's control and it was therefore responsible for the way in which the short code was used.
17. The Complainant noted the Member's statement that African Rainbow Life had not been on-boarded as a client at the time of the complaint. However the Complainant argues that since the Member had at that point requested assignment of the short code, it was responsible for ensuring the proper and compliant use of that short code.
18. The Complainant believes that the use of the short code in a campaign without clearly displaying the pricing information of R 30.00 was neither honest nor fair in the Member's dealings with customers on the Vodacom network.
19. The Complainant also took issue with the Member's statement that Vodacom had confirmed that the relevant short code had been activated at the standard rate.
20. The Complainant stated that at the time that the advertising campaign and associated short code was tested on 19 November 2019, the short code on Vodacom was linked to a R 30.00 rate band.

21. The Complainant referred to email interactions between the Member and Vodacom at the time, wherein Vodacom stated on various occasions that the short code was on the R 30.00 rate band. Vodacom only confirmed on 22 November 2019 that the rate band had been amended to the standard rate.
22. The Complaint therefore argues that no confirmation had been given by Vodacom at the time the complaint was lodged as alleged by the Member.
23. As such, the Complainant submitted that the Member was in breach of clause 5.5 at the time when the complaint was lodged.
24. At the time when the complaint was lodged, Vodacom users were charged R 30.00 for interacting with the short code, and as such pricing information was required on all advertising.
25. The Complainant also stated that since the short code had been re-rated, pricing information still had to be displayed since the short code was linked to the R0.50 or R0.86 rate band for MTN and MTN had previously notified its business partners of its business rule requiring an advice of charge for all campaigns that use the R 0.50 or R 0.86 rate band. The Complainant provided a copy of the notice given by MTN to all its business partners in this regard.
26. The Complainant submitted that the Member was therefore in breach of clause 11.2 at the time when the complaint was lodged.
27. The Complainant alleges that, by virtue of the provisions of section 3 of the WASPA Code of Conduct, the Member should be held liable for the breach of clauses 5.4, 5.5 and 11.2 of the WASPA Code, irrespective of whether it was intentional or by mistake, or occasioned by the Member or its actual or potential customer.

Member's further response

28. The Member responded to the further arguments raised by the Complainant by reiterating that the Member did not and does not have any business or contractual relationship with African Rainbow Life, even though the parties had been in negotiations to conclude an agreement since 5 September 2019.
29. The Member submitted that it therefore cannot be held liable for the actions of African Rainbow Life.
30. The Member stated that it would be different if the Member had already entered into an agreement with African Rainbow Life and the Member had authorized the use of the relevant short code. In that instance, by virtue of clause 3 of the WASPA Code of Conduct, the Member could be held liable for the non-compliance of the Code by allowing African Rainbow Life to use the short code.
31. However no authorisation was provided by the Member and at the time of the complaint African Rainbow Life was merely a potential customer and still is.
32. The Member also provided correspondence from Vodacom on 23 October 2019 to show that after the Member's request to allocate the relevant short code to the Member at the standard rate was sent on 23 October 2019, Vodacom confirmed that "*The below is done on SMScode website*".
33. The Member argued that nowhere in the correspondence does Vodacom mention that the code had been assigned to the Member at a different rate to what was requested, i.e. at the standard rate.
34. The Member also argued that it was not notified of an amendment made to the WASPA Code and could not be held in breach the Code of Conduct as it did not receive the notice to the amendment.
35. However, the Member did not provide any further detail in support of its allegation in this regard, specifically which version of the Code was amended without any notification to it and/or which provisions of the Code would then not be binding on the Member.

Sections of the Code considered

36. The Complainant cited clauses 5.4, 5.5, 11.2 of the WASPA Code of Conduct as the basis for this complaint.
37. Clause 5.4 states that members must have honest and fair dealings with their customers.
38. Clause 5.5 states that members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
39. Clause 11.2 states that for any print advert, pricing information does not need to be displayed for services which are free or which are billed at standard rates, provided that the mobile network operator does not prescribe any specific advice of charge requirements. For all other services, pricing information for the service must be clearly and prominently displayed adjacent to the call-to-action.
40. No further clauses were applied by WASPA.

Decision

41. I am satisfied from the evidence provided that the billboard used by African Rainbow Life to advertise the relevant short code did not contain any pricing information and that the subsequent charging of R30.00 to the Complainant's account for an SMS sent to the advertised short code was in contravention of the requirements of the WASPA Code of Conduct.

42. However, the pertinent issue in this matter is whether the Member, by virtue of the provisions of clause 3 of the WASPA Code of Conduct, should be held liable for the aforementioned contraventions of the Code.
43. The Member has presented evidence that, at the time this complaint was lodged, there was no business or contractual relationship between the Member and African Rainbow Life.
44. The Complainant has not challenged this evidence but has instead argued that the provisions of clause 3 should be applied in the current circumstances even if African Rainbow Life was not yet an actual customer of the Member, and was only a potential customer.
45. I do not share the Complainant's view in this regard.
46. Clauses 3.5, 3.6 and 3.7 of the WASPA Code¹ each use the term "*customer*". The term is not defined in clause 2 of the Code or elsewhere and the relevant clauses do not refer to "potential" or "prospective" customers.
47. The underlying basis for extending liability to a member for the conduct of its customers in terms of clauses 3.5, 3.6 and 3.7 is that the member is the party who is best placed, either contractually or otherwise, to exercise some level of control over the conduct of its customers and to take reasonable steps to ensure that its customers comply with the requirements of the WASPA Code when providing or using services regulated by the Code.

¹ Clause 3.5 of the WASPA Code states that members must ensure that any customer, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, is aware of the requirements of this Code of Conduct.

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

Clause 3.7 states that a member is liable for any breaches of this Code of Conduct resulting from services offered or marketed by a customer, supplier, affiliate or sub-contractor if that party is not also a member of WASPA.

48. If a member has not yet entered into a contract with a customer, it cannot be expected to enforce the provisions of the WASPA Code.
49. The Complainant has also argued that after the relevant short code was assigned to the Member by the network operators and activated, the Member was then responsible for the use of that short code.
50. However the Member's evidence that it had not yet allocated the short code to African Rainbow Life's account and, more importantly, that it had not authorised African Rainbow Life to use the short code in its advertising, was not challenged by the Complainant and I see no reason why this evidence should not be accepted.
51. The Member cannot therefore be held responsible for the unauthorised use of the relevant short code by African Rainbow Life in its advertising even though the short code had been assigned to the Member.
52. There is also no evidence to suggest that the Member knew, or ought reasonably to have known, that African Rainbow Life intended to or was already advertising the short code to the general public, and that the Member failed to take any reasonable steps to prevent this from happening.
53. After the Emergency Panel issued its ruling, the Member immediately implemented the remedial steps to be taken to prevent any further harm to consumers, and since doing so has not concluded a contractual relationship with African Rainbow Life.
54. Based on the foregoing, I find that the Member has not breached clauses 5.4 and 5.5 of the WASPA Code of Conduct and should not be held liable for the contravention of clause 11.2 of the Code in respect of the billboard advertising erected by a third party with whom the Member had no business or contractual relationship.
55. The complaint is accordingly dismissed.