



Report of the Adjudicator

Complaint number	#57712
Cited WASPA members	Perform Plus N.V.
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Non-compliant subscription service
Date complaint lodged	2022-09-30
Date of alleged breach	2022-08-30
Applicable version of the Code	v17.2
Clauses of the Code cited	5.1, 5.4, 5.5, 8.7, 8.8, 8.10, 15.4 and 15.5
Related complaints considered	n/a
Fines imposed	Member fined following amounts: R5 000 for breach of clause 5.1; R5 000 for breach of clause 5.4; R5 000 for breach of clause 5.5; R10 000 for breach of clause 8.7; R5 000 for breach of clause 8.8;

	R5 000 for breach of clause 8.10; R5 000 for breach of clause 15.4; and R5 000 for breach of clause 15.5.
Other sanctions	n/a
Is this report notable?	n/a
Summary of notability	n/a

Initial complaint

1. On 30 August 2022, whilst monitoring and conducting manual tests on the Cell C network, a tester from the WASPA Compliance Department came across a service which allegedly does not comply with the requirements as set out in the WASPA Code of Conduct.
2. The Complainant provided a detailed outline of the tester's experience whilst interacting with the Member's service, together with a video of the full test and relevant screenshots as evidence of the alleged breaches of the Code.
3. The tester typed in the following URL on Google Chrome: filefist.com/903322. The website loaded and the tester browsed through the page with the title "Claim iPhone Below".
4. The tester clicked on a banner with the text: "*Landa Okuqukethwe Kwakamuva Namuhla!*" The above text is in Zulu and using google translate it translates to the following: "*Download the Latest Content Today!*"
5. The tester was redirected to a subscription service landing page with a green "CONTINUE" call-to-action button, pricing information stating "*Subscription R9/day*" and a link to the Member's terms and conditions.
6. After reviewing the terms and conditions, the tester clicked the "CONTINUE" call-to-action button and was redirected to a verification page.
7. The verification page displayed and then automatically (without any interaction by the tester) redirected to the Cell C Network Hosted Confirmation Page ('NHCP'), which requested the tester to confirm or decline the request for the *Oxygen8 FreakApps Mtn*

subscription service at R 2.50 per charge, max 4 charges per day. (This equates to R10.00 per day).

8. The pricing information of “R9/day” as displayed on the subscription service landing page, the verification page, and contained in the terms and conditions, does not correspond with the pricing information on the Cell C NHCP of “R2.50 per charge, max 4 charges per day”.
9. The tester clicked the “YES” button on the NHCP. The subscription acquisition process was completed, and the tester was redirected to the service homepage for FreakApps.
10. The tester received a welcome message and reviewed the content. The tester clicked on the link provided in the welcome message to access the service.
11. The tester browsed on the subscription service homepage and clicked on the “Play Now” button for the “Unlock It” browser game. The tester expected to be directed to the game but was redirected back to the landing page of the service. The tester clicked on the “CONTINUE” button and was redirected to the verification page, which then automatically redirected to a Cell C page informing the tester that they had already subscribed to the service.
12. The tester clicked on the link provided on this page and was redirected to the subscription service landing page, which now looked different from the first landing page.
13. The tester clicked on the link from the welcome message again and was redirected to the subscription service homepage. The tester selected a different game called “Emoji Quiz”, with the expectation to play this game, but was again redirected to the subscription service landing page. The tester clicked on the “CONTINUE” button and was redirected to the verification page, which again automatically redirected to a Cell C page informing the tester that they had already subscribed to the service.
14. The tester clicked on the link provided and was redirected to the subscription service landing page which looked different from the first and second landing pages. The tester clicked on the “Continue” button and was redirected to the first landing page of the service.
15. In the meantime, R7.50 worth of airtime was deducted.
16. The tester used the termination instructions contained in the welcome message by sending the keyword “STOP” to 31800 to unsubscribe from the service and received a message confirming that the service had been cancelled.
17. The Complainant also provided further examples of non-compliance of a similar nature to supplement the complaint in a separate annexure to the formal complaint. In all these

examples, misleading marketing and/or non-existent promotional competitions that link to the Member's FreakApps subscription service are used.

18. The Complainant alleges that the Member is in breach of clauses 5.1; 5.4; 5.5; 8.7; 8.8; 8.10; 15.4 and 15.5 of the WASPA Code of Conduct.

