



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Autopage
Information Provider (IP)	Blue World Agencies t/a SMS Portal
Service Type	N/A
Source of Complaints	WASPA Secretariat
Complaint Number	#3557
Date received	25 February 2008
Code of Conduct version	5.7

Complaint

It is common cause that the SP has indicated its unwillingness to comply with the sanctions specified by the Adjudicator for complaints 1743, 1986 and 2090 and that the SP has, prior to the initiation of this Complaint, provided its reasons for such unwillingness.

The Complaint is set out as follows:

"Clause 13.3.16 of the WASPA Code states that "the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code". Thus after consultation with the relevant adjudicator and the WASPA Management Committee, the WASPA Secretariat is lodging a complaint in terms of section 13.1.5. of the Code.

Autopage is encouraged to provide the reasons for its decision not to comply with the sanctions in response to this complaint, so that an independent adjudicator can assess if this constitutes a further breach of the WASPA Code."

SP Response

The SP provided the following Response, set out in full, on a without prejudice basis:

Letter dated 4 February 2008

With reference to Adjudicator reports for complaints numbered 2090, 1986, 2392 and 1743:

“Autopage’s relationship with Blue World Agencies is such that Autopage provides Blue World Agencies with SIM cards and airtime contracts as they require. Autopage does not have the mandate nor the capacity to regulate what the end customer uses the SIM cards and airtime contracts for.

As per the telephonic discussions on the 1st February 2008 between the writer and Jacqui from your offices, Autopage’s relationship with Blue World Agencies is based on Autopage’s Service Provider licence and not Autopage’s WASP licence. At no stage whatsoever was Blue World Agencies operating under Autopage’s WASP licence, hence rendering Autopage not liable for any fines imposed by WASPA in respect of breaching WASPA’s code of conduct.

In spite of the above Autopage has obtained assurance from Blue World Agencies regarding the stringent measure that have been put in place by Blue World Agencies to prevent future customer complaints, which can be noted in Blue World Agencies letter, a copy of which is attached hereto. Furthermore you will note from the letter that the relationship between Autopage and Blue World Agencies is governed by Agorae’s Service Provider Agreement and not the WASPA code of conduct.

Autopage will only suspend services to customers based on a direct instruction from the Networks – where they have identified fraud or any other illegal act. Autopage can therefore not suspend the service to Blue World Agencies as requested.

Should WASPA be of the understanding that Blue World Agencies have acted illegally, WASPA may proceed with discussion with the relevant Networks in order to resolve the matter.

With reference to your invoice dated 29/01/2008 for the consultation fees, Jacqui clarified that the aforesaid fees are for consultations regarding back billing of content. At no stage did Autopage requested WAPA assistance in dealing with such back billing.

Autopage is only able to on-bill customers as and when such billing is handed down from the Networks. Here again, back billing disputes that have occurred between Autopage and Autopage's clients are governed by our Service Provider Agreement and in no way whatsoever is WASPA entitled to hold Autopage liable in this regard.

Autopage requests that the fines imposed by WASPA be withdrawn and all charges pertaining to consultation fees be voided.

In light of the above, Autopage requests a meeting between WASPA and themselves in order to resolve the issues amicably."

Letter dated 6 February 2008

"I refer to the above matter and the letter sent by our financial director, XXXXXXXX.

I have met with Blue World Agencies CC, t/a SMS Portal on the 5th February to further discuss this matter with them and I have suggested that they become members of WASPA however this is up to SMS Portal to decide but please address any further complaints directly to them."

Formal Response to this Complaint dated 4 March 2008

“Without Prejudice”

RE: COMPLAINT IN TERMS OF SECTION 13.3 OF THE CODE OF CONDUCT – COMPLAINT #3557

1. Altech Autopage Cellular (Pty) Ltd ("Autopage Cellular") is a wholly owned subsidiary of Allied Technologies Limited ("Altech") and accordingly, I am authorised to provide this response to you on behalf of Autopage Cellular.

2. We refer to your recent notification regarding the complaint under Section 13.3 of the Code of Conduct. According to WASPA, this complaint arises as a result of the failure of Autopage Cellular to comply with the sanctions imposed on it by WASPA on the basis that "the failure of any member to comply with any sanction imposed on it, will itself amount to a breach of the Code".

3. We are advised that Mr XXXXXXXX, the Financial Director of Autopage Cellular, has been involved in extensive discussions regarding the sanctions under complaints 1743, 1986 and 2090. The sanctions imposed, relate to a fine payable by Autopage Cellular and that Autopage Cellular suspends its services to the IP for a period of 14 days or until such time as it has satisfied itself that the IP is in compliance that it is in provision with clauses 5.1.4(a) and 5.3.1 of the Code of Conduct.

4. As advised in writing by Mr XXXXXX, the IP in question is SMS Portal which has concluded a Subscription Agreement with Autopage Cellular and is not a provider of content under the Wireless Application Service Provider Agreement ("WASP Agreement").

5. Accordingly, the relationship between Autopage Cellular and SMS Portal is governed by the Service Provider Agreement concluded between it and the network in question.

6. The basis upon which you seek to sanction Autopage Cellular under the aforesaid complaints is wholly incorrect. As previously advised, Autopage Cellular cannot be held accountable under the WASPA Code of Conduct for the actions of an independent third party who is not a content provider and in turn, not bound by any WASP Agreement signed by Autopage Cellular and the relevant network.

