

WASPA appeals panel
Complaint 15029

REPORT OF THE APPEALS PANEL

Date: 02 May 2012

Service Provider (SP): Mira Networks

Information Provider (IP): Atinco

Appellant and SP: Mira Networks

Complaint Number: 15029

Applicable versions: 11.0

1. BACKGROUND TO THE APPEAL

1.1 This appeal concerns a complaint lodged on 27 September 2011 against Atinco an Information Provider (IP), for irregularities regarding its subscription display and process.

1.2 The SP is a member of WASPA and based in South Africa.

1.3 The IP is a Spanish company with a South African arm (Jetcel) and is a full member of WASPA.

1.4 The complaint relates to subscription irregularities.

1.5 The complaints, the findings of the Adjudicator, the IP's response to the complaint and the SP's appeal, are fully recorded in the case files provided to this appeals panel, and as these are, or will be, publicly available on the WASPA website, they will not be repeated in full in this appeal panel's report.

2. CLAUSES OF THE CODE CONSIDERED

2.1 The following clauses of the Code were considered:

2.1.1 3.9. Information providers

2.1.1.1 3.9.1. Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct or the Advertising Rules.

2.1.1.2 3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.

2.1.2 4.1. Provision of information to customers

2.1.2.1 4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

2.1.2.2 4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

2.1.3 11. Subscription services

2.1.3.1 11.1. Promotion of subscription services

2.1.3.1.1 11.1.1. Promotional material for all subscription services must prominently and explicitly identify the services as “subscription services”. This includes any promotional material where a subscription

is required to obtain any portion of a service, facility, or information promoted in that material.

2.1.4 **14.3. Formal complaint procedure**

2.1.4.1 14.3.3. The member (or members) named in the complaint, or identified by the WASPA Secretariat on the basis of any identifying information included in the complaint, will be notified by the secretariat that a complaint has been lodged and that the formal complaint procedure is being followed.

2.1.4.2 14.3.6. If the member fails to respond within this time period, it will be assumed that the member does not wish to respond. An extension to this time period may be given to the member at the discretion of the WASPA Secretariat.

2.1.5 **14.4. Sanctions**

2.1.5.1 14.4.6. Where a service is provided by one WASPA member using the facilities of another member, if the member providing these facilities has taken reasonable steps in response to any alleged breach of the Code by the member providing the service, this must be considered as a significant mitigating factor when considering any sanctions against the member providing the facilities.

2.1.5.2 14.4.7. For the avoidance of doubt, no sanction may be applied to a member who has not been given an opportunity to respond to a complaint.

2.1.6 14.5. Information provider notices

2.1.6.1 14.5.1. If the adjudicator has determined that an information provider is operating in breach of the Code of Conduct, and the adjudicator is of the reasonable opinion that the information provider may persist in such

breach, whether through the member against whom the complaint was lodged or another member, the adjudicator may instruct the secretariat to issue a notice to WASPA's members.

2.1.6.2 14.5.2. The notice referred to in 14.5.1 must clearly identify the information provider and the relevant breach or breaches of the Code of Conduct, and must specify a date from which the notice applies.

2.1.6.3 14.5.3. Any member permitting the information provider to operate in breach of the Code of Conduct (in the same or substantially similar manner to that identified in the notice referred to in 14.5.1), after the date specified in the notice, will be automatically in breach of the same part or parts of the Code of Conduct as the information provider. Such members will be subject to sanctions determined by the adjudicator in accordance with section 14.4, read in conjunction with clause 14.3.15.

2.1.7 **14.9. Media Monitor**

2.1.7.1 14.9.1. WASPA may employ a Media Monitor, whose role it is to monitor WASPA members' advertising and services for compliance with the WASPA Code of Conduct and Advertising Rules.

2.1.7.2 14.9.2. The Media Monitor may lodge complaints with WASPA using the procedure outlined in sections 14.1, 14.2 and 14.3 of the Code.