Member's response

19. In its response to the formal complaint, the Member agreed that the service needed adjustments to comply with the requirements of the WASPA Code of Conduct and that it had taken steps to remedy the situation.
20. In particular, the Member advised that the URL in the free welcome message was corrected and now directed to a version of the content portal with direct access to all the content. It was no longer possible to re-enter the subscription flow after subscribing.
21. Regarding the difference in tariff stated on the landing page and on the Cell-C page, this was due to a recent change made by Cell-C. The landing page had always displayed the correct tariff. The Member reached out to Dynamic Mobile Billing, through which it was connected, and they in turn clarified things with Cell-C and gave the following statement:

The tariff change has been edited -- here is explanation of how it works -- you can also send to WASPA. This happened because Cell C does not support a billing amount of R2.25 (R9.00 / 4). In that situation we pick the closest supported amount. Since the 2 closest amounts are R2.00 and R2.50, both equally close, we ended up with R2.50 here.
22. The Member advised that it would now always round down, and the pricing will end up showing 4 x R2.00 = R8.00 instead of R9.00. The Member stated that even when using R2.50, it would not have billed users for the final R2.50 in a day (assuming the other 3 billings were successful) as the fourth bill would have exceeded the R9.00 / day service fee.
23. The Member stated that in order to do partial billings (aka micro-billing), the message text is generated by Cell C and the Member specifies the micro-billing amount and the maximum number of billing attempts per day for that amount.
24. With Cell C, the billing amount (no matter how many times per day) is fixed at whatever amount was specified in the DOI request. So, if the Member specifies R9.00 / day, that is the amount that gets attempted for every billing. If the user has only R5.00 airtime, the billing fails. With the "R2.00 / charge, max 4 charges per day" approach it is possible to recover R4.00 out of that R5.00 airtime balance.

25. The Member attached a further explanation from Cell C to show that no user was ever billed more than the tariff stated.
-

Complainant's further submissions

26. The Complainant noted the Member's response that the service required adjustments to align with the requirements of the WASPA Code of Conduct, and therefore that the Member admitted that there were breaches of the Code on the date that the service was tested.
 27. The Member only addressed two of the cited breaches in its response and failed and/or omitted to make any submissions regarding the other alleged breaches.
 28. In response to the allegations of a breach of clause 5.1, it was noted that the Member had implemented corrective measures to ensure that consumers have access to the service after subscription, by correcting the URL in the welcome message.
 29. In response to the allegations of a breach of clause 8.7, it was noted that the Member's explanation, via its billing aggregator, of how billing works, and the billing logs provided to confirm that no consumer was billed in excess of the advertised R 9.00 per day subscription fee.
 30. The Complainant submitted that since the Member was now aware of the billing amounts allowed on the Cell C network, the Complainant recommended that the Member aligned the advertised price on the promotional material (in this instance the landing page) to correlate with the actual billing methodology (for example advertise the service as R 8.00 per day if the billing sequence is R2.00 per charge, max 4 charges per day, or alternatively, advertise the service as R 10.00 per day if the billing sequence is R2.50 per charge, max 4 charges per day). This would ensure that the consumer is provided with accurate information on the total cost of the subscription service per day.
 31. The Respondent failed and/or omitted to address the other breaches cited relating to the misleading marketing of the service, the non-alignment of the language used, and the claiming of an existing prize/non-ancillary element of the benefit linking to the subscription service.
 32. The Member has only implemented partial remedial steps, and there are other breaches which have not been addressed or corrected. The Member should be held liable for the non-compliant service.
-

Member's further submissions

33. The Member responded further by stating that it had not made clear in its previous statement that the publisher responsible for the misleading 'WIN' offer was blocked immediately after receiving the initial complaint.
 34. The Member was of the view that with this action, together with the previously shared explanation from DMB, all points seem to have been solved.
-

Sections of the Code considered

35. Clauses 5.1, 5.4, 5.5, 8.7, 8.8, 8.10, 15.4 and 15.5 of the WASPA Code of Conduct were cited in the formal complaint and considered.
 36. No other relevant clauses were assigned by WASPA.
-

Decision

37. After carefully reviewing the complaint, the response from the Member, and the further submissions from both parties, together with the evidence presented by the Complainant, I have made the following findings:
 - 37.1 After completing the subscription process, the tester was not able to access content or services offered by the Member as part of this subscription service. This occurred on multiple occasions and after repeated attempts were made to access such content or services. The Member has therefore offered or promised and has charged for services that it was unable to provide.
 - 37.2 The Complainant also provided further evidence of other separate instances of non-functioning URLs being used for this same service.
 - 37.3 In its response, the Member simply stated that the non-functioning URL provided in the welcome message had been corrected since the complaint was lodged against it. However this does not adequately explain why the links provided to the content on the relevant home pages displayed for the service were not functioning correctly.
 - 37.4 I am therefore not satisfied with the explanation given by the Member and find that the Member is in breach of clause 5.1 of the Code and the complaint is upheld in this regard.

