



Report of the Appeals Panel

Complaint number	#53765
Cited WASPA members	Newstor FZC (1990)
Notifiable WASPA members	Mondia Media South Africa (Pty) Ltd (1975)
Appeal lodged by	WASPA Compliance Department
Type of appeal	Written appeal
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	Version 16.16
Clauses considered by the panel	3.5, 3.6, 3.7, 5.1, 5.2, 5.4, 5.5, 8.8
Related complaints considered	
Amended sanctions	The sanctions are amended as follows: (a) For the infringement of clause 8.8 a fine of R5,000 is imposed. (b) For the infringement of clauses 5.1 and 5.4 a fine of R10,000 is imposed.
Appeal fee	Fifty percent of the appeal fee to be refunded
Is this report notable?	Not notable
Summary of notability	Not applicable

Initial complaint

1. This complaint was lodged by the WASPA Compliance Department on the 19th of July 2021, and the member was notified of the complaint by the WASPA Secretariat on the 20th of July 2021. The Secretariat also notified the service aggregator, Mondia Media South Africa (Pty) Ltd, of the complaint on the same day, but received no response.
2. The WASPA Compliance Department included both comprehensive notes of its examination of the member's service, as well as a video record of the examination in its formal complaint. The report is comprehensive but was accurately summarised as follows by the Adjudicator:
 - a. On the 31st of May 2021 the WASPA Compliance Department's tester (hereafter the "tester") visited several mobile websites of an explicit adult nature, and eventually clicked on an image on a website at URL "xxxsex.men". The link took the tester not to a landing page for a website offering explicit adult material, but to a landing page advertising non-explicit games.
 - b. The tester then proceeded to sign-up for the member's "Go Games" game service.
 - c. R7.00 was deducted from the tester's account.
 - d. The tester received a welcome SMS and clicked on the link in the message. The tester was however unable to access the service. The tester's browser accessed the member's site, but the tester was presented with the message "we are unable to process your request (*sic*)".
 - e. On the 1st of June the tester ascertained that another R7 had been deducted from the tester's account, and then attempted to follow the link provided in the welcome message. The tester achieved a similar result, with a different error page reading "500 Oops, something went wrong! Please check your request or try again later." The tester then successfully unsubscribed from the service.
3. The member responded as follows to the complaint:

The Advertised Service was not the Service Provided

- a. The member uses a combination of DSP and affiliate traffic. In the case of affiliate marketing the advertiser does not control placement of banners; in this case their advertising agency placed their banner on certain sites without the member's approval.

- b. The member further advised that it had taken action against the agency, instructed it to block all traffic from that source, and also provided a copy of email correspondence with the agency to that effect.
- c. The tester responded to the member's version by citing clauses 3.5, 3.6 and 3.7 of the Code, restating the facts, and noting that the member had not denied the breach.

The Subscribed Service was not Provided Despite being Charged for

- a. The member argued that for various technical reasons its system required the consumer to click on the "continue" button on the subscription confirmation page on its site after the subscription process had been completed. The member also provided a video of how this should have been done.
- b. The member also argued that clear instructions to click on the continue button are given (though it was not made clear where these instructions were to be found), and that accordingly if the tester had followed the instructions, the system would have worked as required.
- c. The tester gave a comprehensive response and raised several points. I summarise these briefly here for reasons that will become apparent:
 - i. Firstly, consumers are in practice unlikely to take this extra step required by the member to finalise the subscription process.
 - ii. Secondly, there are several technical reasons why this approach is problematic.
 - iii. Thirdly, there are in fact no instructions requiring the consumer to take the steps that the member requires.
 - iv. Finally, the process demonstrated by the member in its video is not the same as that followed by the tester: the member's process was off-net flow which utilised a NIUSSD confirmation step, not a web confirmation page, while the tester's was an on-net web acquisition flow. The MSISDN is detected and a two-step MTN confirmation web flow process is used.
4. The member also submitted that they do not control the technical flow of the subscription process, which is determined by the mobile network operator.
5. On the missing instructions, the member stated that these are determined by the operator. Though how this relates to requiring the consumer to click a further button is not quite clear. The member stated further that while the process flow captured in the tester's versus the member's videos may not have been the same, the purpose was to demonstrate how content access and redirection are dealt with, and this is handled the same way in both scenarios.
6. The member also mentioned that it uses an anti-fraud platform.

