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ISPA Code of Conduct
Ruling of the Independent Adjudicator
Issued: 30 September 2015

ISPA Member	Afrihost
Complainant	Public
Date received	8 July 2015
Complaint summary	In essence, the complainant submitted that the ISP cannot provide the advertised service.
Code of Conduct version	3.2
Sections considered	C – Consumer protection and provision of information to customers J – Internet standards
Finding summary	Breach Clause 8. Remedial sanction and suspended fine.

Complaint

In essence, the complainant submitted that the ISP cannot provide the advertised service of “Unshaped, Unmetered, Prioritised Perfect. . .”.

The complainant submitted that the ISP could not provide consistent connection.

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In a subsequent submission, the complainant specified that he believed that the Code had been breached in the following respects:

- Clause 6, in that the ISP infringed its AUP;
- Clause 7, in that the ISP had not acted fairly, reasonably or transparently in that it has been aware of its network issues from August 2014;
- Clause 8, in that it offers services beyond their technical and practical abilities;
- Clause 9, in that it has not complied with advertising standards.

Sections of the ISPA Code of Conduct considered

C. Consumer protection and provision of information to customers

4. ISPA members must provide the following information on their web sites: their registered name, email address, telephone and fax numbers and physical address.
5. ISPA members must inform their customers that members of ISPA must uphold and abide by this Code of Conduct. Members' web sites must include a reference to ISPA membership, a prominent copy of ISPA's logo and a link to the section of the ISPA web site that contains the Code of Conduct, complaints and disciplinary procedure and the take-down procedure.
6. ISPA members must have an Acceptable Use Policy (AUP) for their Internet access services. This policy must be made available to customers prior to the commencement of any such service agreement and at any time thereafter, on request.
7. In their dealings with consumers, other businesses, each other and ISPA, ISPA members must act fairly, reasonably, professionally and in good faith. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.
8. ISPA members may only offer service levels which are reasonably within their technical and practical abilities.
9. ISPA members must comply with all compulsory advertising standards and regulations.

J. Internet standards

28. ISPA members must operate with due regard for established Internet best practices, as set out in the various request for comment (RFC) documents and as mandated from time to time by established and respected Internet governance structures.

Response

After initial correspondence attempting to resolve the issues directly with the complainant, and requesting ISPA's advice as to how to do so, the ISP responded substantively as follows, in essence that:

- It is honest in individual interactions and on public forums;
- They are developing a new network which they offer to clients to trial but continue working on improving the Afrihost network;

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- Allegations that customers struggle to cancel or get refunds are unfounded;
- Afrihost attempts to resolve all complaints;
- Afrihost complies with its terms and conditions, which allow for a “best effort” service.

Ruling

This complaint is an unusually clear complaint in that the complainant has identified in exactly which respects he believes the Code has been breached. I will therefore consider each of these specific allegations raised by him.

Clause 6

The complainant alleges that the ISP has infringed its own AUP and therefore is in breach of Clause 6.

Clause 6 states:

ISPA members must have an Acceptable Use Policy (AUP) for their Internet access services. This policy must be made available to customers prior to the commencement of any such service agreement and at any time thereafter, on request.

Clause 6 does not actually enforce the AUP (this is an issue of contract between the client and the ISP). It requires that the AUP exist and be made available to the client before the services start. Nothing before me indicates that this did not occur.

There is therefore no breach of Clause 6.

Clause 7

The complainant submitted that the ISP has had network challenges since at least August 2014 and has not communicated these fairly, reasonably or transparently. It continues to advertise what it cannot offer.

The ISP submitted that it is honest “during individual interactions and on public forums. . . Where we have had technical difficulties, Afrihost have been opened (*sic*) about it on our network status page, to individual clients and on public websites and forums”.

Clause 7 reads:

In their dealings with consumers, other businesses, each other and ISPA, ISPA members must act fairly, reasonably, professionally and in good faith. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

It appears to be common cause that the ISP has experienced technical challenges. It also appears *ex facie* that they do not attempt to obfuscate around these challenges as they arise.

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Clause 7 is one that addresses the *manner* in which an ISP communicates. The question before me is whether the clause puts a duty on the ISP to temper its advertising and initial marketing communications in line with these challenges. Should they be stating, upfront, that they experience certain technical challenges?

In this regard, I considered the terms and conditions that the ISP referred to in its response – namely the “Best Effort” clause, which says, *inter alia*:

- “DSL speeds will be provided on a best-effort basis, subject to Telkom line constraints and demand on the Afrihost network at any given point”
- “No guarantees or warranties whatsoever are provided on throughput or any other aspect of the service, including but not limited to. . . freeness from errors or interruptions or availability”
- “DSL is an access medium to the Internet and accordingly remains subject to any bandwidth constraints which may apply to or be experienced in the use of the world wide web(www)”

It is therefore clear that the ISP communicates upfront that connection and speed are not guaranteed. I have no reason to believe that these terms are not made available to the customer to read before they sign up, and while I realise that few customers actually read such terms, this cannot be used to penalise the ISP.

