



Report of the Adjudicator

Complaint number	#49150
Cited WASPA members	HYVEMobile
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Misleading advertising. Dissemination of deceptive or false information. Failure to display pricing information clearly and prominently.
Date complaint lodged	2021-02-02
Date of alleged breach	2021-02-02
Applicable version of the Code	v16.12
Clauses of the Code cited	5.4, 5.5, 8.2, 8.9, 12.1, 12.2, 12.4, 12.5, 15.10, 15.11
Related complaints considered	n/a
Fines imposed	R10 000 for breach of clauses 8.9, 12.1, 12.2, 12.4, and 12.5. R10 000 for breach of clauses 15.10 and 15.11.
Other sanctions	n/a

Is this report notable?	n/a
Summary of notability	n/a

Initial complaint

1. Whilst monitoring and conducting manual tests, the Complainant came across two separate promotional campaigns for the Member's subscription services that the Complainant alleges were not compliant with the requirements of the WASPA Code of Conduct.
 2. In particular, the Complainant alleges that the Member failed to comply with the following requirements:
 - 2.1 Pricing information must be displayed to potential customers on two respective occasions, firstly displayed adjacent to the call-to-action (banner advert or landing page) and secondly displayed in a confirmation step (Network Hosted Confirmation Page or Step) during the subscription activation flow and before the service can be activated.
 - 2.2 Minimum terms and conditions must be displayed as part of the call-to-action step or the Network Hosted Confirmation Page or Step.
 3. The Complainant alleges that the promotional material used for both campaigns was the relevant call-to-action, and in both cases there was no pricing information or terms and conditions displayed in the promotional material.
 4. The Complainant also alleges that as a result, a consumer would be subscribed to the relevant subscription services through a single opt-in and not via the double opt-in process required.
 5. The Complainant alleges that the Member is in breach of clauses 5.4, 5.5, 8.2, 8.9, 12.1, 12.2, 12.4, 12.5, 15.10, 15.11 of the Code of Conduct.
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Member's response

6. In its response to the complaint, the Member advised that the banner adverts in question were served through the Google Ads platform. The Member alleges that the layout of these adverts is dynamically determined by Google using various text and image components provided by a third party agency contracted by the Member.
 7. The Member states further that due to an oversight by the third party agency, the relevant text and image components containing the required pricing information etc., which should have been placed within the promotional material, were not provided to the advertising platform provider.
 8. The Member states that after being notified of the complaint it had immediately requested the contracted agency to make updates to all the Member's adverts to ensure that the service price was included as a text component in each case.
 9. The Member undertook to have all its adverts updated on the same day as its response and to ensure full compliance was achieved within 48 hours.
 10. The Member states that this was not an intentional misrepresentation. The Member also alleges that the breach would only have impacted a limited number of ad slots within the mentioned campaigns.
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Complainant's response

11. The Complainant replied to the statements made by the Member in its response as follows:
 - 11.1 In the original complaint, the Complainant provided two separate and distinct examples of the Member using a single opt-in flow.
 - 11.2 The consumer was only presented with the pricing information of the service once on the Cell C Network Hosted Confirmation Page.
 - 11.3 No pricing information was displayed on the promotional material leading to the confirmation page. The promotional material was the 'Call to Action' and should have clearly displayed the pricing information. The industry required 'Double Opt-in' was therefore not in place.
 - 11.4 The Complainant considers this to be a serious breach of the WASPA Code of Conduct, as this procedure is specifically in place to protect consumers and to ensure that they have been provided with adequate pricing information on two separate occasions before a subscription service can be activated.

- 11.5 In response to the Member's explanation regarding its third party marketing agency who omitted to include the pricing information on the promotional material, the Complainant referred to the provisions of section 3 of the WASPA Code regarding non-members and the responsibility of the Member to ensure that its services are advertised and provided in accordance with the provisions of the Code, and its liability in the event of any breach thereof.
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Member's further response

12. The Member confirmed that it acknowledged responsibility for the breach, but again stated that the breach was unintentional and limited to a very specific set of advertisements.
13. The Member states that the issue was resolved immediately as soon as WASPA brought it to its attention and steps were put in place to ensure the same issue does not occur in future.
14. The Member acknowledged that the nature of the complaint is viewed in a serious light by WASPA. However the Member requested that the unique circumstances of the advertisements in question be considered in that they were designed and intended to be fully compliant.
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Sections of the Code considered

15. The following clauses of the WASPA Code of Conduct were cited in the complaint and have been considered:
- 15.1 Clause 5.4. *Members must have honest and fair dealings with their customers.*
- 15.2 Clause 5.5. *Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.*
- 15.3 Clause 8.2. *For a subscription service, the "pricing information" consists of the word "subscription" and the cost to the customer and frequency of the billing for the service. The cost and frequency portion of the pricing information must follow the following format, with no abbreviations allowed: "RX/day", "RX/week", or "RX/month" (or RX.XX if the price includes cents). For services billed at an interval other than daily, weekly or monthly, the required format is "RX every [time period]", with no abbreviations permitted when specifying the time period.*

Examples of pricing information: "Subscription R5/week", "R1.50/day subscription", "RX every three days", "RX every two weeks". In a case where the total amount is billed in smaller increments over the subscription period, the pricing must still reflect the full price and not the incremental amounts ("R30/month" and not "6 x R5 per month").