7. Furthermore, as advised herein above, the relationship between SMS Portal and Autopage Cellular is governed by the Service Provider Agreement concluded between Autopage Cellular and the network. In terms of that Agreement, the only basis upon which Autopage Cellular is entitled to suspend services to the relevant subscriber is where a fraud or unlawful act is committed by the subscriber. Therefore, the suspension of the services to SMS Portal would constitute a breach of

the Subscriber Agreement and would expose Autopage Cellular to a damages claim. The sanction under complaints 1743, 1986 and 2090 including the complaint under 13.3 of the Code of Conduct constitute an unlawful inducement of Autopage Cellular to breach its Subscription Agreement with SMS Portal.

8. Autopage Cellular also objects to the unilateral imposition of the fine by WASPA for the actions of SMS Portal who are an independent third party and are not bound by a WASP Agreement.

9. Accordingly, we would suggest that prior to the imposition of a further charge of misconduct, Autopage Cellular be granted an opportunity to clarify the validity and the nature of the sanctions. Failing which Autopage Cellular will have no alternative but to seek all remedies available to it in law, the cost of which will be for your account.

10. Please also be advised that the submissions contained herein are not exhaustive, and Autopage Cellular reserves its rights to amplify the content of this letter at the appropriate time and in the appropriate forum.

11. In the interim, Autopage Cellular's rights remain strictly reserved."

Sections of the Code considered

The following sections of version 5.7 of the WASPA Code of Conduct were considered:

13.3.12. Once the adjudicator has determined whether there has been a breach of the Code, and any sanctions, the adjudicator will provide the secretariat with a written report detailing these findings.

13.3.13. The secretariat will provide a copy of this report to the relevant member and to the complainant.

13.3.14. The member has five working days to notify the secretariat if it wishes to appeal against the decision of the adjudicator.

13.3.15. Unless otherwise specified in the adjudicator's report, any sanctions will be considered suspended if an appeal is lodged, until the appeal process is completed.

13.3.16. If no appeal is lodged, or if the adjudicator has specified certain sanctions as not being suspended pending an appeal, the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code and may result in further sanctions being imposed.

13.6.1. Any member found to have breached the Code of Conduct by an adjudicator has the right to appeal for a review of the adjudicator's decision, and/or a review of the sanctions imposed by the adjudicator.

Decision

This is not an Appeal against any of the Adjudications which laid down sanctions which the SP, for the reasons advanced above, has failed to comply with ("the underlying Adjudications"). Rather this is simply an independent adjudication as to whether such failure to comply constitutes a breach of section 13.3.16.

Accordingly it is not open to this Adjudicator to enter into any review of the merits of the underlying Adjudications. The findings of such Adjudications and the responses made by the SP to the individual complaints as also in respect of this matter are accordingly not, in the main, germane to this Complaint.

As is clearly set out in section 13 of the Code of Conduct the correct remedy for an SP who believes an Adjudication to be erroneous is to lodge an appeal against such Adjudication whereafter the matter will be referred to a WASPA Appeals Panel.

The crisp question lying for decision is simply whether or not the SP has complied with a sanction properly imposed. Clearly it has not and, while the SP has expressed its unhappiness with the decisions in the Underlying Adjudications and there has clearly been a great deal of negotiation between the SP and WASPA, it has not appealed them or set its views as contained in correspondence before the correct forum.

The obligation on the SP to comply with sanctions imposed by a WASPA Adjudicator under the WASPA Complaints process flows from its membership of WASPA and more specifically from section 13.3.16.

According to the provisions of the Code in the absence of the lodging of an appeal the sanction imposed by an Adjudicator is binding and the SP is obliged to comply therewith. The language used in section 13.3.16 is peremptory:

"the failure of any member to comply with any sanction imposed upon it will itself amount to a breach of the Code".

(my emphasis)

The complaints process is set out in the Code and this Adjudicator has no latitude to deviate therefrom in order take into account the efforts of the SP to resolve the matter outside of the ambit of the Code or to conduct what would amount to an appeal in respect of the underlying Adjudications.

In the circumstances it is found that the SP has breached section 13.3.16 of version 5.7 of the WASPA Code of Conduct.

The setting out of an appropriate sanction is particularly difficult in this matter.

It is firstly necessary to clarify that no sanction lies in respect of the IP in this matter and whose citation herein is only relevant insofar as it was involved in the underlying Adjudications is concerned. The refusal to comply is that of the SP alone.

Secondly the efforts of the SP in trying to resolve this matter can be taken into account in assessing the sanction notwithstanding that such efforts were made outside of the structures dictated by the Code.

Thirdly the Adjudicator does not believe that any sanction involving a further punitive element will be of any assistance whatsoever in resolving the matter. Insofar as it may be possible the sanction should seek to provide a basis for a pragmatic solution. Nevertheless the failure of an SP to comply with a sanction is a very serious offence which goes to the heart of the ability of WASPA to function as a self-regulating body.

The following sanction is imposed in terms of section 13 of the Code:

- The SP is issued with a formal reprimand.

The following suggestion is raised by the Adjudicator in respect of the proper resolution of this matter:

1. That the SP be allowed to make application for condonation in respect of the lodging of appeals against the underlying Adjudications and that WASPA consider such application favourably.
2. That the WASPA Appeals process be followed in respect of the underlying Adjudications and that the SP be given an opportunity to raise its concerns in this, the appropriate forum.
3. That, in the event of the SP failing to avail itself of this opportunity within a reasonable period, that the matter be referred back to this Adjudicator on the understanding that there will be little alternative but to impose a sanction involving suspension or expulsion from WASPA.