2.1.7.3 14.9.4. In addition to the informal and formal complaints process, the Media Monitor may also make use of the "Heads Up" process set out below. The Media Monitor may make use of this process if it seems feasible for the member concerned to provide a prompt remedy to the problem identified.

- 2.1.7.4 14.9.5. For the "Heads Up" process, the Media Monitor will send a notification of the problem directly to the relevant WASPA member, and send a copy of this notification to the WASPA Secretariat.
- 2.1.7.5 14.9.6. The Member has two working days to respond to the "Heads Up" complaint, thereafter, if the Media Monitor is satisfied that the member has adequately addressed the "Heads Up" complaint, it is considered closed, and no further action is taken against the member.
- 2.1.7.6 14.9.7. If the Media Monitor is not satisfied that the "Heads Up" complaint has been satisfactorily resolved then the Media Monitor may either give the member a further two working days to resolve the matter, or proceed to lodge a formal complaint, as described in sections 14.1 and 14.3 of the Code.

3. FINDINGS AND DECISIONS OF THE ADJUDICATOR (Please note that this extract is a verbatim copy of part of the Adjudicator's Report)

- 3.1 The IP has contravened the Advertising Rules and Code of Conduct of WASPA on a consistent and flagrant manner as outlined in the WMM's complaint and the attachments thereto. The contraventions started in March and April 2011.
- 3.2 The initial contraventions were dealt with informally with the WMM affording the IP and SP a reasonable opportunity to ensure that the IP's websites complied with the Advertising Rules and Code of Conduct. That is clear from the WMM's complaint and attachments.
- 3.3 The IP thereafter, at least for a period seemed to comply with the agreement reached with the WMM in displaying appropriate references to the subscription services on its webpages. Subsequent tests by the WMM on 22 September 2011 revealed that the IP was once again contravening the provisions of the Code of Conduct and Advertising Rules by not displaying the required text and references to the subscription services in accordance with the agreement reached with the WMM.

- 3.4 The contraventions seemed to be deliberate and in flagrant disregard for the obligations of the IP and the SP. Using the newly adopted heads up procedure the WMM entered into new negotiations with the IP and SP to make the services compliant.
- 3.5 Within days of the agreement reached, the IP was once again contravening the Code and Advertising Rules by not displaying the required notices in the required positions on its webpages.
- 3.6 Although the IP and SP were both afforded an opportunity to respond to the serious complaints by the WASPA secretariat in the notice of complaint, only the IP responded by indicating that it was ensuring that the webpages would be changed (once again) to comply with the Code and Advertising Rules.
- 3.7 More specifically the SP did not provide any indication that in the light of the serial nature of the breaches by the IP that it was taking reasonable steps to monitor the conduct of the IP making use of its services.
- 3.8 The WMM in her communication of 22 September 2011 requested the SP to “ensure that all these links, and any other services run by Binbit are displayed as set out by the Code of conduct”. She also threatened that if transgressions occurred again, she would file a repeat offence formal complaint.
- 3.9 The SP was therefore adequately forewarned of the seriousness of the charges and the conduct of its client.
- 3.10 In terms of section 3.9.2 the SP “shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.”
- 3.11 In the light of the absence of any explanation I find that the SP was grossly negligent in failing to take reasonable steps to monitor and control the conduct of

the IP even though it was aware of the conduct of the IP over a period of time and the disregard of the IP for any undertakings given.

3.12 In the complaint and attachments the WMM accuses the IP of deliberately infringing the Code of Conduct and acting in an underhanded manner by agreeing to comply and then deliberately changing the webpages again.

3.13 The IP offered no explanations for the subsequent changes to their pages in contravention of the code of conduct, nor did it deny the charges that this conduct was deliberate.

