



Report of the Adjudicator

Complaint number	#57571
Cited WASPA members	HYVEMobile
Notifiable WASPA members	N/A
Source of the complaint	WASPA Compliance Department
Complaint short description	Subscription services Misleading advertising Unclear pricing information
Date complaint lodged	2022-08-22
Date of alleged breach	2022-07-11 and 2022-07-18
Applicable version of the Code	17.2
Clauses of the Code cited	5.1, 5.4, 5.5, 8.8, 12.1, 12.2, 21.4, 21.11, 23A.5 (a)
Related complaints considered	#49150
Fines imposed	R10 000 for breach of clauses 5.1, 5.4, 5.5, 8.8, 12.1, and 12.2 R10 000 for breach of clauses 21.4, 21.11, and 23A.5 (a)

Other sanctions	N/A
Is this report notable?	Not notable
Summary of notability	N/A

Initial complaint

1. Whilst monitoring, testing and conducting compliance checks on wireless application services, the WASPA Compliance Department (“the Complainant”) identified a service which they believed did not comply with the requirements of the WASPA Code of Conduct (“The Code”).
2. The formal complaint which consisted of Annexure A, B and C was sent to the Member on 2022-08-24 (“the complaint”).
3. Annexure A of the complaint stated that on 2022-07-11, a tester employed by the Complainant (“the Tester”) was browsing on an adult website with URL <https://palimas.org/>, using a test device which was on the MTN network, and the following was highlighted:
 - 3.1. The Tester clicked on the “Hotel Pool Hookup” adult video and was redirected to another page. The Tester clicked on the “RK Taste Tests” adult video and was redirected to another adult website. The Tester then clicked on the explicit adult banner with a play button with the expectation of watching the explicit adult content video. Thereafter, the Tester was redirected to a landing page for “Whats Trending from Hyve Mobile”, the Member’s subscription service charged at R15.00 per day, and the following text was displayed: “Get the latest content for WhatsApp”.
 - 3.2. The landing page was designed to appear as though it was linked to content for the WhatsApp chat platform, as it displayed a predominant WhatsApp icon, and a green call-to-action button which mimics the colours of the WhatsApp icon alluding to the same service.
 - 3.3. The Tester also clicked on the “Subscribe” button on the landing page and was redirected to the MTN confirmation page.
 - 3.4. The Tester elected to stop the test at this point, as there were multiple breaches of the Code in the subscription acquisition flow for the Member’s subscription service.
4. Annexure B of the complaint stated that on 2022-07-11, the Tester was browsing on an adult website with URL <https://mkvpapa.lol/> using a test device which was on the MTN network, and the following was highlighted:

- 4.1. A pop-up banner appeared, and the Tester clicked on the X to close the advertisement. The Tester was however redirected to another page on the website with URL <https://mkvpapa.lol/category/18-movies/>. The Tester then clicked on an adult video with the following title: “18+ Protarok Premik (2022) FilmyMurga Bengali ShortFilm 720p Watch Online”.
- 4.2. The Tester was redirected to another page on the same website with URL <https://mkvpapa.lol/18-protarok-premik-2022-filmymurga-bengali-short-film-720p-watch-online/>. The Tester clicked on an adult video and was redirected to a website that loaded the adult video. The Tester then clicked on the play button with the expectation of watching the adult video. However, the Tester was instead redirected to the Member’s landing page with a R15.00 subscription fee per day.
- 4.3. The Member’s landing page was designed to appear to be linked to content for the WhatsApp chat platform by using the WhatsApp icon as its main image, and a green call-to-action button which mimics the colours of the WhatsApp icon alluding to the same service. The landing page displayed the following text: “New WhatsApp upgrade available now”.
- 4.4. The Tester clicked on the “Subscribe” button on the landing page and was redirected to the first MTN confirmation page. The Tester clicked on the “Subscribe” button and was directed to the second MTN confirmation page. Thereafter, the Tester ended the test.
5. Annexure C of the complaint stated that on 2022-07-18, the Tester was browsing on an adult website with URL <https://youwatchporn.com/>, using a test device which was on the MTN network, and the following was highlighted:
 - 5.1. The Tester clicked on the “Rocco’s Perverted Secretaries 3” adult video and was redirected to another page where the Tester clicked on the “StreamTape” link. The Tester was redirected to another adult website. The Tester then clicked on the explicit adult banner with a play button with the expectation of watching the explicit adult content video. However, the Tester was instead directed to the Member’s landing page with a subscription fee of R15.00 per day.
 - 5.2. The Member’s landing page was designed to appear to be linked to content for the WhatsApp chat platform by using the WhatsApp icon, and a green call-to-action button which mimics the colours of the WhatsApp icon alluding to the same service. The landing page displayed the following text: “Get the latest content for WhatsApp”.
 - 5.3. The Tester clicked on the “Subscribe” button on the landing page and was redirected to the MTN confirmation page. Thereafter, the Tester ended the test.