- 15.4 *Clause 8.9. A "call-to-action" is any link, input box, shortcode, or any other component of an advert which triggers the confirmation step for a transaction or a service. In the case where a mobile network operator provides a two-stage confirmation process for the service, the first page of this confirmation process may be considered to be the call-to-action.*
- 15.5 *Clause 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 adjacent to the call-to-action.*
- 15.6 *Clause 12.2. There must not be any intervening text or images between the call-to-action and the pricing information. Pricing information must be legible, horizontal and presented in a way that does not require close examination. Pricing information must not be obscured by any other information. Pricing information must not be animated. It must not be a requirement that the viewer of an advert has additional software installed in order to see pricing information in the advert.*
- 15.7 *Clause 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.*
- 15.8 *Clause 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.*
- 15.9 *Clause 15.10. For all subscription services initiated via a web page, there must be an additional specific confirmation step before the customer is billed. This confirmation step must be provided in one of three ways: (i) The customer's mobile carrier may implement the confirmation step. (ii) The member can provide the customer with a "confirmation page". (iii) The member can send a "confirmation message" to the customer. The customer must not be charged for the confirmation message.*

- 15.10 Clause 15.11. *A confirmation page must contain the following information: (a) the name of the service, (b) the pricing information, (c) a customer support number, (d) Instructions for confirming the initiation of the subscription service, and (e) a link to any applicable terms and conditions.*
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Decision

16. The Member has admitted that the promotional material reported by the Complainant was in breach of the WASPA Code of Conduct.
17. The Member has also acknowledged that a breach of this nature is viewed in a serious light by WASPA.
18. I have noted the Member's explanation for why the breach occurred. However, since the display of pricing information and relevant terms and conditions for the service in the promotional material, and the resultant double opt-in protection for the consumer, is such a fundamental requirement of the WASPA Code, the Member must ensure that its suppliers and service providers comply with these requirements of the Code.
19. The Member has not demonstrated that it took any reasonable steps to ensure that the third party agency contracted to market its services did so in a manner consistent with the requirements of the WASPA Code of Conduct.
20. The Complainant was correct in stating that the Member remains responsible and is liable for the actions of its third party suppliers and service providers in terms of section 3 of the WASPA Code of Conduct.
21. Based on the foregoing, I find that the Member has breached clauses 8.2, 8.9, 12.1, 12.2, 12.4, and 12.5, by failing to display the required pricing information and terms and conditions in its promotional material. The complaint with regard to these clauses is accordingly upheld.
22. The Member also failed to provide the additional specific confirmation step required by the WASPA Code before a customer would be billed and is therefore in breach of clause 15.10, read together with clause 15.11, of the Code. The complaint is also upheld in this regard.
23. I have noted the Member's assertion that the breach in question was not intentional and that it was not guilty of making any intentional misrepresentations. While the Member has failed to demonstrate that it took reasonable steps to avoid the breach, there is no evidence to suggest that the Member acted intentionally or deceptively and I must

accept the Member's version that this was an error on the part of its contracted agency. The complaint regarding the alleged breach of clause 5.4 is therefore dismissed.

24. There is also no evidence to suggest that the Member *knowingly* disseminated information that was false or deceptive, or that was likely to mislead by inaccuracy, ambiguity, exaggeration or omission. The complaint relating to the alleged breach of clause 5.5 is therefore also dismissed.

Sanctions

25. In determining appropriate sanctions against the Member for its breach of the WASPA Code of Conduct, the following has been taken into consideration:
 - 25.1 any previous successful complaints made against the Member in the past three years;
 - 25.2 any previous successful complaints of a similar nature;
 - 25.3 the nature and severity of the breach; and
 - 25.4 any efforts made by the Member to resolve the matter.
26. No previous complaints, including complaints of a similar nature, have been lodged and/or upheld against the Member.
27. The Member's timeous response to the complaint is also viewed as a mitigating factor.
28. However, the nature of the Member's breach of the WASPA Code of Conduct is viewed in a very serious light due to the potential harm to consumers. It is also noted that two separate and distinct promotional campaigns were detected to be non-compliant.
29. In determining appropriate sanctions previous precedent set by WASPA adjudicators and appeal panels in previous complaints for the same or similar contraventions must also be taken into account.
30. Based on the foregoing, the following sanctions are imposed:
 - 30.1 The Member is fined a sum of R 10 000.00 for its breach of clause clauses 8.2, 8.9, 12.1, 12.2, 12.4, and 12.5 of the WASPA Code of Conduct.
 - 30.2 The Member is fined a sum of R 10 000.00 for its breach of clause 15.10, read together with clause 15.11 of the WASPA Code of Conduct.

