



Report of the Adjudicator

Complaint number	#52867
Cited WASPA members	Inspiritum LTD - 1808
Notifiable WASPA members	Worldplay - 0015
Source of the complaint	WASPA Compliance Department
Complaint short description	Information that is false or deceptive; Pricing information that is misleading; Terms and conditions not clearly displayed; No prior indication that adult content; No welcome message
Date complaint lodged	2021-06-11
Date of alleged breach	2021-04-8
Applicable version of the Code	16.12
Clauses of the Code cited	5.4; 5.5; 8.7 5.4; 8.9 12.4; 12.5; 5.7; 5.8; 5.10 21.3; 21.4; 21.5 15.17; 15.18
Related complaints considered	#49150 Misleading advertising. Dissemination of deceptive or false information. Failure to display pricing information clearly and prominently; #48941 & #48942 Appeal: Subscription and failure to send correct welcome and reminder messages

Fines imposed	<p>a) R 5 000.00 for its breach of clause 5.4 read with clause 8.9:</p> <p>b) R 10 000.00 for its breach of clause 12.4, 12.5, 5.7, and 5.10, taken together</p> <p>c) R 10 000.00 for its breach of clause 21.3, 21.4 and 21.5 taken together</p> <p>d) R 5 000.00 for its breach of clause 15.17 read with clause 15.18.</p> <p>With the exception of the fine in (c), all of the fines are suspended for a period of one year provided that the Member is not held liable for an infringement of the relevant clause/s.</p>
Other sanctions	N/A
Is this report notable?	N/A
Summary of notability	N/A

Initial complaint

This complaint was lodged by the WASPA Compliance Department after tests conducted by the Complainant on the Cell C network on 8 April 2021 identified that the Member's service offering there had breached various provisions of the Code of Conduct as set out more fully in the "Sections of the Code considered" below.

Member's response

The Member did not dispute any aspect of the breaches of the Code alleged by the Complainant. The main thrust of its explanation was as follows:

"Access to Playboy and EasyFitness services as well as the link in question are not supposed to be provided to Cell C users, therefore Inspiritum Ltd. acting in good faith could not predict the click-through on this link by Cell C user, because this is a nontypical action of our platform which entailed several technical errors. Said technical errors in its turn have resulted in problems mentioned in WASPA Code of Conduct Complaint #52867 (such as incorrect LP etc.)."

We kindly ask you to take into consideration that our target audience for promotion of Playboy and EasyFitness services is limited only to MTN customers, however we shall immediately re-examine that promotion by our partners used for targeting our audience is strictly performed with reasonable care, skill and diligence.”

Complainant’s response

The complainant disputed that the Playboy and/or Easy Fitness service was/ were limited to MTN end-users and should technically not have been available for access to consumers on the Cell C network and elaborated as follows:

- The tester was directed to a Cell C Network Hosted Confirmation Page for the Playboy subscription service at R 10.00 (Ten Rand) per day.
 - R 10.00 (Ten Rand) airtime was deducted from the tester’s balance by Cell C for the Playboy subscription service.
 - The Cell C USSD self-help portal listed the Playboy service as an active subscription .
-

Member’s further response

The member denied that it purposely targeted Cell C users. It blamed the problem on its partner having a single API configured for all cellular networks in South Africa. It did, however, concede that it was partly to blame for the situation.

Sections of the Code considered

Provision of information to customers

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

Accuracy of pricing information

8.7. Pricing information must not be misleading. The price must be the full retail price of the service, including VAT. There must not be any hidden costs over and above the price included in the pricing information.

Definition of call-to-action

8.9. A “call-to-action” is any link, input box, short-code, 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.

Terms and conditions

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.

5.7. A web page containing the full terms and conditions of a service must be readily available to current and potential customers of that service.

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

5.10 Whenever a customer is asked to consent to the terms and conditions of a service, it must not be assumed that the customer consents by default; a customer must take a specific action to confirm consent. (Example: A consent tick-box must be empty when presented to the customer, and the customer must click on the tick-box to indicate consent.)

Required practices

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

21.4. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.;

21.5. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult content services. Reasonable steps may include the customer confirming his or her age prior to or as part of initiating the service.

Welcome message

15.17. Once a customer has joined a subscription or notification service, an SMS message must immediately be sent to the customer confirming the initiation of the service. The message must be provided in one of two ways:

- (i) The customer's mobile carrier may send the message.
- (ii) The member can send the "welcome message". The customer must not be charged for the welcome message.

15.18. The "welcome message" must be a single message and may not contain any line breaks or carriage returns. The welcome message must contain only the following additional information:

- (a) (optionally) the word "welcome" at the beginning,
 - (b) confirmation that the customer has subscribed to a service,
 - (c) the name of the service,
 - (d) the pricing information,
 - (e) a customer support number,
 - (f) instructions for terminating the service, and
 - (g) (optionally) a link to a WAP landing page or a web page describing the service.
-

Decision

1. The only dispute of fact between the parties was whether or not it was due to a technical error that the Member's services were accessible by Cell C customers.
2. It is not readily apparent from the submissions of the parties how this issue was relevant to the resolution of the dispute. The Member's response dated 2021-06-18 seems to imply that the problems complained of only applied to Cell C customers and not its MTN customers.
3. It is not necessary for me to consider this further as the real issue is whether or not the service accessible to Cell C customers breached the provisions of the Code.
4. When the Member was challenged on its contention that there was a technical fault by the Complainant, the Member insisted the problem was caused by the configuration of its partner's system. It did, however, concede that the fault also lay with it. It was right in doing so in light of clause 3.4 of the Code (my underlining for emphasis):

3.4. A member is not liable for any breaches of this Code of Conduct resulting from services offered or marketed by a third party, if that party is also a member of WASPA, provided that the member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of this Code of Conduct.