3.14 The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services.

3.15 The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.

3.16 The Code of Conduct also sets standards for advertising mobile application services.

3.17 The kind of conduct displayed by the IP and the failure of the SP to effectively address that conduct undermines the very objectives of the WASPA Code of Conduct as set out in Clause 1.2. I find that the IP deliberately contravened the provisions of Sections 4.1.1, 4.1.2 and 11.1 of the Code of Conduct and 9.2 of the Advertising Rules

3.18 Sanctions Imposed

3.18.1 In view of the seriousness of these contraventions and the failure of both the IP and the SP to provide any explanation for their conduct, the following sanctions are imposed:

3.18.1.1 The SP must monitor the webpages of the IP on a regular basis and provide the WMM or Secretariat with monthly reports of such monitoring.

3.18.1.2 In the event that the IP should again contravene any of the provisions of sections 4.1.1 or 4.1.2 of the Code of Conduct or section 9 of the Advertising Rules, the SP shall suspend all services provided to the IP forthwith and inform the WASPA Secretariat of such suspension.

3.18.1.3 A fine of R50,000 is imposed on the SP.

4. GROUNDS OF APPEAL

4.1 Grounds of appeal for complaint 15029

4.1.1 The Appellant submitted detailed grounds of the appeal which will not be recanvassed in full here.

4.1.2 Therefore, the Panel has decided to extract a verbatim copy of 6 key aspects submitted by the Appellant:

To the extent that the learned adjudicator interpreted section 3.9.2 of the Code of Conduct, of itself, as imposing liability on the Appellant for a contravention of the Code of Conduct by an information provider that is also a member of WASPA, we submit that the learned adjudicator erred in such interpretation.

To the extent that the learned adjudicator interpreted sections 3.9.3, 3.9.4 3.9.5 and/or 3.9.6 of the Code of Conduct as imposing liability on the Appellant for a contravention of the Code of Conduct by an information provider that is also a member of WASPA, we submit that the learned adjudicator erred in such interpretation.

To the extent that the learned adjudicator interpreted section 3.9.1 of the Code of Conduct, of itself and without reference to the Appellant's conduct, as imposing liability on the Appellant for a contravention of the Code of Conduct by an information provider that is also a member of WASPA, we submit that the learned adjudicator erred in such interpretation.

To the extent that the learned adjudicator sought to impose liability on the Appellant for the contraventions of Atinco SA by invoking section 3.9.1 of the Code of Conduct and having found fault in the form of intention on the Appellant's part, the learned adjudicator erred in finding such fault as no such intention was or could be demonstrated.

To the extent that the learned adjudicator sought to impose liability on the Appellant for the contraventions of Atinco SA by invoking section 3.9.1 of the Code of Conduct and having found fault in the form of negligence on the Appellant's part, the learned adjudicator erred in finding that the Appellant had acted negligently.

To the extent that the learned adjudicator drew a negative inference from the Appellant's conduct in relation to the informal heads up complaint procedure, which then influenced his finding and sanctions in relation to the Appellant, the learned adjudicator erred in drawing such a negative inference as the informal heads up complaint procedure was fatally flawed *ab initio*...

4.2 The Appellant also claimed, prior to laying down its grounds of appeal as detailed above, that undue process was followed, by petitioning the principles of Ultra Vires and Audi Alteram Partem.

5. FINDINGS OF APPEAL PANEL

5.1 Version of the Code

5.1.1 The date when the alleged breach took place and the date on which the complaint was lodged, is 27 September 2011.

5.1.2 Version 11.0 of the Code, in use from 8 June 2011 to 17 November 2011, therefore applies.

5.2 Decision

5.2.1 The Panel has taken careful consideration of the appeal prepared by the Appellant.

5.2.2 The Panel has also revisited all the communication, documents and samples that were provided to the Adjudicator in assisting him or her to have reached his or her decision, which decision / adjudication was subsequently scrutinised by this Panel in evaluating the arguments levelled against it by the Appellant in this matter.