6. In summary, the Complainant's test results illustrated misleading advertising with regard to the acquisition flow and subsequent landing pages. The Tester was misled into believing that the Tester was about to watch an adult video in all three tests, when in fact the Tester was being directed to the Member's unrelated subscription service for "Whats Trending" at R15.00 per day ("the subscription service").
 7. Furthermore, the Complainant stated that the pricing information on the landing pages for the subscription service was neither clear nor prominent and required closer examination to be noticed.
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Member's response

8. The Member provided its formal response to the complaint on 2022-09-15.
9. The Member stated that its advertisements were published contrary to explicit adult publisher exclusions and that the creatives were not those provided by the Member in the configuration of the campaigns for the subscription service.
10. The Member responded that its publishing partner Smadex was able to identify an example of fraudulent publishing of the campaigns in question, and that the logs on Smadex's platform indicated that the campaign displayed did not use the creative supplied by the Member and the end publisher was masked in such a way that it appeared to have been served by a mainstream non-adult publisher.
11. Therefore, the Member denied liability regarding WASPA's requirement for the creative used in advertising to be a representative of the service, as it alleged it had taken all reasonable steps to prevent such occurrences but despite these efforts, had fallen victim to bad faith actors bypassing these measures to generate revenue from mainstream campaigns displayed on adult websites.
12. The Member also stated that the users of these websites were aware that these sites were widely known to generate revenue through excessive popup advertisements, while offering users content that would otherwise be restricted behind a paywall. Therefore, the Member alleged that the users of these sites expected that their experience would contain aggressive advertising and they accepted a sub-optimal user experience in exchange for access to content that would otherwise be unavailable.

13. In terms of Annexure B, the Member responded that it acknowledged that the heading on the consent page banner of the landing page was unclear as to the functionality of its service and may have been construed as an offer to upgrade the WhatsApp application itself, where the intention was in fact to convey that the subscription service offered had received an update with new content. Therefore, the Member stated that they would make the necessary changes to this landing page to make it clear that the service offered content to be used in conjunction with the WhatsApp application and did not form part of the WhatsApp application itself.
 14. The Member responded to the complaint of unclear pricing that was displayed on the Member's landing pages by stating that the pricing information was displayed on both the second and first landing pages directly adjacent to the call to action using the template supplied by the mobile network operator being MTN. The Member further admitted that the design of the landing page used colours that made the pricing information less prominent than the other text on the page. However, the Member also indicated that it felt that WASPA needed clearer guidelines in this regard, as MTN was ultimately in control of the size and position of the pricing information text.
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Complainant's response

15. The Complainant responded to the Member's formal response on 2022-10-06.
16. The Complainant noted that the Member utilised the services of third-party marketing suppliers and alleged that its subscription service was not promoted in accordance with its agreement with said marketing suppliers.
17. The Complainant confirmed that the fraudulent activity alleged by the Member may have in fact been the cause of the non-compliant marketing material which promoted its non-adult subscription service.
18. The Complainant quoted clause 3.1 to 3.7 of the Code, which relates to clients, suppliers, affiliates, or sub-contractors in relation to the Member. The Complainant alleged that there was a positive obligation on the Member to ensure that the third-party marketing suppliers promoted and marketed the Member's services in accordance with the requirements of the Code.
19. The Complainant further stated that the Member merely provides mitigating factors herein and did not deny the non-compliant promotion and marketing of its subscription service.