Adjudicator's findings

7. The Adjudicator made the following findings under two broad headings:

The advertised service was not the service provided

8. There was no indication that the website from which the member's landing page was accessed, is owned or controlled by the member. Moreover, the member admits that the banner in question was placed by an advertiser.
9. Under clause 3.5 and 3.6, the member has a duty to ensure that its "supplier, affiliate or sub-contractor" is aware of the WASPA code and must ensure that it markets the member's services in a manner consistent with the Code.
9. It was not clear to the Adjudicator why a banner advertisement for adult services would erroneously link to a non-adult service. Even if the member had no control over where the banner appeared, it could surely control the URL embedded in the banner itself before its distribution and hence the target URL when the banner was clicked.
10. No matter the precise technical issue, there is no doubt that the banner in question breached clause 8.8, in that the service provided was not even vaguely related to the content advertised. In terms of clause 3.7 of the Code, the member is liable for the advertising agent's breach in placing the banner. Accordingly, the member has breached clause 8.8 of the Code.
11. The Adjudicator found that there was no breach of clause 5.5, as the member did not intend to be deceptive.

The subscribed service was not provided despite being charged for

12. The Adjudicator held that both parties to this matter expended some effort in their submissions on this point, but the essential issue is quite simple: the member required the consumer to carry out steps to confirm a subscription AFTER the subscription had already been confirmed. To do so is a breach of clause 5.4 in that it is unfair and misleading to expect a consumer to confirm a subscription service after the consumer has already been notified that the subscription service has commenced.
13. The Adjudicator also held that the existence or otherwise of instructions for the consumer to do so is irrelevant as this should not be a requirement. The operator's technical requirements are also irrelevant, as it is simply impermissible under the Code to require a further step. If it is not technically possible to provide the service without requiring this further step, then the service cannot be provided without contravening the Code.

14. The complainant has alleged that the member infringed clause 5.1 in that it could not provide the services that it offered. It clearly COULD offer these services, as its demonstration video showed, but its subscription process was such that the services were not provided despite being charged for.
15. The Adjudicator finally held that clause 5.2 had not been infringed, in that the services were neither prolonged nor delayed: they were never going to be provided at all. In the circumstances however there is little doubt that the member has infringed clause 5.4 for the reasons already discussed above.

Sanctions

16. The Adjudicator held that this was a first transgression by the member. The Adjudicator further held that the member was unable to demonstrate that it had taken the reasonable steps necessary for the member to benefit from the mitigating factors set out in clause 3.7 of the Code. A fine of R15 000 was imposed on the member for the infringement of clause 8.8 of the Code.
17. The Adjudicator held that there was no indication of any prejudice suffered by consumers generally due to the member's breach of clause 5.4. The tester was charged for two days of the member's subscription service without the service being made available, and this could very well have been the experience of many consumers. The Adjudicator found that it would not be feasible to provide for a refund, as it was strongly suspect that the member would not be able to ascertain which consumers were affected. Nonetheless, considering the potentially significant prejudice to consumers that the member's practice in this regard could cause, the member was fined in the amount of R30 000 for its infringement of clause 5.4 of the Code.

Appeal submissions

18. The member qualified its factual submissions stating that although the complaint was received on 20 July 2021, it only became aware of the complaint on 26 July 2021 as the email had been diverted to its spam folder. It therefore took action on the complaint on the same day and not a week later. It replied to the WASPA secretariat. The member also requested its client to stop all traffic and from its side, blocked the services. The member has also terminated its agreement with this client.
19. The member submits that the control of where their ads are placed is not 100% in their hands and that this is an industry wide phenomenon that is not restricted to them. It has control of the click once it reaches its environment given that it is using one of the world's best anti-fraud platforms. It submits that the only practical way to control this is to work with good agencies and weed the bad ones out and that this is exactly what it has done.

