



Wireless Application Service Providers' Association

Report of the Adjudicator

Complaint number	31771
Cited WASPA members	MyPengo Mobile BV (1429)
Notifiable WASPA members	
Source of the complaint	Media Monitor
Complaint short description	Uncompliant subscription process and advertising
Date complaint lodged	06/10/2016
Date of alleged breach	
Applicable version of the Code	14.6
Clauses of the Code cited	4.2., 5.1., 5.4., 12.1., 12.4., 12.5 (a,b),22.10., 22.11.
Related complaints considered	
Fines imposed	<p>4.2. I fine the Member R15 000.</p> <p>5.4. I fine the Member R15 000.</p> <p>12.1. I fine the Member R50 000, R15 000 suspended provided there are no further complaints relating to this clause in the next 6 months.</p>

	<p>12.4. I fine the Member R50 000, R15 000 suspended provided there are no further complaints relating to this clause in the next 6 months.</p> <p>12.5. I fine the Member R50 000, R15 000 suspended provided there are no further complaints relating to this clause in the next 6 months.</p> <p>22.10. I fine the Member R50 000.</p>
Other sanctions	
Is this report notable?	
Summary of notability	

Initial complaint

The complaint relates to a set of tests done by the Complainant (screenshots of which were attached to the complaint and won't be duplicated here as all parties have copies thereof). The test results show the journey of subscribing to the member's subscription service and the Complainant raised several problem areas which are set out below:

1. No pricing on banner or landing page;
2. The service could not be accessed after being charged on MTN;
3. The service could not be accessed on Cell C; and
4. The MTN DOI message promotes an XXVid service which is not permitted.

The Complainant stated as follows when setting out the test followed for MTN:

"Whilst browsing the internet, the user was directed to a page promoting the Project X service. The user then clicked on the "OK" call to action button. Note: no pricing displayed on the page and no helpline or T&C's displayed or a URL to the terms.

The user was then directed to a page where he then confirmed his age and was then directed to the MTN double opt-in page Project X at R5.00 per day. The user then clicked on the "Accept" call to action button. The user then received the Welcome SMS on his mobile phone and proceeded to open the provided URL.

The user was then unable to navigate to the webpage, via 3G and WIFI. The user then elected to cancel the subscription by replying to the Welcome SMS with the keyword "Stop" and received an SMS confirming the subscription has been unsubscribed."

This is what the Complainant set out with regards to the Cell C test:

“Whilst browsing the internet, the user was directed to a page promoting the Project X service. The user then clicked on the “OK” call to action button and proceeded to confirm his age by clicking “YES” on the following page. The user was then directed to a Cell C error page which informed him that there was an error processing his request and he should try again later. The opt-in has failed.”

Member’s response

The Member began by setting out their time as a WASPA member and the number of successful complaints against them prior to this complaint.

They then addressed each of the Complainant’s issues one by one as follows. Once again screen shots were attached but have not been duplicated due to both parties being in possession of same.

“3. TEST PERFORMED BY THE MEDIA MONITOR ON MTN USING MSISDN 27604805073 AND CELL C USING MSISDN 27847774513 – IN ANSWER TO ALLEGED BREACHES OF CLAUSES 12.1, 12.4 and 12.5

3.1 The Media Monitor states that “while browsing the internet, the user was directed to a page promoting the project X service.”

3.1.1 The Media Monitor fails to indicate how / from which source he was directed to the Landing Page. The service is promoted by means of a banner that states the cost of the service as being R5/day, as well as an indication that the services is intended for users ‘18+ only’.

3.1.2 By not capturing the banner, and including the banner in the test, the Media Monitor is creating the impression that the user does not see the price of the service and the “18+” indication prior to the Network Hosted Confirmation Page. An end-user is likely to go directly to the Network Hosted Confirmation Page after clicking on the compliant banner, and as a result the test conducted is not a true reflection of the end-user experience.

