

DECISION ON A COMPLAINT BY VAS GARAGE LIMITED AGAINST MTN UGANDA LIMITED

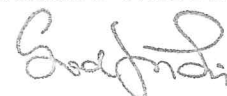
Reference is made to a letter from Vas Garage Limited to the Commission dated 19th July 2017 in which a complaint against MTN Uganda Limited of among others; unfair business practices was lodged, and to the several other correspondences and a meeting between the Commission, MTN and Vas Garage.

Further reference is made to the powers of the Commission to receive, investigate, and make decisions and sanctions against operators in violation of provisions of the Uganda Communications Act 2013, and the several Regulations thereto in order to achieve the objectives, spirit, and intentions of the Act and the Regulations.

Back ground

On the 25th day of July 2017, the Commission received a complaint against MTN Uganda Limited of 'unfair business distortion' dated 19th July 2017 from Vas Garage Limited. Vas Garage is a telecom Value Added Service company, majoring in the provision of VAS innovations to the telecom industry.

Vas Garage in its complaint noted that they had "tried to iron out 'issues' with MTN Uganda for the last two years, but with no breakthrough." The Commission wrote to MTN on 14th September 2017 informing them of the complaint and requiring them to provide a response to the allegations raised in the said complaint. MTN received this letter on 28th September 2017 and responded thereto on 24th October 2017. In its response, MTN denied in totality all allegations raised by Vas Garage, except for an acknowledgement that the complainant had not 'invoiced a total of UGX 2,911,955 for both MT SMS & MO SMS for the period January 2016 to August 2017;' which MTN said it would pay once Vas Garage delivered valid invoices in accordance with the payment process under the duo's Content Provision Agreement.



Since then, the Commission has variously engaged the parties in a bid to resolve this complaint. Specifically, the two parties have (together with their respective legal teams) met with the Commission's officials from the Legal Department and those responsible for Competition & Consumer Affairs and have also made written submissions on issues that the duo framed with the assistance of the Commission to help them resolve this matter.

Nature of relationship between MTN Uganda and Vas Garage Limited, and key issues contained in the complaint

MTN Uganda Limited first entered into a Content Provision Agreement with Vas Garage Limited in July 2013 wherein Vas Garage was authorized to deliver subscription based content to MTN Uganda customers on terms under the contract. The contract was one year thereby expiring in June 2014 and was subsequently renewed on 22nd December 2014 with new terms including implementation of the Do Not Disturb (DND) directive. The renewed contract was not time-bound and could be terminated by either party by a notice in writing. Operations under this Agreement ceased after MTN expired the data base containing its customers that had subscribed to Vas Garage's services. In an email to Vas Garage, MTN noted that the decision to expire the said data base was a business one. Since then, Vas Garage has been involved in numerous processes to have MTN cooperate with them to re-instate their business to no avail, thus this complaint.

KEY ISSUES

The parties during a meeting between themselves, being mediated by the Commission framed the issues (of contention) below and undertook to make written submissions to the Commission in response to the same by end of 15th January 2018. The issues were;

- (1) Whether MTN Uganda legally executed the do-not-disturb (DND) Directive.
- (2) Whether MTN Uganda "expired" the Vas Garage "profiled data base of subscribers" in December 2014 and 2015.



(3) Whether there is any amount of income or monies, due to either party, that remains unaccounted for or unpaid.

RESPONSES TO THE ISSUES BY THE PARTIES AND FINDINGS BY THE COMMISSION

In response to the issues framed above, whereas Vas Garage made its detailed submissions on each of the issues raised, MTN Uganda (through a letter to the Commission dated 15th January 2018) opted to reiterate and maintain its response (contained in their letter to the Commission dated 24th October 2017) to the allegations stated in the complaint.

Briefly, the parties responded to the framed issues as follows;

(1) Whether MTN Uganda legally executed the do-not-disturb (DND) Directive.