20. In regard to sanction 2 the member addresses the complaint in two parts. In respect of the service denial on 30 May 2021, the member provided a detailed explanation of its processes and why the tester was denied access to the service on the day. It submitted that the system acted in a different way because of the fraud control parameters. At the time of on boarding, they do multiple fraud checks for the user before they send the user to the operator for subscription.
21. In regard to the service denial on 31 May 2021 further explanation is provided on why there was a service denial. As per the content access & architecture flow the user's request goes through the operator then the aggregator before reaching their environment/application. In this case, they did not receive any request in the first place & the error was displayed to the user by the aggregator.
22. The member submits that both the errors were well beyond its control and requests a fair assessment. It is worth mentioning that the possibility of such errors can only be mitigated and not eradicated completely given the challenges of the environment that all VAS service providers operate in.
23. The complainant responded to the appeal submission of the member by referring to WASPA's Code of Conduct Advisory #6 which had been circulated to all members during November 2020. This Advisory provides a detailed explanation of what are considered the reasonable steps that members should follow to comply with the Code of Conduct. This includes amongst others that:
 - a. If a member has a client offering or marketing services using its facilities, then the WASPA Code limits its liability for any resulting breaches of the Code. If the client is also a WASPA member, then the member is not liable at all provided that it has taken reasonable steps to ensure that the client follows the Code. If the client is not a WASPA member, the member remains liable for any breaches, but if it has taken reasonable steps, then an adjudicator must take that into account as a mitigating factor when determining the extent of the member's liability
 - b. That a member should ensure that all of its customer agreements make reference to the WASPA Code of Conduct, and bind the client to abide by the Code. If necessary, specific reference should be made to the clauses that the member consider relevant to the particular services each client uses. Send them a copy of the Code with the agreement. Make sure there is a section of the agreement where the client has to tick to specifically indicate that they understand their obligations.
 - c. That a member should include a provision in their service agreements making their client liable for any fines imposed on them by an adjudicator for a breach of the Code caused by that client's actions. Members should also reserve the right to terminate the services you are providing in the case of a serious breach or repeated breaches of the Code by that client.

24. The complainant submits that the member does not dispute the fact that a non-adult, games subscription service landing page was accessed through an explicit, adult banner that was found on the xxxsex.men website which was not the service advertised. It submits that an undisputed breach of the WASPA Code of Conduct (“Code”) occurred, for which the member is liable, as the member failed to submit any proof that reasonable or pro-active steps were taken.
25. The complainant submits that the member failed to provide any information, documentation, or evidence, that they took pro-active steps to ensure that they adhered to the provisions of Clause 3.5 and 3.6 of the Code with regards to their third-party marketing supplier, which may have been considered as reasonable steps and a mitigating factor in terms of Clause 3.7.
26. The complainant submits that the member provided no evidence that they made their supplier aware of and required them to comply with Code, via contracts or written communications, or that they audited or monitored whether their suppliers complied with the Code, etc. The only information the member provides is their reactive actions – which took place after the breach.
27. The complainant submits that the member’s subscription processes are flawed as set out in the original complaint, and that the member’s explanations do not sufficiently address these flaws. It also finds the member’s reliance on its anti-fraud solutions ‘disturbing’ since the purpose of such solutions is to verify and validate interactions with a member’s service prior to activating the service, to ensure that is a legitimate request which did not happen in this case.
28. The complainant finally submits that the tester subscribed to a service after duly completing the double opt-in process, they were notified that the subscription was successfully activated, airtime was deducted for the subscription charge, the service was listed as an active subscription on the MTN USSD portal – yet the member did not provide clear instructions on how to access the content, alternatively failed to provide access to the service subscribed to.

