

The Parties

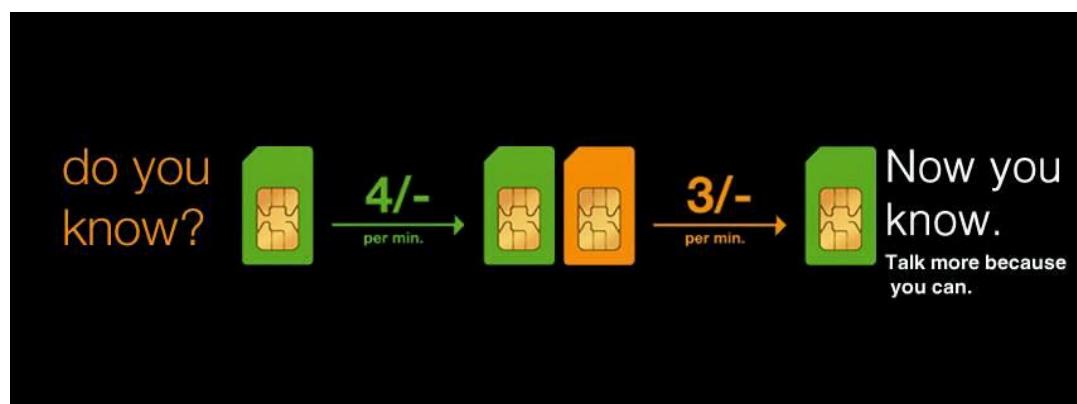
The claimant in this dispute is Scanad Kenya Limited of P. O. Box 34537 -00100 GPO Kenya, which files this complaint on behalf of its client, Safaricom Limited. Sandeep Madan represented the Claimant's position.

The Respondent in this dispute is Telkom Orange Kenya of P. O. Box 30301 -00100 Nairobi Kenya, whose position was represented by its Ad Agency, Access Leo Burnett. Annette J Martyres represented the Respondent's position.

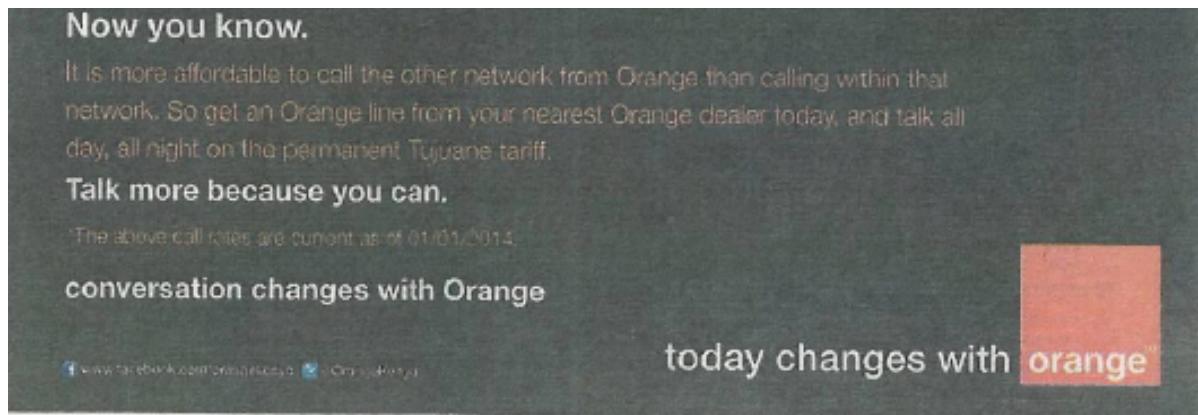
Complaint

The ASC sees no need to burden the text of this judgment with a recital of correspondence with the parties, which are all part of the written record of this dispute.

On the 28th of January 2014, Scanad lodged a complaint against the The Respondent Orange Kenya 'Do you know' ad campaign as regards the following claims:



- "Did you know it costs Kshs 4/- per minute to call from here to here"
- "It just costs Kshs 3/- per minute to call from here to here" and
- "only Kshs 2/- per minute to call from here to here"



- "It is now more affordable to call the other network from Orange than calling within that network."
- "So get an Orange line from your nearest Orange dealer today and talk all day, all night on the permanent Tujuane tariff."
- The Claimant submitted that these claims were inaccurate, deceptive advertising that skewed the Respondent's pricing model and in breach of the Code of Advertising Practice and Direct Marketing. The Claimant asserted that the said ad campaign was meant to infer in the eyes of consumers that Safaricom depicted by the green sim card, was more expensive than the Respondent, depicted by the Orange sim card. The Claimant's position was that an ordinary construction of "*so get an Orange line...and talk all day, all night on the permanent Tujuane tariff,*" was that Safaricom "*has one pricing point, is more expensive and that the rates shown in the advert applied all day and all night and were correct as at 1st January 2014*"
- The Claimant produced evidence to show that Safaricom's flagship Prepay tariff, 'uwezo tariff' had peak rates of Kshs. 4/- and offpeak rates of Kshs. 2/- while Safaricom's flagship Postpay tariff, 'Advantage Postpay' was similarly priced as of July 2013 to date. With this pricing structure, it was the Claimant's submission that the said advert was deceptive and was calculated to disparage Safaricom and thus provide the Respondent with an undue advantage. The Claimant claimed that Safaricom's customers were bound to be deceived by the Respondent's campaign resulting in confusion as to the actual pricing model of Safaricom. For this to be corrected, it was submitted that Safaricom would have to expend time and resources in emphasizing the correct tariff to its customers and the public at large.