3.1.3 When opening the URL as contained in the test page, the pricing information and T’s and C’s are clearly visible - the adjudicator is invited to simply test this by clicking:

http://w.xxvid.org/sa/projectxx_a/?cpid=2467_w3S1QNVSB4GIA3401PS5QFE8&publisher=1374

However, in the screenshot provided by the Media Monitor, the pricing information is not visible. MyPengo submits that the screenshot provided by the Media Monitor has been cropped and therefore the pricing information is not visible. When taking a screenshot on a LG G4 device, as the Media Monitor was using, the image captured automatically contains the device’s

information at the top (eg time, battery life etc) as well as the button set (triangular, round and rectangular) at the very bottom.

The screenshot used by the Media Monitor in his test does not show the button set at the bottom

and we therefore we cannot accept the screenshot as being a true reflection of the test, let alone

the end-user experience.

3.1.4 The same points raised in 3.1.1 and 3.1.2 herein are applicable to the Cell C test.

3.2 We therefore ask that the Adjudicator dismiss the allegation of a breach of sections 12.1, 12.4 and

12.5 of the Code of Conduct on the basis that the Media Monitor's recorded account of the alleged

breach (i.e. the test flow description and accompanying screenshots) are insufficient and/or misleading. Alternatively that the adjudicator sanction retesting of the services by the Media Monitor and pend any other sanctions depending on the outcome of proper testing.

4. MTN TEST – MEDIA MONITOR NOT BEING ABLE TO ACCESS CONTENT – IN ANSWER TO ALLEGED BREACH OF CLAUSES 4.2, 5.1 AND 5.4

4.1 MyPengo uses the services of a third party adult content streaming- and Video On Demand services provider called Melodi Media. We have consulted with them and they agreed to have their identity known in order to address this complaint. Furthermore, Melodi Media confirmed that they experienced a small window of irregular downtime on the 4th of October (15 minutes in total) and have provided screenshots from their monitoring software depicting same. The Adjudicator is requested to see in this regard ANNEXURE A – Email Extract Melodi Media.

4.2 As is evident from the monitoring software of the Melodi Media platform (which hosts MyPengo's Xxvid service content), the platform boasts 99% regular uptime, and MyPengo is therefore not offering a service which it is 'unable to deliver', as the Media Monitor alleges. It is unfortunate that the timing of the events was such that the Media Monitor could not access the content. Again, this would be easily resolved by a quick retest, alternatively MyPengo can show multiple instances of other subscribers (outside of the 15min downtime window) successfully accessing and downloading the desired content.

4.3 We therefore request the Adjudicator to dismiss the allegation of a breach of Clauses 5.1 and 5.2.

5. CELL C TEST – MEDIA MONITOR NOT BEING ABLE TO SUBSCRIBE – IN ANSWER TO ALLEGED BREACH OF CLAUSES 4.2, 5.1 AND 5.4

5.1 MyPengo's local South African aggregator (whom is a full member in good standing of WASPA), Mire Networks, sent an email to its clients, including Mypengo, on midday of 3 October 2016 informing of delays in Cell C responses (meaning that due to a delay at Cell C's side users may not be able to subscribe.) The Adjudicator is requested to see in this regard ANNEXURE B – Email from Mira re Cell C. It is thus not unlikely that the delay persisted the next day (4 October 2016) and caused the inability of the Media Monitor to complete the Cell C subscription.

Further evidence of the fact that the error was at the network's side, is the URL in the address-bar

at the bottom of the screen, (of the Media Monitor's testing) showing doi.cmobile.co.za/?wasp ->

This, the page where the error occurs, is not a page hosted by, or belonging to either MyPengo or

its aggregator, but to the network.

5.3 Lastly, the temporary inability to subscribe would not prejudice any member of the public as they

will not be charged, nor would their MSISDN be captured for further marketing. The temporary inability to subscribe, especially due to an error or delay at the operator cannot be attributed to, or interpreted to constitute a breach of any Clause of the Code of Conduct by the member.

6. SERVICE NAME "XXVID" AND VIDEO TITLED "PROJECT X" – IN ANSWER TO ALLEGED BREACH OF CLAUSES 22.10 AND 22.11

6.1 Clauses 22.10 and 22.11 of the Code of Conduct prohibit members from '...offering content which is classified by the Film and Publications Board, or likely to be classified... as XX or X18'

6.2 The Xxvid content, and the video titled Project X, as supplied to MyPengo by Melodi Media, a UK company, has never been classified by, nor has it ever been submitted for classification by, the FPB.