20. The Complainant quoted clause 4.11 (a) and (c) of the Code and alleged that the onus lay on the Member to show that it took reasonable steps to detect and prevent such fraudulent behaviour, by providing proof that it adhered to the WASPA Fraud Detection and Mitigation Guidelines (“the Guidelines”). The Complainant further responded that the Member should have shown that it had especially implemented the required Fraud Mitigation Requirements in this matter and had a sufficient anti-fraud solution in place to detect and block illegal traffic and sources.
 21. The Complainant stated that there was no evidence of the Member informing WASPA of the fraudulent activity as required by the Code.
 22. In addition to the above, the Complainant confirmed that the issue herein had been brought to the Member’s attention previously by way of the Heads-Up Complaints procedure, and was therefore not a limited exposure problem, but appeared to be an ongoing issue linking to the Member’s subscription services.
 23. Regarding the issue of unclear pricing, the Complainant asserted that although the landing pages, and the confirmation pages are hosted by the mobile network operator, the Member was in full control of the design elements, including but not limited to the images used, the colour of the background, the colour of font, the bolding of text, and the size of font. The Complainant stated that the Member could select the colour and size of font of the pricing information which would be clear, prominent, and legible.
 24. In response to the Member’s request for a guideline for the pricing information, the Complainant stated that the acknowledged industry standard has always been unwavering, in that a reasonable consumer should be able to determine the pricing information with ease and without any doubt.
 25. The Complainant further stated that in determining whether pricing information adhered to this standard, one would look at the Oxford dictionary definitions of “clear”, “prominent”, and “legible”, and that the Member’s pricing information fell short of these definitions.
 26. The Complainant reiterated that the Tester interacted with explicit adult content with the expectation of viewing same, not to be directed to a non-adult subscription service for a WhatsApp update or an add-on content service offered by the Member.
 27. The Complainant further provided an email from MTN which confirmed that the Member was in control of the design elements on the landing page and confirmation page.
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Member's further response

28. The Member provided its final response to the complaint on 2022-10-21.
29. The Member stated that while its service was published on an adult website according to the monitoring tool employed by WASPA, its supplier had confirmed that according to their logs, their system published the advertisement on a non-adult site as per the information supplied in their initial response. Furthermore, the Member stated that its supplier had provided logs which confirmed the above and as such has acted in accordance with its mutual agreement.
30. The Member confirmed that it did not use any third-party companies to buy media on its behalf such as affiliate marketers and that its in-house team bought all the media and only uses premium sources such as Google and premium DSP's.
31. The Member further alleged that there are no other reputable companies to buy media from and as such, these market leaders make significant investments in developing technologies to ensure the sourcing of clean, non-adult traffic. The Member asserted that this fact constituted all reasonable steps being taken to ensure compliance with the Code on the part of both the Member and its suppliers, as it pertained to mitigating potentially fraudulent activity in advertising.
32. The Member alleged it had implemented all the requirements contained within the WASPA Fraud Detection and Mitigation Guidelines.
33. Regarding mitigating fraudulent activity in traffic sourcing, the Member stated that its partners are market leaders and employ the most sophisticated systems available in the market to mitigate fraud.
34. The Member further alleged that it was not aware of any incidents prior to the complaint aside from the issues in the Heads-Up notices, and therefore could not report such fraudulent activity.
35. Regarding the pricing information, the Member alleged that the DEP platform programmatically prohibited changing the font color to a colour that it considered to be too light with respect to the background color. As such, the configurations made were within the limits of what the Operator considered acceptable and were therefore used in the campaigns executed.

Sections of the Code considered

36. The following sections of the Code are considered, and read as follows:

Service levels

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

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 services and content advertised

8.8. Content that is promoted in advertising, must be the same content that is provided to the customer as part of the advertised service. Advertising must not mislead consumers into believing that it is for an entirely different service or for different content.

Display of pricing information

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.

Required practices

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.

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.

MTN

23A.5. Subscription services must have a landing page prior to the confirmation step. An advert for a subscription service may not send a customer directly to a confirmation page but must link the customer to a landing page for the service. A landing page:

(a) must clearly show the pricing information for the service.

Decision

37. The Tester interacted with explicit adult content with the expectation of viewing same and was instead directed to a non-adult subscription service offered by the Member. The Member argued that its advertisements were published contrary to explicit adult publisher exclusions it had put in place, and that the creatives were not those provided by the Member in the configuration of the campaigns for its subscription service. The Member also asserted that it had taken all reasonable steps to prevent any potentially fraudulent activity involved in its subscription service's advertising.
38. Clause 3.3.2 of the Guidelines specifically states that an effective fraud detection and prevention solution must be implemented by Members across all Mobile Network Operators to validate subscription requests and block requests that do not originate from human users. The Guidelines confirm that mere block listing is not satisfactory for fraud mitigation and that the Member itself, must take the necessary steps to sufficiently adapt to the fraudulent tactics of external parties in real time to effectively mitigate fraudulent activities. Considering the above, the onus was on the Member to confirm that it had implemented the required Fraud Mitigation Requirements herein and that it had sufficient anti-fraud solutions in place to detect and block illegal traffic and sources.
39. Therefore, the Member had not demonstrated that it took the necessary reasonable steps itself nor did it ensure that the third-party agency did so in a manner consistent with the requirements of the Code or the Guidelines.

