



## Report of the Adjudicator

Complaint number	<b>#52713</b>
Cited WASPA members	<b>Telefuture Nederland B.V. (Globway) (1447)</b>
Notifiable WASPA members	<b>Smartcall Technology Solutions (0090)</b>
Source of the complaint	<b>WASPA Compliance Department</b>
Complaint short description	<b>Issues with pricing information, labelling of adult services, terms and conditions, the subscription process, and the unsubscribe process.</b>
Date complaint lodged	<b>2021-06-04</b>
Date of alleged breach	<b>21<sup>st</sup> of April 2021</b>
Applicable version of the Code	<b>16.12</b>
Clauses of the Code cited by the complainant	<b>5.1, 5.2, 5.4, 5.5, 5.6A, 5.8 (e) (f) (g), 12.1, 12.2, 15.6, 15.8, 15.8A, 15.26, 15.31, 21.3</b>
Related complaints considered	<b>None</b>
Fines imposed	<b>R215 000 of which R150 000 conditionally suspended</b>
Other sanctions	<b>n/a</b>
Is this report	<b>Not notable</b>

notable?	
Summary of notability	n/a

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## 1. Initial Complaint

- 1.1. This complaint was lodged by the WASPA Compliance Department on the 4<sup>th</sup> of June 2021, and the member was notified of the complaint by the WASPA Secretariat on the 7<sup>th</sup> of June 2021. The Secretariat also notified the service aggregator, Smartcall Technology Solutions (Pty) Ltd, of the complaint on the same day.
  - 1.2. The details of the complaint, as well as the Compliance Department's very comprehensive notes made during the examination of the member's service on 21<sup>st</sup> of April 2021, are set out in the Compliance Department's formal complaint, but can be summarised as follows.
  - 1.3. The member operates a service which allows its customers to access and view adult videos via mobile devices on a daily subscription basis.
  - 1.4. The WASPA Compliance Department examined the member's service and alleged the following issues with it, which in the Compliance Department's view constitute breaches of the WASPA Code of Conduct:
    - 1.4.1. The pricing information on the service's landing page is not clearly and prominently displayed.
    - 1.4.2. The landing page does not display "18+" as is required for adult services.
    - 1.4.3. The service's terms and conditions do not contain certain required statements: that network fees may apply, how billing errors are handled, and that the service must be used with the permission of the bill-payer.
    - 1.4.4. The subscription process is defective and leads to the customer being charged for unsuccessful subscription attempts and/or not being granted access to the subscribed services.
    - 1.4.5. The member's system did not send a message confirming that the Compliance Department had unsubscribed from the service.
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## 2. Member's Response

- 2.1. The member's only substantive response was on the 23<sup>rd</sup> of June 2021, to the effect that its employees had noted that they "...needed to make some adjustments", and that they had done so and tested the system, which was now "...working properly again."

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## 3. Sections of the Code considered

- 3.1. As the conduct complained of took place on or around the 21<sup>st</sup> of April 2021, version 16.12 of the WASPA Code of Conduct applies to this complaint.

- 3.2. It is alleged that the member has infringed clauses 5.1, 5.2, 5.4, 5.5, 5.6A, 5.8 (e) (f) (g), 12.1, 12.2, 15.6, 15.8, 15.8A, 15.26, 15.31, and 21.3 of the Code of Conduct, which read as follows:

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

*5.2. Services must not be unreasonably prolonged or delayed.*

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

*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.*

*5.6A. Members must ensure that customers have ready access to information on how to access and use services.*

*5.8. The full terms and conditions for any service provided by a member must contain:*

*...*

*(e) an indication that network fees may apply;*

*(f) an indication of how billing errors are handled;*

*(g) a statement that the service must only be used with the permission of the bill-payer (for paid services);*

*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, provided that the mobile network operator does not prescribe any specific advice of charge requirements. 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.*

*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.*

*15.6. Once a customer has joined a subscription service, neither the amount and frequency of the billing nor the frequency of the service may be increased without the customer's explicit permission.*

15.8. *Billing for subscription services must not exceed the total amount specified in the pricing information.*