6.3 The Media Monitor cannot possibly claim that the content is likely to be classified as XX or X18, because the Media Monitor, by their own account, never accessed or viewed the content. The only images the Media Monitor saw was that on the Landing Page, which is of clothed women and therefore would never be likely classified as XX or X18.

6.4 The video titled 'Project X' uses the letter X in the same manner as a popular television show called The X Factor, or the sci-fi series The X Files, and is therefore not implying hardcore content. Similarly, the service name Xxvid uses two instances of the letter 'X', which is not prohibited in the Code of Conduct, and is also not likened to the popular use of three X's to indicate hardcore content.

6.5 The inclusion of alleged breaches to clauses 22.10 and 22.11 in this complaint is completely unfounded and the Adjudicator is requested to dismiss these summarily."

Complainant's response

The Complainant responded as follows to the Member's response. I have left the Member responses in black and highlighted the Complainants further responses in red for ease of reading:

"Below is my response to their questions:

The Media Monitor states that "while browsing the internet, the user was directed to a page promoting the project X service."

3.1.1 The Media Monitor fails to indicate how / from which source he was directed to the Landing Page. The service is promoted by means of a banner that states the cost of the service as being R5/day, as well as an indication that the services is intended for users '18+ only'.

3.1.2 By not capturing the banner, and including the banner in the test, the Media Monitor is creating the impression that the user does not see the price of the service and the "18+" indication prior to the Network Hosted Confirmation Page. An end-user is likely to go directly to the Network Hosted Confirmation Page after clicking on the compliant banner, and as a result the test conducted is not a true reflection of the end-user experience.

The lead was generated from an already non-compliant marketing flow, see attached Excel test result... "the user was directed to a page" is a template way of starting any of our test result flows.

However, in the screenshot provided by the Media Monitor, the pricing information is not visible. MyPengo submits that the screenshot provided by the Media Monitor has been cropped and therefore the pricing information is not visible. When taking a screenshot on a LG G4 device, as the Media Monitor was using, the image captured automatically contains the device's information at the top (eg me, battery life etc) as well as the button set (triangular, round and rectangular) at the very bottom.

No cropping or editing has been performed whatsoever, see attached images. When using the browser and taking a screenshot, the battery info, me etc is included in the screenshot. When the user then navigates to the SMS inbox for example and takes a screenshot, battery, me etc is then not captured. The below buttons as mentioned, is only displayed when taking a screenshot of the home screen. (examples attached)

The media monitor and tester do no fabricate or engineer dishonest test results. We take great offense to such allegations.

In response to further technical issues and downtime, WASPA was not notified of any issues or downtime, therefore we test and proceed as usual.

And lastly, the member took issue with the fact that the MM team did not view the content.

Viewing the content is not what has been highlighted, it is the fact that the member misleads a consumer into thinking they have content that is not permitted in SA. Using XX in a service name is therefore misleading, not permitted and needs to be revised.

Clauses 22.10 and 22.11 of the Code of Conduct prohibit members from '...offering content which is classified by the Film and Publications Board, or likely to be classified... as XX or X18'.

Member's further response

The Member responded as follows:

"a) We did not pose 'questions' to which we expect the Media Monitor to answer. We are making statements / submissions and it is up to an adjudicator to adjudicate on those.

b) These extra (new) screenshots contained in the response are not permitted. It is new material and did not form part of the initial complaint.

c) In no way do we allege any mala fides on the part of the Media Monitor when we refer to possible cropping of the screenshots. We are merely stating fact - which is that on the tests conducted by us, the pricing is visible. Whilst in the MM test it is not. We are submitting possible reasons for the adjudicator to consider as to why not.

d) We CATEGORICALLY disagree with the Media Monitor's stance on the fact that using xx in a service name is misleading. The content itself was not described and/or being promoted as that of an XX-classification. The same way that a product NAME can be 'baby oil' but that does not mean it contains babies. She can also refer to famous company Exxon Mobil. Or content streaming company ShowmaX - does this mean they offer content rated 'X' because there is an 'X' in the name?"

Sections of the Code considered

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

5.1. Members must not offer or promise services that they are unable to provide.

5.4. Members must have honest and fair dealings with their customers.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed.