In their response, MTN argued that when the Commission issued the Do Not Disturb (“DND”) directive in November 2014, the implementation of the same required a revision of all Content Provision Agreements and a ‘clean up’ of all existing content customer subscriptions to ensure compliance with the new regulatory requirements. MTN further stated that the ‘clean up’ of the customer subscriptions and the amendment of contracts between itself and the content providers was done across the board for all content providers and not targeted at only Vas Garage.

On its part, Vas Garage argued that MTN Uganda did not implement the Commission’s Directive of 14th November 2014 as directed by the Commission, and as had been recommended by the Commission’s working committee on unsolicited SMSs, which was held on 19th June 2014 with the participation of MTN.

Vas Garage further contended that the UCC Directive of 14th November 2014 was about standardizing SMS broadcasts and giving subscribers choices to manage consumption of SMS messages which they received from their respective service providers. Vas Garage thus argued that according to the



directive, telecom companies were required to send the following message to all subscribers on the 22nd of November 2014;

*“Dear Customer, if you want to STOP receiving ALL unwanted messages, SMS, send “STOPALL” to 196 or dial *196#”*

Vas Garage further argued that as a requirement of the directive, each operator was required to incorporate the message below in every message except for peer to peer messages;

*“Dial *196# or send “STOP” to 196 to opt-out.”*

Vas Garage argued that instead of implementing the Directive as required by the Commission, MTN hurriedly expired Vas Garage’s Profiled databases of subscribers and that three days later, by way of email dated 18th December 2014, MTN’s Principal Vas Planning Engineer, Elizabeth Olule-Liri informed them that MTN had made some modifications on the content management process to better align with the DND solution and that instead of auto renewal, subscribers were expired and going forward they were required to re-subscribe on a monthly basis to the subscription services and that a formal communication on the matter was on its way to them. For this assertion, Vas Garage availed a copy of the email correspondence.

Vas Garage also challenged MTN’s assertion that the DND directive was implemented across the board, arguing that whereas MTN expired Vas Garage’s database of subscribers, the same was not done with the parallel MTN Play services managed by MTN’s international VAS Partner, IMI Mobile. Vas Garage contended that MTN Play services continued to broadcast its messages without including the opt-out instructions of (“Dial *196# or send “STOP” to 196 to opt-out.”) as had been directed by the UCC Directive.

In the end, Vas Garage thus argued that the rationale for the DND Directive was to ensure that customers do not receive unsolicited SMSs and that if they did, they were able to block such SMSs from being delivered to them in the future. Vas Garage hence argued that the impugned Directive did **not** require expiring the profiled subscription databases of existing subscribers and requiring them to undertake a “tiresome mandatory monthly subscription”.



Vas Garage thus strongly contended that MTN's actions in as far as expiring their profiled database of subscribers was against goodwill and was not in line with UCC's Directive and not *interdem* with aspirations of the stakeholders' working committee on unsolicited SMSs.

Finding by the Commission

After a thorough consideration of either party's arguments on this issue, the Commission notes as follows;

The Commission's directive to MTN Uganda vide Ref No. T&B/463 dated 14th November 2014, a copy of which has also been attached to Vas Garage's submissions stated that; "Uganda Communications Commission (UCC) has standardized the SMS broadcast message to the statement below;

*"Dear Customer, if you want to STOP receiving ALL unwanted messages, SMS "STOPALL" to 196 or dial *196#"*

The Commission's directive went on to state that:

*"You are required to send this message to all your subscribers on the 22nd of November 2014. Please note that with the exception of peer to peer messages; All SMS messages should have the opt-out instructions; "Dial *196# or send "STOP" to 196 to opt-out." This message should always be incorporated as part of the message at the **beginning of the message.**"*

Whereas the Commission's intention was to save mobile phone users from unsolicited SMSs through the implementation of the directive above, it is not true that the Commission (through the directive) required profiled databases of subscribers to be deleted/expired.

In result therefore, MTN's way of implementing the do-not-disturb (DND) directive (through the expiry of databases) **was not** in line with or as envisaged by the Directive as issued by the Commission. It was enough for MTN to send the messages as directed in the Directive, as opposed to expiring the said databases and requiring subscribers to engage in a mandatory monthly re-subscription.