5.2.3 The Panel has thought it appropriate to first address the argument brought by the Appellant under the headings “Ultra Vires” and “Audi Alteram Partem”.

5.2.4 In its appeal, the Appellant argues that both the Secretariat and Adjudicator acted beyond their powers by conjoining the Appellant to a complaint that was directed at the IP.

5.2.5 The Appellant then went further and reiterated its stance by referring to the decision reached in Appeal 6759.

5.2.6 The Panel read the relevant case and analysed the decision reached by the Panel in Appeal 6759.

5.2.7 This Panel does however not agree with Appellant’s claim that the WASPA Secretariat acted beyond the scope or in excess of its authority (ultra vires).

5.2.8 Section 14.3.3 clearly allows the WASPA Secretariat to identify members as respondents on the basis of any identifying information included in the complaint.

5.2.9 This is in the opinion of the Panel, exactly what the WASPA Secretariat has done.

5.2.10 The Secretariat also acted accordingly by notifying the SP and Appellant in this Appeal in accordance with section 14.3.3.

5.2.11 This Panel does therefore not see the relevance of the “Ultra Vires” principle and finds that the Appellant failed to prove the principle by its attempt in drawing inference from the Appeal mentioned in paragraph 5.2.5.

5.2.12 Further to the claim by the Appellant of the Adjudicator acting “Ultra Vires”, the Panel is of the opinion that this can’t be reviewed independent of having interpreted certain key sections of the Code, of which such key sections were also mentioned by the Appellant in its grounds of appeal, referenced in paragraph 4.1.2 above.

5.2.13 There also seem to be ample proof in communication aimed at the SP and Appellant in this matter to suggest that the Appellant had more than sufficient time to give an account of its own actions taken to remedy some of the alleged breaches by the IP, even though some of the communication was outside the formal complaint process.

5.2.14 However, the Panel is of the opinion that the Appellant’s utterance of an “Audi Alteram Partem” failure by the Adjudicator cannot be heard without also taking cognisance of its grounds of appeal, referenced in paragraph 4.1.2 above.

5.2.15 Therefore, this Panel will now draw its attention to that part of the appeal.

5.2.16 Section 3.9.1 of the Code states that Members must bind any information provider with whom they contract for the provision of services to ensure that none of the services contravene the Code of Conduct or the Advertising Rules.

5.2.17 Proof of such assurance could however only be achieved if some qualifying criteria applies.

5.2.18 Section 3.9.4 states that a WASPA member shall, by obtaining the information provider's signature on the WASPA template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

5.2.19 It is this Panel's opinion that section 3.9.4 of the Code might be interpreted as only applying to those members that are dealing with Information Providers that are not members of WASPA, since Information Providers that are members, have on the basis of their membership, been indoctrinated in the workings and sections of the Code of Conduct.

5.2.20 However, section 3.9.1 applies to ALL Information Providers and section 3.9.4 could therefore then serve to provide mitigating circumstances for a member where it contracted with an Information Provider that is also a member.

5.2.21 In Appeal 6759 (an Appeal referenced by the Appellant), the Panel stated the following:

5.2.21.1 *The Panel does not believe that section 3.9.1 should be interpreted as providing a form of strict liability on SP's but that fault in the form of intention or negligence is required before this section can be invoked.*

5.2.21.2 *In this regard section 18.2 of the WASPA Constitution is also relevant:*

5.2.21.3 *"18.2. No member of WASPA shall be answerable or deemed to be in any way responsible for any act or default of any other member or for any deficiency or insufficiency of any title or security whatsoever taken by WASPA, save to the extent that such member acted negligently or fraudulently."*

5.2.21.4 *Where there is a question as to whether an SP has been at fault in the non-compliance of another WASPA member it would, the Panel believes, be incumbent upon WASPA to make such SP a direct party to the proceedings so that it can be properly heard in this regard.*

5.2.22 This Panel agree with the stance taken by the learned Panel in the above mentioned case.

5.2.23 This Panel is however also of the opinion that the Secretariat in this instance **did** make the SP a direct party to the complaint by notifying the SP accordingly and does therefore not concur with the Appellant.