Deliberations and findings

29. it is not necessary for purposes of this appeal to provide a detailed exposition of the facts as the facts are largely uncontested. The further explanations provided by the member and its submissions do not address the fact that it has indeed infringed the Code of Conduct as held by the Adjudicator, but is rather aimed at addressing the severity of the fines imposed by the Adjudicator by providing evidence of the steps that were taken once the member became aware of the complaint.

30. The member has provided no evidence that it has taken any of the pro-active steps set out in the WASPA Advisory of November 2020. Although the Advisory is not binding on members, the Advisory in part simply replicates what is already stated in clauses 3.5 to 3.7 of the Code of Conduct. The member has not provided any evidence that it had taken steps to make its client aware of clause 3.5 which requires a member to 'ensure that any client, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, is aware of the requirements of this Code of Conduct.
31. The member has also not provided any evidence or submission that it has complied with clause 3.6 which requires members to 'ensure that any client, supplier, affiliate or sub-contractor who is not a member of WASPA, but is providing or marketing services covered by this Code of Conduct, provides and markets those services in a manner consistent with the requirements of this Code of Conduct.
32. The fact that the member uses some of the best anti-fraud solutions is laudable, but does not address the very specific requirements of clauses 3.5 and 3.6 of the Code of Conduct.
33. We agree with the Adjudicator that there was a clear breach of the Code by the member's client. The banner in question breached clause 8.8, in that the service provided was not related to the content advertised at all.
34. In terms of clause 3.7 of the Code, the member is liable for the advertising agent's breach in placing the banner. Accordingly, the member has breached clause 8.8 of the Code. We also agree that there was no evidence of a breach of 5.5 by the member as there does not seem to have been any intention to deceive, either by the member or the client.
35. We do not agree with the Adjudicator that there was no breach of clause 5.1. The processes used by the member, including the anti-fraud solutions, resulted in the member not being able to deliver the subscription services as presented and charged for. We also agree that there was an infringement of clause 5.4 in that it is unfair and misleading to expect a consumer to confirm a subscription service after the consumer has already been notified that the subscription service has commenced. One could also argue that there was an infringement of clause 5.2 due to the fact that the services offered were unreasonably prolonged or delayed, but in the light of our finding that there was a breach of 5.1 and 5.4, there may be a potential overlap in the infringements. We are in any event of a view that for purposes of the sanctions, the infringements should be viewed together as it arose from the same set of actions by the member and its client.
36. To summarise:
 - (a). We find that there were infringements of clauses 5.1, and 5.4 of the Code of Conduct – the member was unable to deliver the services advertised.

- (b) We find that there was an infringement of clause 8.8 because the service advertised by the member's client was not the service purported to be provided by the client. In terms of clause 3.7 the member is liable for breaches by its clients who are not WASPA members.

Amendment of sanctions

37. In mitigation we take note that this is the member's first breach of the Code of Conduct and the member took immediate corrective steps once it became aware of the infringing conduct of its client and the inadequacies of its own systems.
38. However, we also take note that the member has not taken any reasonable prior steps to ensure compliance with the Code by its non-WASPA member clients as specifically required by clauses 3.5 and 3.6 of the Code. It would seem also that the member did not take heed of the WASPA Advisory of November 2020 since it did not address this issue pertinently raised by the complainant.
39. There is no explanation for the infringement of clause 8.8, either by the member or its client. If it had been an honest mistake, one would have expected evidence or submissions to that effect.
40. Although there is no evidence of any actual consumer detriment, we also find it disconcerting that the complainant could be subscribed and charged for a service which was never provided due to the inadequacies of the member's systems.
41. We amend the sanctions as follows:
- (a) For the infringement of clause 8.8 a fine of R5,000 is imposed.
 - (b) For the infringement of clauses 5.1 and 5.4 a fine of R10,000 is imposed.

Appeal fee

42. As the member has been successful in part with its appeal, we direct that 50% of the member's appeal fee be refunded.