15.8A. *A customer may not be billed in advance for a subscription service if this exceeds the amount specified in the pricing information. For the avoidance of doubt, this restriction does not prevent a member from billing historical charges for a subscription service that have not yet been paid by the customer.*

15.26. *If a member is unable to immediately act on a service termination request received from a customer, the customer must be informed. (Example: "This may take up to 24 hours to be processed.")*

15.31. *Once a customer has terminated a service, a message confirming this must be sent to that customer. This message must specify the service the customer has terminated, and the customer must not be charged for this message.*

21.3. *Any adult service must be clearly indicated as such in any promotional material and advertisement, and must contain the words "18+".*

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#### 4. **Decision**

4.1. I will deal with the issues raised by the Compliance Department in the order in which they are dealt with in the Compliance Department's report, and will not re-state the facts that are set out there. I request that the WASPA Secretariat publish the Compliance Department's report (suitably redacted) along with this document.

4.2. I note that the member did not dispute the Compliance Department's findings.

#### Prominence of Pricing Information

4.3. I agree with the Compliance Department that the pricing information was not clearly and prominently displayed adjacent to the "call-to-action" on the landing page (the "continue" button). The text of the pricing was small and greyed out. Accordingly, the member has breached clause 12.1 of the Code.

4.4. On the alleged infringement of clause 12.2, I am of the view that the phrase "...presented in a way that does not require close examination..." is at odds with the small grey font used for pricing. I note however that this clause overlaps with clause 12.1 in this regard.

4.5. Presenting pricing information in the manner in which the member has done is almost certainly intended to mislead the customer. The hope was probably that the customer would not notice the price and click through to the service subscription. Hence, I find that the member has breached clause 5.4 of the Code.

4.6. I do not think that clause 5.5 applies here. The information presented is not itself false or deceptive. It is the *manner* of presentation that is deceptive. Hence the member has *not* infringed clause 5.5 of the Code.

### “18+” Required on Promotional Material and Advertisement

- 4.7. While the “pre-lander” described by the Compliance Department contains the text “18+”, this page is a gatekeeper for the service’s advertising material, which must itself *also* contain this text. I find that the member has infringed clause 21.3 of the Code.

### Missing Requirements in Service Terms and Conditions

- 4.8. The Compliance Department made a record of the service terms and conditions on the date that the service was tested. On that date the terms and conditions did not deal with the fact that network fees may apply, deal with how billing errors are handled, and contain a statement that the service must be used with the permission of the bill-payer. The terms and conditions at clause 4.2 *do* contain the missing provisions as at the date of this report.
- 4.9. As the relevant provisions were missing when the Compliance Department examined the terms and conditions, I find that the member has infringed clause 5.8 of the Code.

### Subscription Process

- 4.10. The Compliance Department examined the member’s subscription process thoroughly and found it wanting. I will not describe a long and thorough examination process, which is described in some detail in the Compliance Department’s report at paragraphs 10 to 34, but the faults identified by the Compliance Department were as follows:
- 4.10.1. The Compliance Department subscribed to the service, the corresponding funds (R50 per day) were deducted from the Compliance Department’s account, and a welcome message with account details was sent to the Compliance Department, but the Compliance Department was not granted access to the service.
- 4.10.2. After a period of several hours the Compliance Department could still not access the service subscribed to.
- 4.10.3. When the Compliance Department subscribed a *second* time (using the same MSISDN), the member’s system created a second account for the same service that the Compliance Department had already subscribed to. Thereafter the Compliance Department was able to access the service.
- 4.10.4. Due to this issue the Compliance Department’s MSISDN was debited with R100 on one day for a service that was advertised as costing R50 per day.
- 4.10.5. Throughout this process the network did not display any active subscriptions for the MSISDN that the Compliance Department used.
- 4.11. In essence then a service was subscribed to but not provided, and no check was in place to determine if a particular MSISDN had already been subscribed to the service in question.

