



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Mobilegate (SP = Sybase)
Information Provider (IP):	Not applicable
Service Type:	Failure to comply with sanctions
Complainants:	Secretariat
Complaint Number:	8613
Code Version:	7.4
Advertising Rules Version:	N/A

Complaint

This is a formal complaint lodged by the WASPA Secretariat.

The Secretariat wrote:

“Failure to comply with the sanctions for complaint 6186. The SP has failed to provide a refund to the customer as ordered by the adjudicator.”

Service provider's response

In its final response the SP stated the following:

“We refer to the SP notification for affiliate member complaint #8613 received by Sybase 365 on 22 February 2010, giving notification of complaint #8613 lodged against the affiliate member and Information Provider Mobilegate and our previous letter sent to WASPA dated 23 February 2010. Complaint #8613 relates to failure for Mobilegate to comply with the sanctions made by WASPA for complaint #6186 under the Adjudicator's Report issued on 6 August 2009 and published on <http://www.waspa.org.za/code/download/6186.pdf> related to services provided by Mobilegate. As WASPA are aware, Sybase 365 does not directly contract with consumers (as defined in the WASPA Code of Conduct) for premium rate services nor advertise such services to consumers,

consequently Sybase 365 does not itself provide the content which was the subject of complaint #6186.

The contractual relationship between Sybase 365 and the Information Provider is set out in a messaging services agreement ("the Agreement"). In essence, the Agreement makes available to the information provider a Sybase 365 controlled short code through which the Information Provider can direct its traffic.

Under the terms of the Agreement, the Information Provider is obliged to abide by the Code of Conduct and associated documentation in South Africa and is obliged to become a member of WASPA. As detailed above, the Information Provider is a member of WASPA.

In the Adjudicator's Report issued with respect to complaint #6186 the adjudicator imposed the following sanctions on Mobilegate:

1. A fine in the amount of R100 000.00.
2. The refund of all amounts charged to the complainant for his use of the IP's service from 3 February 2009 to date of termination.

As you know, Sybase 365 seeks to ensure that all its customers comply with their legal and regulatory obligations, by including specific provisions in its contracts and ensuring that they become members of WASPA, and by taking any necessary contractual steps and sanctions in case of any breach of legal or regulatory obligations by its customers. Sybase 365 seeks to cooperate with WASPA in enforcing sanctions imposed against its customers.

We confirm that :

- Sybase 365 is reliant on the Information Provider for information related to the services which are subject to this complaint.
- Sybase 365 no longer has a contractual relationship with Mobilegate since 29 July 2009:
 - On 1 June 2009, Sybase 365 terminated its messaging services related to the short codes 38696 and 31730, suspended the relevant accounts;
 - On 29 July 2009 Sybase 365 terminated its messaging services related to the bulk account, which it suspended, and therefore terminated the Agreement.
- Sybase 365 has not been able to reach any Mobilegate staff since it stopped providing any services to Mobilegate. As such Sybase 365 has not been able to determine the status of Mobilegate's payment of the fine and refund imposed by the Adjudicator's Report issued with respect to complaint #6186.

Sybase 365 is determined to cooperate with WASPA and comply with any directions of WASPA in relation to this case. If you would like any further information or assistance from Sybase 365 please let me know."

Sections of the Code considered

13.3.5. If the member fails to respond within this time period, it will be assumed that the member does not wish to respond.

13.3.17. The member must provide the secretariat with confirmation of compliance with any applicable sanctions within five working days of receiving the adjudicator's report.

13.3.18. The member must pay any applicable fine(s) imposed by an adjudicator within five working days of receipt of invoice.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent response.

From the communication received from the Secretariat it is quite obvious that the IP does not wish to respond, can't respond or is ignorant to any communication from the Secretariat. It is also unclear whether the IP is in fact reachable or still existent.

This left the Secretariat with no option but to draw a response from the SP.

Due to the SP's suspension of its contractual relationship with the IP it might be assumed that this particular adjudication should not have any relevance to the SP.

However, the original breach in 6186 took place before the SP relinquished its services with the IP.

At the same time it has to be stated that no IP notice was served in the Adjudicator's report 6186 and it would have been impossible for the SP to have known that the IP in this matter acted in contravention of the Code of Conduct and in breach of any subsequent sanctions. The Adjudicator has also taken note of the fact that the SP in this matter has responded voluntary to the complaint and has also not been able to contact the IP.

The IP is found to be in breach of 13.3.18.

The Complaint is upheld.

Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct;

The IP is fined R 50 000-00 for its breach of the code.

The IP is also ordered to comply with the refund provisions in Adjudication 6186.

Should the Secretariat fail to draw any response from the IP within 5 (five) working days from notification hereof, then the Secretariat is ordered to expel the IP from WASPA.

At the occurrence of such an event, the **SP** is ordered to comply with the refund provisions in Adjudication 6186. This is based on the date of origin of the complaint in 6186 and its relationship with the IP at such time.