The Commission therefore finds that the first issue is answered in the negative.

(2) Whether MTN Uganda “expired” the Vas Garage “profiled data base of subscribers” in December 2014 and 2015.

In response to this issue, MTN argued that;

*“Vas Garage does not own any customers on the MTN Uganda network, the customers belong to MTN Uganda and Vas Garage is only given a right to deliver content to **those who have subscribed for the content.** The same authorization is given to several other content providers without exclusivity. Therefore, there is no exclusive database capable of being deleted by MTN Uganda.”*

MTN further averred that;

“In August 2015 the parties undertook a clean-up exercise of the ‘key words’ used by Vas Garage which were too long leading to billing failures and this was consented to by Vas Garage who admitted that indeed they had implemented ‘key words’ with longer characters.”

For the above assertion, MTN availed email correspondences to support the same.

Vas Garage on its part started by referring to clause 4.1.3 of the Content Provision Agreement (CPA) between itself and MTN Uganda dated 22nd December 2014, in which Vas Garage was required (undertook) to advertise its available services to MTN network customers. In light of the above, Vas Garage submitted that the process of advertising required profiling interested customers who subscribed by way of the UCC provided short code 6666 and a Toll free long code 0800206666 to the unique Vas Garage key words that represented the various services on the Vas Garage content platform. Vas Garage availed a copy of the CPA referred to above as evidence.

Vas Garage further averred that on 21st November 2014, MTN Uganda communicated that it had invested in a new billing solution to provide



improved MT Billing services and that therefore it wanted to migrate Vas Garage's services from the old platform where Vas Garage managed its profiled subscription databases to a new billing platform where MTN would take over management of the subscription Databases. Vas Garage presented a copy of the Communication from MTN herein referred to above to buttress their submission.

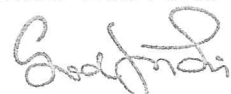
Vas Garage further argued that the migration process of its profiled data base of subscribers had clear written terms that were agreed to between MTN and Vas Garage, among which was that; numbers which had not been billed in the past 90 (ninety) days were to be omitted; and only active numbers would be submitted to MTN to upload onto the new billing platform in the interest of having a cleaner subscription base. Vas Garage thus argued that MTN's act of turning around and expiring the entire subscription base was an "illegal and selfish idea" and had neither been presented to Vas Garage before the migration nor had it been discussed.

The complainant (Vas Garage) submitted further that MTN Uganda used its dominant market position and took advantage of the fact that Vas Garage had already submitted its three years' work of investment (Profiled subscription database) to expire its subscription database and refuse to pay Vas Garage's full revenues. Vas Garage attached the Migration terms between itself and MTN in support of its case.

Vas Garage Uganda also referred to a letter from MTN Uganda dated 18th December 2014 as evidence that indeed its data base of profiled subscribers was expired. The letter in part read as follows;

*"I wish to take this opportunity to thank you for your cooperation during migration to the subscription Billing Platform that was concluded end of November. **The expiry of all subscriptions has taken effect today**"*

Vas Garage also provided documentary evidence to the fact that their expired database (in 2014) was later restored after successfully protesting the expiry, before it was again permanently expired by MTN Uganda in August 2015. Vas Garage also availed a communication from MTN dated 17th August 2015



stating that the “decision to expire profiled subscription databases was a business decision.”

Vas Garage thus further submitted that;

“The ‘expire rule’ was selectively implemented without written notice before its execution and it was intended to give market advantage and protection to IMI Mobile, MTN’s international VAS partner in order to enjoy the provision of mobile content services to improve MTN Play revenues without sharing at the expense of local Ugandan companies.”

To buttress the assertion that there was no notice given prior to the expiry of the databases, Vas Garage referred the Commission to MTN’s communication dated 18th December 2014 (already referred to above) in which MTN noted that “**the expiry of all subscriptions has taken effect today.**”

In support of the arguments above, Vas Garage also provided a copy of *The Independent* dated 20th June 2016 under the title “*Mission Accomplished?*” In this publication, the then CEO of MTN Mr. Brian Gouldie who was defending his legacy at the end of his term, among other issues discussed, he made the statement below;

“I took the unpopular decision to reset all content management and subscription providers’ subscriptions to zero to the effect that the complaints are now minimal.”

