



REQUEST FOR FURTHER INFORMATION BY THE ADJUDICATOR

WASPA Member (SP):	iTouch Ventures SA
Information Provider (IP):	n/a
Service Type:	Subscription Services
Source of Complaints:	Consumer
Complaint Number:	4387
Code of Conduct version:	Code v5.7

Complaint

A complaint was lodged by a member of the public who wished to subscribe to an adult subscription service advertised by the SP. The consumer claimed to have attempted to join the service on 26 May 2008 from Vodacom, MTN and Cell C numbers respectively by sending the relevant keyword to a particular short code provided by the SP. The consumer further claimed to have received no welcome messages and that no content was available for download. Furthermore, the consumer claims that a message was sent to the Cell C number used advising that the service was only available to MTN and Vodacom subscribers. The complainant was concerned that the services were being charged for despite being unavailable.

Version 5.7 of the WASPA Code of Conduct applies to this complaint.

SP Response

In its initial response dated 10 June 2008, the SP acknowledged its awareness of instances when messages associated with this particular service were not delivered to consumers and stated that "We, iTouch, are aware that we are in breach of clauses within the code of conduct and have taken all means possible to rectify this situation."

The SP further provided screenshots of MSISDN searches conducted by it to confirm that welcome messages and links to content had been sent to the consumer on both the MTN and Vodacom numbers. The SP also confirmed that the consumer was billed against both those numbers for the service. The SP advised that when it became aware that subscribers were not receiving messages in respect of this service that the marketing of the service was suspended.

Request for Further Information

After examining the complaint and the SP's initial response it was not clear whether the message delivery failures occurred as a result of circumstances within or beyond the control of the member.

It would have been helpful and relevant for the SP to have responded by providing WASPA with an analysis of why messages in respect of this service were not received by several consumers. Instead, it merely indicated that messages were caused to be sent but did not appear to confirm that messages were delivered nor did it specifically deny the allegations made by the consumer. It did however acknowledge that it had breached the Code.

In terms of section 13.3.8 of the Code, the SP was requested to properly investigate the reasons for non-delivery of certain messages pertaining to the service generally and to report the results of its investigation to WASPA within 10 (ten) working days. The SP was also directed to simultaneously deliver copies of all advertising associated with the service used during May 2008 to determine whether the availability of the service to MTN and Vodacom subscribers only was properly advertised as contemplated by the provisions of, inter alia, section 1.3.14 of the Advertising Rules.

Several weeks later the SP responded to the request for further information. This response was delivered late despite repeated request from the Secretariat. In its response of 9 October 2008 the SP stated as follows:

"Messages were not being delivered from our platform as our billing table was not being updated correctly. This technical malfunction meant that the user was in our billing table and was given a specific code relating to the status of his/her funds. If the funds were pending they would have a code 12 allocation, once the funds were received the code would change to code 13 and our sms server would then initiate a response message that would be sent to the client.

What was happening was that the billing table status was not updating and the code was remaining in a pending phase. This was a technical malfunction that has been investigated extensively. As soon as the situation was brought to our attention marketing of the service was stopped.

This has been rectified but the MoviSexy Service is still not being advertised in the market.

The reason for the malfunction: iTouch SA is in the process of migrating all of our services to an international platform in Milan, due to this some of the errors experienced is due to this massive project. By end November 2008 all services will have been migrated.

For this we ask grace from the adjudicators and assure them with every problem that arises we take it as high priority to rectify as we have no intention to mislead the public in any way."

The SP did not furnish copies of its advertising for the service as requested.

Decision

Section 3.1 of the Code provides as follows:

- 3.1.1. Members will at all times conduct themselves in a professional manner in their dealings with the public, customers, other wireless application service providers and WASPA.
- 3.1.2. Members are committed to lawful conduct at all times.