12.5. The minimum terms and conditions displayed on any web page must include at least the following information:

(a) a customer support number, and

(b) a link to a web page where the full terms and conditions for the service are available.

22.10. Members may not offer adult content which is classified as XX or X18 by the Film and

Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

22.11. Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

Decision

After reviewing the documentation submitted I find as follows:

4.2. Members must at all times conduct themselves in a professional manner in their dealings with the public, customers, other service providers and WASPA.

- I find a breach of this clause due to the way the Member has dealt with arguing their way out of a breach of 22.10.

5.1. Members must not offer or promise services that they are unable to provide.

- I am persuaded by the Members arguments.

5.4. Members must have honest and fair dealings with their customers.

- I find this section has been breached due to the arguments posed by the Member around the issues raised by the Complainant relating to 22.10 of the Code. The Complainant justified their use of "XX" to WASPA when they thought the Complainant was stating that they were prohibited from doing so in terms of 22.10, they argued that the Complainant couldn't know if there was x rated adult content being offered as they did not get to see the content and due to the fact that the adverts of the content were of girls in clothes and the Complainant couldn't know whether or not they were clothed or not it could not be "likely" that this would get classified by the FPB as x rated. If the Member is indeed not offering an x rated service then their use of the "XX" is misleading. It is also misleading in that it entices consumers to think they are being able to view an XX service in South Africa which is not allowed.

12.1. For any web page, pricing information does not need to be displayed for services which are free, or which are billed at standard rates. For all other services, where there is a call-to-action, pricing information must be clearly and prominently displayed immediately adjacent to the call-to-action.

- I find this section to have been breached as no pricing information was displayed. The Complainant demonstrated in their second response why the arguments by the Member were inaccurate by providing additional information and screenshots.

- The Member argued that the Complainant could not submit further screenshots as they were not part of the initial complaint. This is not true. The Member was given an opportunity to respond to such additional information and the Code specifically allows for this process (see 24.27 and 24.28 of the Code of Conduct version 14.6).

- The Member also raised the fact that banner adverts relating to the Landing Page had the relevant cost for the services. However, notwithstanding the nature of such banner ad which I will deal with later, this section talks to all calls-to-action and not just one of them.

12.4. For any web page advertising a service for which there is not a subsequent confirmation step containing a link to the terms and conditions, the minimum terms and conditions for the use of the service must be clearly displayed.

- I find this section to have been breached in that there were no minimum terms and conditions.

12.5. The minimum terms and conditions displayed on any web page must include at least the following information:

(a) a customer support number, and

(b) a link to a web page where the full terms and conditions for the service are available.

- I find this clause to have been breached as there was no customer support number or link to a webpage with full terms and conditions available to be viewed.

22.10. Members may not offer adult content which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

- I find this to have been breached. The Member argues that there is nothing preventing it from using the letter “x” in the name of a service. This argument holds no merit. Their examples of the use of an “x” in the well-known brands “Exxon” and “Showmax” are fatuous. Not only are both well-known brands and as such their services are familiar to the consumer, the “x” itself is placed either at the end or in the middle of the word. The placement of a double “xx” as a prefix to the name of a service is well known to indicate the x-rated nature of such content and is the very reason that the FPB regulates this and not other letters in the alphabet.

- If the start of the process was the banner ad provided by the Complainant, it is clear that the reference to XX is not one related to a service which is not x-rated.

22.11. Marketing material for any adult services may not make use of material which is classified as XX or X18 by the Film and Publication Board, or which has not yet been classified but which would likely be classified as XX or X18.

- The banner ad itself has not been referred to about the breaches involved in this complaint and as such I am not going to deal with it. I do however refer this ad back to WASPA.
- I find no breach based on the information before me.

Sanctions

4.2. I fine the Member R15 000.

5.4. I fine the Member R15 000.

12.1. I fine the Member R50 000, R15 000 suspended provided there are no further complaints relating to this clause in the next 6 months.

12.4. I fine the Member R50 000, R15 000 suspended provided there are no further complaints relating to this clause in the next 6 months.

12.5. I fine the Member R50 000, R15 000 suspended provided there are no further complaints relating to this clause in the next 6 months.

22.10. I fine the Member R50 000.

Matters referred to WASPA

The banner ad used to link to the Landing Page about possible breaches of the Code.