RESPONSE

AcessLeo, responded on behalf of their client, the Respondent and denied all the allegations made by the Claimant, terming them vexatious and aimed at infringing on the Respondent's marketing abilities. The Respondent did not deny that the said ad campaign was actually depicting Safaricom by implication; rather, they asserted that the Code allows for such implied comparative pricing. The Respondent maintained that the price comparison contained in their ad was factual and capable of substantiation but did not provide any evidence to this effect. However, the Respondent initiated good faith negotiations with the Claimant and thereafter duly amended the advert to include

an asterisk with the words, 'peak rates apply'.

APPLICABLE CLAUSES OF THE CODE

Clause 11.2 of Section VII of the Code states in part 'Advertisements should not attack, discredit or disparage other products, services, advertisers or advertisements either directly or indirectly.

11.2 Comparisons highlighting a weakness in an industry or product will not necessarily be regarded as disparaging when the information is factual and in the public interest provided that the comparative advertising adheres to the provisions of this Code and remains as subtle and decent as possible. (emphasis ours)

Clause 12.1 of Section VII states 'Advertisements in which factual comparisons are made between products and/or services are permitted provided that:

- 12.1.2 Only facts capable of substantiation are used as governed by this Code;
- 12.13 One or more material, relevant, objectively determinable and verifiable claims are made;
- 12.14 The claims are not misleading or confusing as governed by this Code;
- 12.15 No infringement of advertising goodwill takes place as governed by this Code;
- 12.16 No disparagement of advertisements takes place as governed by this Code;
- 12.17 The facts or criteria used are fairly chosen. In this assessment the following will, inter alia, be taken into account
 - o The significance of the facts or criteria used;
 - o The relevance and representatives of the facts or criteria used; and
 - o Whether the basis of the comparison is the same.

- 12.1.8 Products or services compared must have the same or similar characteristics

The guiding principle in comparative advertising is contained in clause 12.4 in these terms, 'The guiding principle in all comparisons shall be that products and/or services should be promoted on their own merits and not on the demerits of competitive products.'

ASSESSMENT

We have considered all relevant documentation submitted by the parties.

Both parties to this dispute concede that the code permits comparative advertising by implication and that the said implication in this instance is between Orange Telkom and Safaricom. There is therefore no need to discuss the merits of this assertion;

rather, the crux of the matter is whether:

1. The comparison is misleading because the ad failed to mention that the other network had a price point of Kshs.2/- during off peak hours

2. The ad was disparaging because it suggested that Safaricom was the more expensive network.

As it has been conceded, the Code provides for comparative advertising but puts a *proviso* as set out above. It is clear from Clause 11.2 of the Code that highlighting a weakness in a product will not necessarily be regarded as disparaging so long as that information is factual and in the public interest provided that the comparative advertising adheres to the provisions of the Code and remains as subtle and decent as possible. The starting point therefore is to establish whether the comparison is factual and therefore verifiable.

The Claimant provided evidence of the pricing model of Safaricom's tariffs showing that it had off peak and on peak calling rates. It would have served the Respondent well if they had produced a comparative study or summary of their rates as against Safaricom to show a factual basis for the comparison. Oranges must be compared with oranges and apples with other apples (no pun intended). It is not enough for the Respondent to say that their advert is verifiable without providing such verification themselves. Clause 12.1.8 of the Code provides that products compared must have the same or similar characteristics. The Claimant led evidence to show that Safaricom's calling rates have remained stagnant since July 2013 and it is therefore reasonable to expect that the Respondent would have known or should have known Safaricom's calling rates *prior* to launching the 'Did you know' campaign. This is especially because there are other networks in competition with the Respondent hence by singling out a particular network for comparison, steps must have been taken to verify the said comparison. Although they later seem to have included the phrase 'peak rates apply' in small print at the bottom of the advertisement in some, not all media. The said asterisk does not make it clear to the consumer that the ad is only comparing peak rates of both networks.