5. The Member offered no proof that it had taken any such reasonable steps.
6. The Member submitted that it works in a large number of countries and had not encountered this problem elsewhere. If this was intended as a defence or explanation, it carries no weight. I will, however, take it into consideration when imposing a sanction.

7. The Member has indicated that it shall carefully examine promotion target preferences and IP filters configuration in future. It ought to have done this in the first place.
8. As to which provisions of the Code have been breached, I will start with a consideration of **clauses 5.4., 5.5. and 8.7**
9. The allegation by the Complainant that, without any action taken by the Tester on the rendered landing page, the Tester was redirected to an adult content page is concerning. One possible inference is that this was an intended deception.
10. South African courts have often relied upon this cautionary advice of Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd 1939(3) All England Law Report s 722 at 733:

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish."

11. As Worldplay did not respond to the complaint and it was not specifically identified as a respondent in terms of clause 24.22A of the Code, it is not known precisely what the facts were and it is not possible to exclude other reasonably possible inferences other than an intentional deception.
12. The allegation that the Member breached **Clause 8.7** misses the mark as the different price indicated on the first landing page is part and parcel of the offering on that page being entirely different to that which the Tester was directed to. This constitutes the possible deception that I have already considered and disposed of above. In any event, the redirection happened so fast that it would be unlikely that a customer would even have seen the price.
13. Accordingly, the complaint relating to the alleged breach of **clauses 5.4, 5.5 and 8.7 are dismissed.**
14. The evidence presented by the Complainant does, however, justify the conclusion that the member **breached clause 5.4 read with clause 8.9.**
15. Regarding **clauses 12.4, 12.5, 5.7, 5.8 and 5.10**, which relate to terms and conditions, the first landing page (Easy Fitness) does have a link to "Terms and Conditions" but this is irrelevant because it was impossible for the Tester to subscribe to the service as the Tester was automatically redirected to the Worldplay Playboy site (recording at 1:04).
16. It was only at a later stage that the Tester was able to access the terms and conditions for that service, albeit for MTN customers (recording 2:53- 3:38). However, clause 5.7. requires that a web page containing the full terms and conditions of a service must be readily available to current and potential customers of that service (my underlining for emphasis). In other words, they must be available before the customer commits to the service.
17. I could find no indication in the recording of a requirement that the Tester consented to the terms and conditions, as required by clause 5.10.
18. Accordingly, I find the Member **liable of breaching clauses 12.4, 12.5, 5.7, and 5.10 and dismiss the complaint regarding clause 5.8**
19. Based on the information contained in paragraphs 14-16 and 19 respectively of the formal complaint, I am satisfied that the **Member breached clauses 21.3, 21.4 and 21.5 and clause 15.17 read with clause 15.18.**

Sanctions

In determining appropriate sanctions against the Member for its breaches of the WASPA Code of Conduct, the following has been taken into consideration:

1. Any previous successful complaints made against the Member in the past three years (none);
2. Any previous successful complaints of a similar nature (none);
- 3 The nature and severity of the breach

The Member's breach of the WASPA Code of Conduct with regard to the automatic redirection of a user to an adult content site, coupled with the lack of warning that the service was restricted to persons over 18 years of age, is viewed in a very serious light due to the potential harm to consumers.

The breaches regarding the lack of prior availability of the terms and conditions undermined a potential customer's ability to make an informed decision before agreeing to subscribe to the service

4. Mitigating factors:

Although the Member did not directly avail itself of the opportunity offered to it when the complaint was referred to it to provide mitigating circumstances, the following have been taken into consideration:

- i) The Member's timely response to the complaint and it having remedied the defects complained of (not disputed by the Complainant);
- ii) The Member had not encountered this problem elsewhere;
- iii) The Member was prepared to accept partial responsibility; and
- iv) The likelihood of a large portion of the blame lying with Worldplay.

5. Precedent

In determining appropriate sanctions, previous precedent set by WASPA adjudicators and appeal panels in previous complaints for the same or similar contraventions has been taken into account.

#48941 Subscription and failure to send correct welcome and reminder messages

#48942 Appeal: Subscription and failure to send correct welcome and reminder messages

Conclusion

Based on the foregoing, I fine the Member:

- a) R 5 000.00 for its breach of clause 5.4 read with clause 8.9:
- b) R 10 000.00 for its breach of clause 12.4, 12.5, 5.7, and 5.10, taken together
- c) R 10 000.00 for its breach of clause 21.3, 21.4 and 21.5 taken together
- d) R 5 000.00 for its breach of clause 15.17 read with clause 15.18.

With the exception of the fine in (c), all of the fines are suspended for a period of one year provided that the Member is not held liable for an infringement of the relevant clause/s.

Matters referred back to WASPA

N/A
