



Report of the Adjudicator

Complaint number	#54293
Cited WASPA members	Mamtic Innovations LTD Membership no: 1819
Notifiable WASPA members	Netsmart SA Membership no: 0126
Source of the complaint	WASPA Compliance Department
Complaint short description	<p>Use of XX marketing material</p> <p>No prior indication that adult content</p> <p>Information that is false or deceptive</p> <p>Pricing information that is misleading</p> <p>Terms and conditions not clearly displayed</p> <p>Termination of service</p>
Date complaint lodged	2021-08-12
Date of alleged breach	<p>Service: Sexy TikTok 25 May 2021</p> <p>Service: Top Games Online Network: 24 May 2021</p> <p>Video Gallery Network: 8 June 2021</p>
Applicable version of the Code	<p>16.15</p> <p>16.16</p>
Clauses of the Code	Service: Sexy TikTok

<p>cited</p>	<p>Clauses breached:</p> <ul style="list-style-type: none"> • 21.11 read with 21.1 and 21.2 • 5.4, 5.5 and 8.7 • 21.3 and 21.5 • 5.6A, 5.1, 5.2 and 5.4 • 5.4, 5.5, 15.26 and 15.27 • 5.4, 8.7, 15.6, 15.8 and 15.8A <p>Service: Top Games Online</p> <p>Clauses breached:</p> <ul style="list-style-type: none"> • 5.6A, 5.1, 5.2 and 5.4 <p>Service: Video Gallery</p> <p>Clauses breached:</p> <ul style="list-style-type: none"> • 21.3 and 21.5 • 5.6A, 5.1, 5.2 and 5.4
<p>Related complaints considered</p>	<p>#48942 Appeal: Subscription #52867 Pricing information that is misleading; No prior indication that adult content.</p>
<p>Fines imposed</p>	<p>Service: Sexy TikTok</p> <ul style="list-style-type: none"> a) R 5 000.00 for its breach of clauses 21.11 read with 21.1 and 21.2 b) R 5 000.00 for its breach of clause 5.4, 5.5 and 8.7 taken together c) R 10 000.00 for its breach of clauses 21.3 and 21.5 taken together d) R 5 000.00 for its breach of clauses 5.6A, 5.1, 5.2 and 5.4 taken together <p>Service: Top Games Online</p> <ul style="list-style-type: none"> e) R 5 000.00 for its breach of clauses 5.6A, 5.1, 5.2 and 5.4 taken together <p>Service: Video Gallery</p> <ul style="list-style-type: none"> f) R5 000.00 for its breach of clauses 21.3 and 21.5 taken together g) R5 000.00 for its breach of clauses 5.6A, 5.1, 5.2 and 5.4 taken together.

	With the exception of the fines in c) and e), 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.
Other sanctions	None
Is this report notable?	Not notable
Summary of notability	N/A

Initial complaint

This complaint was lodged by the WASPA Compliance Department after tests conducted by the Complainant on the MTN and Cell C networks respectively on 24 & 25 May, 2021 and 8 June 2021 (as detailed immediately below) identified that the Member's service offering were in breach of various provisions of the Code of Conduct as set out more fully in the "Sections of the Code considered" below.

Service: Sexy TikTok Date: 25 May 2021: MTN
 Service: Top Games Online Network: Date: 24 May 2021: Cell C
 Video Gallery Network: Date: 8 June 2021: MTN

Member's response

The Member listed the actions it took to remedy the breaches

(areas of dispute with the Complainant are indicated in italics):

Service: Sexy TikTok

Clauses breached: • 21.11 read with 21.1 and 21.2

- The marketing supplier was warned and payment for incompliant promotion will be withheld (correspondence with the responsible partner is attached).

• 5.4, 5.5 and 8.7

- Inaccurate information was removed from marketing materials to prevent any misunderstanding of service price. - The marketing supplier was notified about responsibility and strict penalties in case of using any misleading price information.

• 21.3 and 21.5

- Promotional campaign was paused and disabled completely.

- It has been ensured that the 18+ symbol is displayed on all adult advertising campaigns together with age restrictions, mentioned in T&C.

• 5.6A, 5.1, 5.2 and 5.4

- There was an issue with our bulk and Content access SMS failed to be delivered. We fixed the error.

Also, automatic redirect after subscription initiation to the content portal was applied.

- Additionally we updated T&C with a content portal URL for the user to have access in case he will not be redirected to the content portal at once.

- Our customer support team initiated a refund in the amount of R14.00 via Netsmart Gateway for 27640920905 due to access to the content wasn't provided.