Section 3.3 provides further as follows:

3.3. Service levels

3.3.1. Members will not offer or promise services that they are unable to provide.

3.3.2. Services must not be unreasonably prolonged or delayed.

3.3.3. A member is not liable for any failure to provide a service due to circumstances beyond that member's control.

From the information presented in this complaint it does not appear (nor did the SP suggest) that the service failure was due to circumstances beyond the control of the SP. To the contrary, the service failure arose out of the SP's own decision to migrate the service to a new platform in Milan and out of certain problems experienced with the billing process as a consequence. An SP's obligation in terms of section 3.1.1 to conduct itself at all times in a professional manner in its dealings with the public would mean that any plan to migrate a service must be adequately tested before any consumer billing commences. It is not clear whether the migrated services were adequately tested or not but it is clear that a consumer was billed for a service that was not fully operational and that this was not as a result of circumstances arising outside of the member's control. During the period in question, the SP was offering a service which it was factually unable to provide in breach of sections 3.1.1 and 3.3.1 of the Code.

The SP did not respond to the request to provide further information within the stated time period and, when it did eventually reply several weeks later, it did not provide copies of the advertising for the service during the period in question. This failure has been viewed in a serious light. Section 3.9.3. of the Code commits a member to acting in accordance with the WASPA complaints process and, as already stated above, section 3.1.1 of the Code requires a member to conduct itself at all times in a professional manner in its dealings with WASPA.

The complainant in this matter complained that a reply was sent to the Cell C number from which the initial subscription request had been sent advising that the service was only available to MTN and Vodacom subscribers. Section 4.4.1 of the WASPA Advertising Rules states that it is mandatory to display in an advertisement in any media where an access channel is advertised whether a service is restricted to any particular network. Although the consumer has not specifically alleged that the SP's advertising did not state that the service was not available to Cell C customers, it seems reasonable to draw an inference from the consumer's complaint that this disclosure requirement was not observed and the SP has not produced any information to rebut such an inference. However, due to the lack of a clear averment that the SP had not properly advertised the unavailability of the service to Cell C customers and due to a lack of evidence on which the adjudicator could investigate this properly, the SP is not found to have breached section 4.4.1 of the Code.

In light of the fact that the SP has not responded to the request for copies of the advertising in question, it is also not possible to know whether the advertisement complied in all respects with other requirements of the Advertising Rules which would be applicable to any advert for subscription services of an adult nature. It is quite possible that copies of such advertisements would reveal other breaches of the Code which may, particularly in the case of age restricted subscription services such as the one forming the basis of this complaint, carry serious sanctions as a consequence. When, during the course of a formal adjudication, an adjudicator requests copies of advertising for the service concerned, such a request should be promptly complied with. No grounds for not complying with the request were put forward by the SP. The

SP is accordingly found to have breached sections 3.1.1 and 3.9.3 by not complying with the adjudicator's request for copies of the advertisements in question.

Sanction

1. For offering and charging for content which it was factually unable to provide in breach of sections 3.1.1 and 3.3.1 of the Code the SP:
 - 1.1 is fined an amount of R10 000;
 - 1.2 is directed to reimburse all monies received from the complainant after 28 May 2008 in respect of the service which forms the subject of this complaint within seven days of receipt of the consumers bank account details;
 - 1.3 is directed to SMS all other consumers affected by the failure of the service informing them of the interruption of the service, the period of the interruption and offering to reimburse all fees and payments received by the SP during such period in respect of such service on the supply of the consumer's banking details; and
 - 1.4 is directed to reimburse all other affected consumers referred to in paragraph 1.3 by payment into their bank account where such details are supplied to them by the consumers concerned or, where not so supplied within 7 days and if possible to do so, by arranging for a corresponding credit in favour of each consumer to be passed by their respective cellular network service providers at the SP's own expense.
2. For not acting in accordance with the WASPA complaints process and for not conducting itself at all times in a professional manner in its dealings with WASPA, the SP is reprimanded and is fined an amount of R25 000. In determining this sanction, it has been taken into account that WASPA is a voluntary association and that its effectiveness rests upon co-operation amongst its members and, furthermore, that by not complying with the adjudicator's request to provide WASPA with copies of the advertisements in question, the SP may well have escaped further and additional sanction for breach of the advertising rules.
3. All fines payable to WASPA shall be paid within 7 days of this adjudication being published.