In consideration of the averment above, the Commission has verified the existence of the publication referred to above, a copy of which can also be assessed via: <https://www.independent.co.ug/outgoing-mtn-uganda-boss-speaks-out-on-his-legacy/>

In the end, Vas Garage referred the Commission to clause 5.1.8 of their Content Provision Agreement dated December 2014 (a copy of which was annexed to their submissions) wherein MTN undertook to:

“Remove the subscribed customer from the database for billing purposes in the event that a subscribed customer is not successfully



billed for a period that will be determined and agreed by both parties.”

On the basis of the above clause, Vas Garage thus argued that the said clause was inserted into their CPA as a check to MTN’s dominant position so that if any subscriber was to be expired, then the two parties had to have discussed and agreed on the basis of which such expiry would be done since the profiled subscription database made the core of the content business and yet it was very expensive to advertise and profile. Vas Garage thus submitted that MTN blatantly, to the detriment of Vas Garage, and without a truly justifiable legal cause went ahead to among others, breach the above term of the Agreement and expire their entire profiled database of subscribers, hence causing them immense losses, collapse of business, and loss of reputation & revenues.

Finding by the Commission

The Commission has duly considered each party’s submissions on this issue and finds as follows;

In resolution of this issue, the Commission has considered two sub-issues;

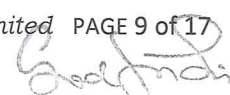
(1) Whether there was such a thing as a “Profiled database of subscribers” in the duo’s arrangement, and

(2) If (1) above is answered in the affirmative, whether MTN Uganda expired these “Profiled databases of subscribers”?

On the first sub-issue, the Commission notes that much of the contention between the parties during their meeting with the Commission on this issue, rotated around the question as to whether there was such a thing as a “Profiled Database of subscribers.”

In arriving at a conclusion on this issue, the Commission has relied on among others, the following:

-Clause 4 of the CPA of December 2014 between the parties in which the service provider (Vas Garage) had: to supply the services provided for; ensure that the services are not provided to non MTN subscribers; and advertise the



-A letter from MTN Uganda dated 18th December 2014 (already referred to above) stating that: **“The expiry of all subscriptions has taken effect today.”**

The Commission has in detail considered MTN’s submissions on this issue and has rejected their argument. Whereas MTN had argued that:

“Vas Garage does not own any customers on the MTN Uganda network, the customers belong to MTN Uganda and Vas Garage is only given a right to deliver content to those who have subscribed for the content. The same authorization is given to several other content providers without exclusivity. Therefore, there is no exclusive database capable of being deleted by MTN Uganda.”

The Commission has thus found that;

- (a) The customers using the MTN network belong to MTN Uganda Limited.
- (b) Since MTN allowed (under a commercial agreement) Vas Garage to advertise its various forms of content to MTN’s customers, provide content to those subscribed, and profile them in line with the kind of content they required, by default, a database belonging to Vas Garage Limited, of profiled subscribers had to arise both for content delivery purposes and billing.

MTN’s argument that “the same authorization is given to several other content providers without exclusivity. Therefore, there is no exclusive database capable of being deleted by MTN Uganda;” has been rejected by the Commission because;

- (1) The profiled data base of subscribers to which each content provider provided content had to be in place to enable billing and sharing of the revenues therefrom (between MTN and each of the content providers), and
- (2) MTN’s letter dated 21st November 2014 to all Content and Bulk SMS Providers (already referred to above) also clearly defeats MTN’s current argument on this issue. In the said letter, MTN required of



each content provider to handover their “**current subscription data bases**” to be maintained and managed by MTN Uganda Limited.

In result therefore, the Commission, having carefully considered submissions of the parties, and the evidence available, has found that MTN Uganda Limited wrongfully ‘expired’ Vas Garage’s subscription data bases as stated by the complainant.

(3) Whether there is any amount of income or monies, due to either party, that remains unaccounted for or unpaid.