I am of the opinion that, while the ISP might arguably offer a poor service, they have not breached Clause 7 in their communications. They *ex facie* address all complaints, explain all delays, and do so in a fair, reasonable and professional manner.

Clause 8

Clause 8 reads:

ISPA members may only offer service levels which are reasonably within their technical and practical abilities.

The complainant referred ISPA to a number of admissions by the ISP that it is unable to deliver the advertised service. For example, at <http://mybroadband.co.za/news/adsl/114552-afrihost-network-problems-explained.html>, an article reports:

“We have been working closely with MTN and the device hardware company over this time to try to get to the bottom of it, but the problem has proved way more challenging to solve than any of us expected,” Visser said.

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After months of research & development by the unnamed company and weeks of testing locally, they deployed a software upgrade to the devices last week which was meant to improve Afrihost's traffic management and — by extension — their ADSL subscribers' experience.

“Unfortunately since the updates, for reasons we are not completely sure of at this time, these appliances have not been working as expected,” Visser said. “They are not classifying all types of traffic correctly.”

This means that Afrihost can't shape certain traffic, such as certain types of peer-to-peer torrent downloads, Visser said.

Without being able to accurately classify and shape traffic on the network, Afrihost can't manage the network usage as effectively as they need to, which Visser said leads to the network performing sub-optimally when it is filled to capacity.

“When our network is stretched to capacity our ADSL clients contend and fight with each other for bandwidth and thus sometimes get poor and inconsistent speeds,” Visser said. “It also means that there are times that their latency and pings are high.”

An update on the website dated July 2015 reads:

Our network team and management are aware that some of our clients have been experiencing poor internet performance over our ADSL services. Due to high demand for bandwidth on our network, affected clients may be experiencing slow speeds and high latency, particularly during periods when demand is very high. We sincerely apologise for the poor experience, and we'd like to assure our clients that their feedback and concerns are very important to us, and every possible resource at our disposal is being employed to improve overall network performance.

We are currently in the process of designing and deploying comprehensive network upgrades nationally.

Unfortunately we're unable give a timeframe for these upgrades to be completed, but we commit to providing our clients with as much information as possible as it becomes available.

Once again we would like to sincerely apologise to affected clients for the poor experience they have had, and assure them that we will continue to dedicate ourselves to providing the best possible internet experience.

It does indeed appear that the ISP is unable to offer the services that it offers to the claimed service levels in relation to their ADSL service. Some examples of the offered service levels are:

- “ZERO risk” (<http://www.afrihost.com/>)
- Uncapped products are advertised as semi-shaped on all our marketing material, including our website, but you can be assured that you will get premium real time services (as opposed to throttling down your entire linespeed like in the past or what our competitors do), no matter what time of the day or how much bandwidth you've moved. (https://www.afrihost.com/site/faq/uncapped_adsl)
- **Does Afrihost have enough capacity to satisfy its client's needs?**

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We currently maintain multiple IPCs across the country - divided into the North, East and South regions. We actively monitor and upgrade our IPC capacity to ensure that our clients have access to the best possible internet experience and value for their money.
(https://www.afrihost.com/site/faq/uncapped_adsl)

While I am satisfied that they communicate clearly around these challenges when raised and in the contract (as discussed above), they still offer the services.

Unfortunately, the ISP did not address this issue head on. While it may not be in breach of contract, I am of the opinion that it continues to offer service levels that it cannot meet, despite knowing that this is the situation. **This is in breach of Clause 8.**

Clause 9

Clause 9 relates to compliance with advertising standards. In other words, if a member breaches any binding advertising standards – such as the Code of Advertising Practice – then they have also breached the ISPA Code.

However, it is beyond my mandate to apply the Code of Advertising Practice and make a finding. That is the jurisdiction of the ASA (Advertising Standards Authority).

In the absence of a finding by the ASA or a similar finding by another forum, I am unable to find a breach of Clause 9.

While the complainant raised Section J, he did not pursue this in his specific complaint, and did not provide details of an internet standard that the ISP has failed to meet. There is therefore no *prima facie* case before me in reaction to Section J.

Sanctions

Having found a breach of Clause 8, I must consider an appropriate sanction. It is obvious to me that the ISP cannot be asked to stop marketing its services at all. However, it is within my powers to order appropriate remedial action, and in this regard I order that the ISP make it patently clear on initial perusal of its websites that it is experiencing technical difficulties and that service it may not meet the offered service levels at this time. This information should be communicated upfront on the website, and pro-actively to each existing and potential customer until such time as these issues are resolved.

To ensure compliance, I am also imposing a suspended sanction of R50 000 that will be enforced should the ISP be found in breach of this clause again in the next 24 months.

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