• 5.4, 5.5, 15.26 and 15.27

- *Subscription initiation and termination are fully controlled by Mobile Network Operators.*

- *We received a STOP notification on Tue May 25 15:43:05 2021 UTC+3, so the user was considered unsubscribed in our system. Please see logs attached.*

- *According to the service flow users are notified regarding opt-out / subscription initiation or termination by Mobile Network Operators*

• 5.4, 8.7, 15.6, 15.8 and 15.8A

- *Billing is fully controlled by MTN (including number of billing attempts, billing tariffs, frequency etc.).*

- *Based on our and Netsmart Gateway logs we were not notified by billing in the amount of R24.00. This tariff and charge itself has no relation to Clubmium service. Please see logs attached.*

Service: Top Games Online

Clauses breached: • 5.6A, 5.1, 5.2 and 5.4

- There was an issue with our bulk and Content access SMS failed to be delivered. We fixed the error. Also, automatic redirect to the content portal after subscription initiation was applied.
- Additionally we updated T&C with a content portal URL.
- Our customer support team initiated a refund in the amount of R7.00 via Netsmart Gateway for 27743853617 due to access to the content wasn't provided. Please see attached subscription notifications with attached log.

Service: Video Gallery

Clauses breached:

- 21.3 and 21.5

- It has been ensured that the 18+ symbol is displayed on all adult advertising campaigns together with age restrictions, mentioned in T&C.

- 5.6A, 5.1, 5.2 and 5.4

- There was an issue with our bulk and Content access SMS failed to be delivered. We fixed the error. Also, automatic redirect to the content portal after subscription initiation was applied.

- Additionally we updated T&C with a content portal URL.

- Our customer support team initiated a refund in the amount of R7.00 via Netsmart Gateway for 27640920905 due to access to the content wasn't provided. Please see attached subscription notifications with attached log.

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In addition to the above remedial actions, the Member provided proof that it had warned its marketing supplier to cease all prohibited activities and withheld payment for noncompliant promotional activities.

Complainant's response

The complainant failed to respond in the time frame provided, even after an extension was granted.

Member's further response

None

Sections of the Code considered

Service: Sexy TikTok

Prohibited practices

21.11. 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.
read with 21.1 and 21.2

Definitions

21.1. An "adult service" is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

21.2. An "adult content service" is any service for the provision of content which has been classified as suitable only for persons 18 years or older by an appropriate body (such as the Film and Publications Board), or content reasonably likely to be so classified.

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.

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+".

21.5. 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.

Provision of information to customers

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

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.

5.5. 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

Terminating a service

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.")

15.27. The processing of any service termination request must not be unreasonably delayed. Termination requests submitted to the member in an automated fashion (including via SMS, USSD or the WASPA API) must be honored within 24 hours, and all other termination requests (including email requests) must be honored within two working days (48 hours).

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

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.

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.

Service: Top Games Online

Clauses breached:

- 5.6A, 5.1, 5.2 and 5.4

Provision of information to customers

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

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

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.

Service: Video Gallery

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+"

21.5. 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.

Provision of information to customers

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

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

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.

Decision

With the exception of the two aspects that I deal with immediately below, the Member did not dispute that the breaches alleged by the Complainant had occurred. Although it mentioned the role played by its marketing supplier in the breaches of the Code, it did not seek to shift the blame to it.

The Member disputed the following alleged breaches in respect of **Sexy TikTok**:

- 5.4, 5.5, 15.26 and 15.27
- 5.4, 8.7, 15.6, 15.8 and 15.8A

(all italicised in Member's response section of this report).

As the Complainant chose not to challenge the Member's explanations, I dismiss the complaints regarding these clauses.

As the Member did not dispute that it had breached all of the other clauses cited in the complaint, I find that the Member breached all the remaining clauses listed in the complaint.

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 use of material would likely be classified as XX or X18 by the Film and Publication Board, 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.

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 timeous response to the complaint;
- ii) The fact that in most instances, the Member accepted responsibility for the breaches and remedied them (not disputed by the Complainant);

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.

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

#52867 Pricing information that is misleading;
No prior indication that adult content.

Conclusion

Based on the foregoing, I fine the Member:

Service: Sexy TikTok

- a) R 5 000.00 for its breach of clauses 21.11 read with 21.1 and 21.2
- b) R 5 000.00 for its breach of clause 5.4, 5.5 and 8.7 taken together
- c) R 10 000.00 for its breach of clauses 21.3 and 21.5 taken together
- d) R 5 000.00 for its breach of clauses 5.6A, 5.1, 5.2 and 5.4 taken together

Service: Top Games Online

- e) R 5 000.00 for its breach of clauses 5.6A, 5.1, 5.2 and 5.4 taken together

Service: Video Gallery

- f) R5 000.00 for its breach of clauses 21.3 and 21.5 taken together
- g) R5 000.00 for its breach of clauses 5.6A, 5.1, 5.2 and 5.4 taken together.

With the exception of the fines in c) and e), 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

None