In response to this issue, MTN acknowledged that Vas Garage had not invoiced a total of UGX 2,911,955 for both MT SMS & MO SMS for the period January 2016 to August 2017. MTN indicated that once Vas Garage availed them with a valid invoice in the above sum, the same would be duly paid. MTN also submitted that “all previous outstanding payments were reconciled and paid in accordance with the terms of the Content Provision Agreement (CPA) which has a payment reconciliation mechanism.”

The Commission notes that MTN did not make any specific reference to any particular clause of the CPA to exemplify their “payment reconciliation mechanism” assertion.

On its part, Vas Garage started by recounting its dilemmas; indicating that MTN Uganda had until 26th February 2016 not paid their dues even after a final demand notice dated 8th December 2015 had been served on them.

Vas Garage asserted further that whereas the amount due to itself by end of August 2015 was UGX 979,008,565 inclusive of VAT, MTN made a “take or leave” offer to Vas Garage for UGX 450,000,000 which was consequently wired to the complainant as settlement of the entire debt. Vas Garage further averred that MTN stated that its revenues had been affected by the UCC Directive and as such, Vas Garage had to accept a lesser amount.

On the above, the Commission was not availed with any evidence from MTN that could show that the DND directive affected their revenues. The foregoing notwithstanding, the Commission has also noted that the total “number of



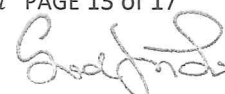
successful hits” from which the revenues were to be computed was 16,687,646 and as such, the Commission has not found any justifiable reason for MTN’s claim of dropped revenues that would necessitate a “a take or leave” offer of a half amount as settlement of the entire debt.

Vas Garage also submitted that as a result of “MTN’s impunity,” it has suffered insurmountable loss of revenue, current and prospective subscribers, good will and advertising revenue. The complainant went ahead to provide specific revenues and growth projections based on actual revenues of 2014 and 2015.

Finding by the Commission

The Commission has considered both parties’ submissions in depth and the evidence availed in resolution of this issue. In doing so, the Commission has been guided by the parties’ arguments, their various correspondences and Agreements, the Uganda Communications Act, and MTN’s NTO Licence Agreement to operate in Uganda. The Commission thus finds as follows:

-MTN Uganda offered half a pay to Vas Garage as settlement of the entire debt with a justification that the Commission’s DND directive affected their business. The Commission has noted that in exchange for a lesser pay, MTN had promised to help Vas Garage carry out a promotion to “drive base acquisition.” This was because, consequent to the expiry of Vas Garage’s Profiled database by MTN in August 2015, Vas Garage had lost its entire core investment hence the promise by MTN that they would be assisted in regaining a base (subscribers). The Commission has considered the email from MTN’s Mapula Bodibe to Vas Garage’s Patrick Kizito dated 18 March 2016, less than a month after a meeting in which it was ‘agreed’ to pay half the amount. The Commission has noted that MTN did not honour its promise to help Vas Garage build the “base” and that the CPA of 2014 between the duo has also been terminated by MTN vide a notice dated 9th November 2017 after Vas Garage had lodged this complaint with the Commission on the 19th of July 2017.



The Commission hereby finds MTN's decision to pay Vas Garage only half of the reconciled revenue to have been in breach of the CPA, and unfair. Thus, the Commission having considered the above, has in accordance with section 55 (7) (c) of the Uganda Communications Act 2013 decided to disregard the alleged settlement between MTN and Vas Garage in which MTN offered a half pay as settlement of the entire accrued sum. The Commission having reviewed the said 'settlement' and all circumstances before and after, has decided to declare the same uncompetitive and is hereby annulled. The Commission has noted that MTN misused its dominant position to frustrate and curtail Vas Garage's ability to receive the due amounts owed to it for fear of losing the relationship between the two.

In result therefore, the Commission hereby finds that the failure by MTN Uganda Limited to make payment to Vas Garage Limited of the balance in the sum of UGX 529,008,565 (five hundred and twenty-nine million, eight thousand five hundred and sixty-five shillings)-inclusive of VAT as indicated in the attachment to Vas Garage's final demand notice to MTN dated 8th December 2015, was a wrongful act, which MTN should immediately remedy.