5.2.24 The Panel is also satisfied that the Appellant, through such notification – which did take place, had sufficient time to proof that there was no *negligence* on its side by providing the learned Adjudicator with proof of its compliance with inter alia section 3.9.4 of the Code.

5.2.25 At no stage did the Appellant, whether through its communication with the WASPA Monitor or as a response to the SP notification made any attempt to clarify its position. All this communication was directly addressed to the SP and Appellant in this matter, and the SP was also forewarned of possible consequences.

5.2.26 This Panel is therefore satisfied that the principle of “*Audi Alteram Partem*” was met in relation to section 3.9.1.

5.2.27 The Panel does however not concur with the Adjudicator’s interpretation of section 3.9.2 as referenced in paragraph 3.10 above.

5.2.28 This Panel is of the opinion that such interpretation is only applicable to a SP where the IP is NOT a member of WASPA.

5.2.29 In this instance the IP proved to be a member and as such, the SP can’t be held *responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider.*

5.2.30 This does however not negate the workings of section 14.4.6. of the Code which states that where a service is provided by one WASPA member using the facilities of another member, if the member providing these facilities has taken reasonable steps in response to any alleged breach of the Code by the member providing the service, this must be considered as a significant mitigating factor when considering any sanctions against the member providing the facilities.

5.2.31 This Panel is of the opinion that the SP, and Appellant in this matter, being aware of the alleged breaches, should have brought the reasonable steps, belatedly indicated in its appeal, *ab initio* to the attention of the Adjudicator.

5.2.32 It is this failure by the SP that might have been interpreted as negligent behaviour.

5.2.33 The Panel is also of the opinion that section 14.4.7 has been adhered to by the Adjudicator since the Secretariat, and Monitor before him / her, did notify the SP of the alleged breaches.

5.2.34 The Secretariat therefore did adhere to the “Audi Alteram Partem” principle and the Adjudicator accordingly did not act “Ultra Vires” in issuing sanctions.

5.2.35 Section 14.3.6 clearly states that if the member fails to respond within the required time period, it will be assumed that the member does not wish to respond.

5.2.36 The Panel has however subsequently been made aware of the fact that the SP did take reasonable steps, as detailed in its appeal, to curb the alleged breaches of the IP and will interpret such steps as a mitigating factor in its reassessment of the sanctions.

5.2.37 The Panel is therefore of the opinion that the SP, and Appellant in this matter, did not show any malice and is therefore not found to be at fault with regard to the IP’s conduct.

5.2.38 The Appellant did however act in an irresponsible and negligent manner by failing to communicate its position to the WASPA Secretariat and by withholding a formal response from the Adjudicator.

5.2.39 Whether such irresponsibility or negligence stems from a misinterpretation by the Appellant of the notification issued, or whether the manner in which the notification was issued by the Secretariat created ambiguity, remains uncertain, but members are well advised to carefully scrutinise notifications and consult the WASPA Secretariat should they harness any uncertainty, before just merely abstaining from issuing a response.

6. The finding of the Appeals Panel is:

- 6.1 The Adjudicator's sanction referenced in paragraph 13.18.1.1 with regard to monthly reports is overturned.
- 6.2 The Adjudicator's sanction of R 50 000-00 imposed on the SP (Appellant) referenced in paragraph 3.18.3 is overturned and the IP in this matter is fined the amount of R 50 000-00, payable to the WASPA Secretariat, within 7 days after having received notice thereof by the WASPA Secretariat.
- 6.3 However, the IP is allowed to lodge a further appeal after having received notice hereof, in accordance with section 14.6 of the WASPA Code of Conduct.

The cost of appeal is non-refundable.