40. Furthermore, this issue of monitoring a third-party agency which the Member had contracted, as well as the display of the Member's pricing information was addressed in complaint number 49150 where the Adjudicator in 2021 upheld the complaint therein which leads to the conclusion that the Member could have taken further precautions to monitor its third-party interactions and report possible fraudulent activities relating to its service. It is also notable that the Complainant and the Member both mentioned that the issue herein had been brought to the Member's attention previously by way of the Heads-Up Complaints procedure, and it is apparent that this is an ongoing matter rather than a once-off problem.
41. Consequently, the Member is held responsible for the advertising that took place, and the breaches of the Code that resulted from such advertising.
42. The marketing material which was used to promote the adult service in this complaint, which duly led the Tester to the Member's non-adult subscription service, made use of material that was classified as X18 and contravened the Code. The Code specifically regulates the Member's actions, and the Member has accepted such regulation. The fact that the consumer should allegedly have been aware of the excessive popup advertisements for content that would otherwise be restricted behind a paywall is irrelevant and holds no weight. Therefore, the Member is in breach of clause 21.11 of the Code.
43. In terms of clause 21.4 of the Code, promotions for adult services must be in context with the publication or other media in which they appear. The content provided by the Member's subscription service was contrary to the reasonable expectation of the Tester, as the Tester was misled into believing that the Tester was going to watch an adult video with adult content, when in fact the Tester was directed to the unrelated subscription service for WhatsApp add-ons or upgrades. The subscription acquisition flow utilised misleading advertisements which deceived the Tester into reasonably believing that the services the Tester was subscribing to were linked to adult content which was in fact an entirely different service than what was subscribed to on the Member's landing page. Therefore, the Member contravened clauses 21.4 and 8.8 of the Code, as it misrepresented its subscription service by way of its advertising material and subscription flow. As such, the Member also contravened clause 5.1 of the Code as the Member must not offer or promise or charge for services that it was unable to provide, as the Member provides a service for WhatsApp updates and content add-ons and not adult videos.
44. Further to the above, the Member admitted to its non-compliant promotion and marketing of its subscription service, and the Member also acknowledged that the heading on the consent page banner of its landing page was unclear as to the functionality of its subscription service and may have been construed as an offer to upgrade the WhatsApp application itself.

45. It is also clear from the evidence provided herein, that the Member had an opportunity to design the pricing information on its landing page in a clear, legible, and precise manner and intentionally omitted to do so. The consumer would have had to closely examine the pricing information, which was overshadowed by the text, images and overall layout of the Member's landing page. It was confirmed by MTN that the Member had control of the pricing information font, however if the Member only had control over the font colour as it alleged, it still deliberately elected to use the lightest font option despite the font size already being small and insignificant in comparison to the rest of the landing pages' content. Furthermore, the Member used MTN as its network operator, which also puts the Member in contravention of clause 23A.5 (a) of the Code, pertaining to the necessity of clearly showing the pricing information for its subscription service on the landing page. Therefore, the Member is in contravention of clauses 12.1 and 12.2 of the Code.
 46. The Member did not act honestly and fairly by misleading its consumers by displaying the pricing information on its landing page in a non-clear manner and by designing the subscription page in such a way that it appeared to be directly linked to the WhatsApp messaging platform and not to the actual subscription service the Member was marketing. Consequently, the Member has also breached clauses 5.4 and 5.5 of the Code.
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Sanctions

47. In determining appropriate sanctions against the Member for its breach of the WASPA Code of Conduct, the following has been taken into consideration:
 - 47.1. Any previous successful complaints made against the Member in the past three years;
 - 47.2. Any previous successful complaints of a similar nature;
 - 47.3. The nature and severity of the breach; and
 - 47.4. Any efforts made by the Member to resolve the matter.
48. Lastly, I have taken note of the following mitigating factors that were provided by the Member, and these will be taken into consideration when applying the sanctions herein:
 - 48.1. The Member was a victim of fraudulent activity and did not purposefully use adult content to advertise its non-adult subscription service; and
 - 48.2. The Member confirmed that it would make the necessary changes to its landing pages to make it clear that the services offered content to be used in conjunction with the WhatsApp application and did not form part of the WhatsApp application itself.

49. Based on the foregoing, the following sanctions are imposed:

49.1. R10 000 for breach of clauses 5.1, 5.4, 5.5, 8.8, 12.1, and 12.2.

49.2. R10 000 for breach of clauses 21.4, 21.11, and 23A.5 (a).

Matters referred back to WASPA

50. N/A.