- 4.12. There is nothing in the record to indicate bad faith on the part of the member in the above regard, and the issues encountered by the Compliance Department were almost certainly due to a system error and not due to any intentional act or omission on the part of the member.
- 4.13. I will deal with each clause of the Code that the Compliance Department alleges that the member infringed in the above regard.
- 4.14. The member has not infringed clause 5.1, as it is clearly perfectly capable of providing the service that it promised and charged for. Its subscription process was faulty, but it was otherwise capable of providing the service.
- 4.15. The service was not prolonged or delayed; the initial registration simply didn't lead to an activation of the service. This is not the same as a delay. Clause 5.2 has hence not been infringed.
- 4.16. As stated above, I did not see any evidence of bad faith on the part of the member, and so the member has not infringed clause 5.4 here.
- 4.17. Clause 5.5 requires an intentional act or omission, and as this intention is lacking here, I cannot find an infringement of clause 5.5.
- 4.18. Clause 5.6A requires the member to ensure that customers have access to information on how to access and use services, but the issues found by the Compliance Department did not turn on or result from a lack of information. In other words, the Compliance Department could not use the service because the member's system was not working properly, not due to a lack of information. Hence this clause has not been infringed.
- 4.19. Clause 15.8 does not include a fault element, so if billing for subscription services exceeds the total amount specified in the pricing information for any reason, then this clause has been infringed. That was certainly the case here as the same MSISDN was billed twice on the same day for the same service, and so I find that the member has infringed clause 15.8.
- 4.20. The same reasoning holds for clause 15.8A, which the member has hence also infringed.

#### Unsubscribe Process

- 4.21. After testing the member's service, the Compliance Department attempted to unsubscribe from it by sending "STOP" to the shortcode listed in the service welcome message.
- 4.22. The Compliance Department did not receive a message confirming that the unsubscribe request had been actioned.
- 4.23. When the Compliance Department tried to access the service the following day, the service's web page displayed the following message: "your subscription has been

stopped: 2021-04-21 13:55". The time and date mentioned correspond to the date and time of the unsubscribe request.

- 4.24. The member has clearly infringed clause 15.31 in this regard, as it did not send a message to the Compliance Department's MSISDN confirming the unsubscribe action.
- 4.25. However, the member has not infringed clause 15.26. The unsubscribe request was acted upon at the time it was made, and so there was no delay; the action was however not reported to the Compliance Department (as the customer).

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## 5. **Sanctions**

- 5.1. In determining an appropriate sanction, I take account of the fact that this is the first complaint directed against the member.
- 5.2. The following sanctions are imposed on the member:
- 5.3. The member's conduct in presenting pricing information as it did was deliberate and intended to mislead the customer. Accordingly, the member's conduct is a serious infringement of the Code. For its infringements of clauses 5.4, 12.1, and 12.2 of the Code, the member is fined the amount of R100 000, of which R50 000 is suspended on condition that the member does not infringe any clause of the Code of Conduct for a period of six months after the date of publication of this report.
- 5.4. A far as omitting the "18+" text on its landing page, and omissions of certain terms from its terms and conditions are concerned, I do not consider the member's conduct here to have been deliberate, and consequently its infringement is less serious. The member is fined an amount R10 000 for its infringement of clauses 5.8 and 21.3.
- 5.5. While the member's technical shortcomings were not as a result of a deliberate ploy, the potential for harm in taking customers' money without providing a service is serious. Accordingly, the member is fined the amount of R100 000 for its infringement of clauses 15.8 and 15.8A, which fine is wholly suspended on condition that the member does not infringe any provision of section 15 of the Code for a period of six months after the date of publication of this report.
- 5.6. The member is to audit the subscription records for the period from 21 April 2020 to date for all of its services and identify all MSISDNs that have been subscribed to any one of its services more than once simultaneously. It will then refund the subscribers concerned the amounts paid for any surplus subscriptions, and report back to the WASPA Secretariat with the number of such surplus subscriptions and a confirmation of refunds made.
- 5.7. Finally, the member is fined an amount of R5 000 for its infringement of clause 15.31 of the Code.

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6. **Matters referred back to WASPA**

- 6.1. The Compliance Department could not obtain confirmation from the relevant MNO that the MSISDN used for testing had been subscribed to the member's service when it clearly had been. I cannot tell from the facts where the fault may lie here, and the Compliance Department is urged to investigate this issue further.
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