- 37.5 It is common cause that the iPhone giveaway promotion used for the Member's service was misleading. This was acknowledged by the Member in its further submissions. However the Member stated further that a third party publisher was responsible for the misleading promotion.
- 37.6 Even if the Member's submissions in this regard are accepted, the Member remains responsible for ensuring that its sub-contractors market its services in accordance with the requirements of the Code and the Member remains liable for any breaches of the Code resulting from services offered by such sub-contractors.
- 37.7 The Member also does not give any answer to the further evidence presented by the Complainant of other examples of misleading promotional material being used to promote the same service.
- 37.8 I am therefore of the view that the Member has not, in its dealings with its customers, conducted itself honestly and fairly. The Member is in breach of clause 5.4 of the Code and the complaint is upheld in this regard.
- 37.9 Based on the evidence provided by the Complainant of other instances of non-functioning URL's and misleading promotional material, this demonstrates a pattern of behaviour on the part of the Member.
- 37.10 I am therefore satisfied that the Member has knowingly disseminated information that was false or deceptive, or that was likely to mislead by inaccuracy, ambiguity, exaggeration or omission. The Member is in breach of clause 5.5 of the Code and the complaint is upheld in this regard.
- 37.11 It has been established that the pricing information for this service was displayed differently throughout the subscription flow, and that the stated price, i.e. R9/day, was less than the full retail price charged to the tester for the service. This is misleading.
- 37.12 The Member provided an explanation for the discrepancies in the displayed pricing information and referred to the billing practices of its billing partner and Cell C. However, as the Complainant rightly pointed out in its response, these discrepancies could have been easily avoided if the pricing charged for the service was aligned with the relevant billing practices referred to. The Member also demonstrated after receiving notice of this complaint that the issue was easily corrected.
- 37.13 I therefore find that the Member is in breach of clause 8.7 of the Code and the complaint is upheld in this regard.

- 37.14 It is apparent from the information provided by the Complainant that the promoted giveaway, i.e. an iPhone, differed entirely from the content provided by the Member via the subscription service being promoted in this way. A consumer would be reasonably likely to be misled into believing that the promotion was for an entirely different service or content to the one they eventually were subscribed to. This has not been disputed by the Member and it is therefore in breach of clause 8.8 of the Code and the complaint is upheld in this regard.
- 37.15 It is also apparent that the language used in the initial promotional material was Zulu, but all subsequent communications by and from the Member were in English. The Member was required to use the same language in all communications with the customer as the language used for the initial advertising, unless the customer elected to change the language to another language supported by the Member. Such an election was not made and the Member is therefore in breach of clause 8.10 of the Code and the complaint is upheld in this regard.
- 37.16 I am also satisfied, based on the evidence presented, that the Member has required a customer to join its subscription service to claim an existing reward or benefit, i.e. the iPhone giveaway promoted. This constitutes a breach of clause 15.4 of the Code by the Member and the complaint is upheld in this regard.
- 37.17 No evidence was provided by the Member that it was offering an incentive to join this subscription service and/or that the Member made it clear that this benefit only applied once the customer had joined the service. The Member is also in breach of clause 15.5 of the Code and the complaint is upheld in this regard.
38. To summarize the findings made, the Member is found to have breached clauses 5.1, 5.4, 5.5, 8.7, 8.8, 8.10, 15.4 and 15.5 of the Code and the complaint is upheld in respect to each of these breaches.
-

Sanctions

39. In determining appropriate sanctions against the Member, the following factors have been taken into consideration:
- 39.1 any previous successful complaints made against the Member in the past three years;
 - 39.2 any previous successful complaints of a similar nature;
 - 39.3 the nature and severity of the breach; and

- 39.4 any efforts made by the Member to resolve the matter.
40. I have also taken account previous precedent set by WASPA adjudicators and appeal panels in previous complaints for the same or similar contraventions when determining appropriate sanctions.
41. No previous complaints have been made or upheld against the Member.
42. I have taken into account the remedial steps which the Member stated in its response that it had taken after receiving notice of the complaint. However, I am not satisfied that these steps are adequate to remove the potential risk of harm to consumers.
43. I have also noted from the Member's further submissions that a third party publisher was responsible for the misleading promotion of the Member's service. However, the Member offered no further evidence to demonstrate that it had taken reasonable steps to ensure that this party promoted the Member's service in a manner consistent with the requirements of the Code. Therefore, there is no mitigating factor to consider in this regard.
44. Breaches of the Code relating to the misleading or deceptive promotion of content subscription services must be viewed and have been viewed in previous adjudications and appeals in a serious light, particularly due to the potential harm to consumers.
45. It is also evident from the other instances of misleading promotions of the same service and the use of non-functioning URLs that there is a pattern of conduct on the part of the Member. This must be viewed as an aggravating factor.
46. Based on the nature and severity of the Member's various breaches of the WASPA Code of Conduct in this complaint, and the other factors referred to, it is appropriate that the following fines are imposed on the Member:
- 46.1 R 5 000 for breach of clause 5.1;
- 46.2 R 5 000 for breach of clause 5.4;
- 46.3 R 5 000 for breach of clause 5.5;
- 46.4 R 10 000 for breach of clause 8.7;
- 46.5 R 5 000 for breach of clause 8.8;
- 46.6 R 5 000 for breach of clause 8.10;

46.7 R 5 000 for breach of clause 15.4; and

46.8 R 5 000 for breach of clause 15.5.