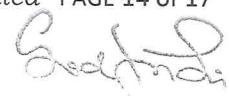
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The Commission is cognizant that this matter was brought to its attention by way of complaint dated 17th July 2017 from Vas Garage Limited and that MTN Uganda Limited consequently terminated the Content Provision Agreement (CPA) between itself and the complainant on 9th November 2017.

The Commission notes that it is mandated to regulate Value Added Services under section 5 (1) (v) of the Uganda Communications Act 2013 and as such, Vas Garage Limited is authorised to offer the communications services that it does.

The Commission also notes that it is empowered under section 5 (1) (j) of the Act to;

“Receive, investigate and arbitrate complaints relating to communications services, and take necessary action;”



Further, the Commission is empowered to make a final decision on a complaint before it under rule 25 (2) of the Communication (Practice and Procedure) Regulations 2005, and such a final decision shall contain;

- (a) Findings of fact and conclusions, and the reasons and the basis of these, upon all material issues of fact, law or discretion presented on the record;*
- (b) Rulings on each relevant and material exception filed; and*
- (c) The appropriate rule or order and the sanction, relief or denial of such rule or order.*

The Commission further, being mindful of the Objectives of the Uganda Communications Act 2013 (as under section 3 thereof), its functions and powers (sections 5 and 6 thereof respectively), and Part VIII and IX of the Act thereof, and in accordance with the Communications (Fair Competition) Regulations 2005 and the Communications (Practice and Procedure) Regulations 2005, hereby rules and directs as follows:

1. MTN Uganda Limited produces or restores Vas Garage's profiled data base of subscribers.
2. The Commission expects that the parties will renegotiate a new commercial agreement on such fair terms as required by the Act and Regulations, with a view of ensuring assess under a mutually beneficial contractual arrangement.
3. The Commission has found as indicated in the findings of issues 1 and 2 above that MTN Uganda Limited, wrongfully expired Vas Garage's profiled data bases of subscribers in December 2014 and then permanently in August 2015. The Commission thus finds that the blatant expiry of the said data bases by MTN Uganda Limited was unjustified, unfair and a clear violation of fair competition, all of which amount to violations of rules 5(1), (2) & (3), and 6 of the Communications (Fair Competition) Regulations 2005.



The Commission has thus found that had it not been for MTN's breach of the CPA 2014 between the parties, and its abuse of dominance coupled with unfair business practices, Vas Garage would neither have lost its business nor suffered the losses in revenue that it has to date.

The Commission therefore, in accordance with its powers enshrined in the Act and Regulations thereto; among others, the Communications (Practice and Procedure) Regulations 2005, and rules 11 (2) (k), (l), (m), (n), and (o) of the Communications (Fair Competition) Regulations, hereby directs that MTN Uganda Limited, in order to remedy the injustice, and losses occasioned to Vas Garage Limited as a result of its breaches;

- (a) Undertakes an unconditional reconciliation with Vas Garage Limited with a view of settling any outstanding amounts and achieving the purpose of this decision.

In the event that any of the parties to this complaint is not satisfied with the above reconciliation, they may, in accordance with section 55 (8) of the Uganda Communications Act 2013 refer the matter to any other appropriate forum.

The parties are hereby directed to comply with the ruling of the Commission **within 30 (thirty) calendar days from the date of this decision and are required to formally inform the Commission immediately thereafter on the steps they have taken in adherence to this ruling. Should the parties fail or refuse to adhere to this ruling, the Commission shall not hesitate to consider imposing penalties and sanctions as enumerated under the Act and Regulations.**

In accordance with section 55 (9) of the Act, if any of the parties to this complaint is aggrieved by this decision, he or she has a right of appeal.

This decision has been made by the Commission on this **27th** day of **March 2018** at the Commission's Head office at UCC House in Bugolobi.



For and on behalf of the Uganda Communications Commission


Godfrey Mutabazi
EXECUTIVE DIRECTOR