The role of the ASC is to provide impartial, efficient and effective means of resolving complaints and disputes concerning advertisements. In doing so, we are mindful of the need to ensure that advertisements live up to the best professional standards in line with Part 12 of the preface to the code. To do so, in our view, requires that we keep up with international best practices so long as they do not set heavier obligations than outlined in our Code. In this regard, we have had sight of decisions by other advertising standards authorities faced with comparative complaints, which we set out herein. We neither defend nor pursue complaints on anyone's behalf, our mandate is to defend and uphold the Code in maintaining the international best practice.

A dispute arose between **Tesco v Asda**¹ where the UK Advertising Standards Authority was called upon to deliberate over an advertisement run by Tesco supermarket stating, *inter alia*, '*when we compared prices with Asda's on Saturday the 30th of January*,

¹ http://www.asa.org.uk/Rulings/Adjudications/2010/9/Tesco-Stores-Ltd/TF_ADJ_49038.aspx

shopping was cheaper for over 1.1 million Tesco customers. Tesco. Every little helps". Tesco baskets were then shown alongside Asda baskets with the statement "1,150,000 cheaper" and "940,000 cheaper" The footnote stated "Equivalent products compared, covering over half our customers' purchases, includes promotions. Excludes multibuy, non-matches, Express, selected Metro. To verify contact Tesco Price or www.tesco.com." The ASA noted that although Tesco supplied competitors and consumers with a sample of their total number of baskets as a statistically significant representation of the total number of baskets, they considered that in order for a competitor to verify the claim, Tesco should have disclosed the full data for the total number of baskets on request so that the competitor could then interrogate the data and ascertain for themselves whether the comparison was accurate. In another comparative advertising dispute over **Tinyfees.com**,² an ad containing the claim, 'Want to sell? We're 20% cheaper than anyone else in the area - guaranteed' was challenged as being misleading and unsubstantiated. The ASA considered that the claim implied that tinyfees.com was cheaper than all other agents in the area by 20 per cent or more. They considered that such a claim required substantiation, with robust and recent comparative market data which showed the rates of commission and fees charged by all the agents operating in the area and which demonstrated that tinyfees were 20% cheaper than all of their competitors. In the absence of such evidence, the ASA held that the advertisement was misleading and unsubstantiated. In another **Tesco v Asda**³ comparative dispute Tesco supermarket ran an ad that stated "Asda always say they're cheaper on lots of branded products, but there are things that they don't include, like own brand milk and eggs, meat, and fresh fruit and veg." The on-screen text stated, "Based on a sample of 218,445 Clubcard transactions in store 02/01 comparing Asda prices online 02/01. Closest match applied. Includes promotions. Excludes multibuy, non-matches, Express, selected Metro." Asda supermarket challenged the ad because they believed it was not 'like for like' comparison, rather, it included some products that were of different size and quality. Tesco's defence was that they provided details of the comparison on their website for consumers and Asda to verify the comparison and that the goods compared were of similar quality. The ASA noted that comparisons did not always have to be like for like in every aspect to ensure they were not misleading. However, they stated that what was necessary was that enough information was provided in the ad for the consumer to understand how the comparison was made, and therefore determine its usefulness to them. Without that information, they considered that viewers and readers would not be able to make an informed choice about the overall claim.

These cases are not binding on the ASC; rather, they offer guidance on how other Advertising Standards Authority, with codes similar to our own have dealt with complaints on comparative advertising disputes. We set them out in order to draw on the lessons of international best practice in the field of comparative advertising.

As earlier mentioned, the guiding principle in comparative advertising contained in clause 12.4 of the Code is that products should be promoted on their own merits and

² http://www.asa.org.uk/Rulings/Adjudications/2012/4/tinyfees,-d-.com/SHP_ADJ_176547.aspx

³ http://www.asa.org.uk/Rulings/Adjudications/2009/7/Tesco-Stores-Ltd/TF_ADJ_46611.aspx

not on the demerits of competitive products. Having regard to all that we have set out, it is clear to us that the ad in question breached Clause 12.16 of the code (on disparagement of advertising) and clause 12.1.8 of the code (on similar characterization). In light of the reasons put forward, it is our decision that the 'did you know' campaign is likely to mislead and misinform consumers that Safaricom is the more expensive network.

DECISION: This claim is misleading and should be withdrawn from the mediums it is run on or edited in the manner stated hereafter. The ad should be reworded to make it clear that it is a peak time comparison as opposed to a general comparison with an asterisk in small text to qualify the same. Whilst we do not consider it necessary for the Respondent to advertise on behalf of the Claimant, by highlighting the various price tariffs of the other network, it should be clear that such a comparative ad is limited to peak rates only.

We advice that in future, parties should hold and make available to customers, evidence to support comparative claims to enable the public to understand how the comparison was made.

As AccessLeo initiated negotiations in good faith and further amended the ad in some mediums following the complaint, we consider that each party should bear their own costs.