



Report of the Adjudicator

Complaint number	#58648
Cited WASPA members	Baseplay (1795)
Notifiable WASPA members	N/A
Source of the complaint	WASPA Compliance Department
Complaint short description	Misleading advertising
Date complaint lodged	2023-04-21
Date of alleged breach	12 April 2023
Applicable version of the Code	Version 17.4 of the WASPA Code
Clauses of the Code cited	4.9(c), 5.1, 5.4, 5.5, 5.6A, 5.7, 5.8, 5.11, 12.1, 12.2, 12.4, 12.5, 15.9A, 15.17, 15.18
Related complaints considered	
Fines imposed	<p>The Member is in breach of clauses 4.9 (c), 5.1; 5.4; 5.5; 5.6A; 5.11; 12.4; 12.5; 15.17; 15.18 and 15.9A of the Code.</p> <p>Accordingly I fine the Member:</p> <ul style="list-style-type: none"> • R 15 000.00 for a breach of 4.9 (c) • R 5 000.00 for breach of 5.1. • R 10 000.00 for a breach of 5.4; • R 10 000.00 for a breach of 5.5;

	<ul style="list-style-type: none"> ● R 5 000.00 for breach of 5.6A ● R 5 000.00 for breach of 5.11 ● R 5 000.00 for breach of 12.4 ● R 5 000.00 for breach of 12.5 ● R 5 000.00 for breach of 15.17; ● R 5 000.00 for breach of 15.18; and ● R 5 000.00 for breach of 15.9A (of the Code).
Other sanctions	N/A
Is this report notable?	Not notable.
Summary of notability	N/A

Initial complaint

Complaint #58648 was logged by the WASPA compliance department: On 12 April 2023 the WASPA Compliance Department identified a service believed to be in violation of the WASPA Code of Conduct (Code).

Test 1:

Whilst browsing the An advertisement was displayed, with the text follows:

“Ads Free >> Memory Full ? 91% Full Clean Your phone could have an issue Your phone could be running slow” (**Screenshot 1** in Annex A).

The tester clicked on the “Open” button and was directed to the service landing page, a pop-up notification with a red exclamation triangle was displayed. The pop-up message read as follows:

“It is recommended that you update to these Cleaner Apps to protect your smartphone now! They will find viruses and other potential threats, clean junk files and increase battery life. Get these Apps right now to improve performance and protect your files and extend your battery life.” (**Screenshot 2** in Annex A)

The tester clicked on the “Continue” button, the service landing page displayed the following:

“games. Games, Apps, Videos & Community Scan now to PROTECT YOUR DATA” Below the wording was a big green button with the words “SUBSCRIBE”. The pricing information was displayed below the call-to-action. (**Screenshot 3** of Annex A)

Based on the preceding pages and notifications, and the information on this page, the tester believed that:

The device could have a memory issue;

The device needed to be updated; The device had potential viruses;
The device needed to be scanned and cleaned.

The tester clicked on the "SUBSCRIBE" button and was directed to an MTN page confirming a subscription to Baseplay Games from Basebone at R39.99 per week.

The tester clicked on the "Confirm" button and the acquisition process was successfully completed, the tester received a welcome message at 09:58 (**Screenshot 4** of Annex A)

The tester elected to stop this specific test at this point.

Test 2:

As per the video submitted by the complainant in evidence: on the 12th of April 2023 a tester from the WASPA Compliance Department used a Samsung Galaxy phone to conduct manual tests on the Cell C network.

The tester:

- a. Switched on the video recorder to show the date, time, and network.
- b. Checked the airtime balance: "Balance: R122.42. Minutes: 900.00. Data: 1019.12MB"
- c. Checked that there were no active subscriptions:
- d. Cleared the browsing history.

The tester typed in the following URL on Google Chrome: waptrick.one. The website loaded successfully, an advertisement displayed, and the text reads as follows:

"Your phone could have an issue Your phone could be running slow"

The tester clicked on the "Open" button and was redirected to the service landing page, a loading percentage graph was displayed with the following text :

"Scanning for viruses and threats...".

The loading graph reached "100%", a notification with a red exclamation triangle was displayed. The pop-up message read as follows:

"It is recommended that you update to these Cleaner Apps to protect your smartphone now! They will find viruses and other potential threats, clean junk files and increase battery life. Get these Apps right now to improve performance and protect your files and extend your battery life." (**Screenshot 5** of Annex A).

The tester clicked on the "Continue" button, the service landing page displayed another loading percentage graph with the following text:

"Loading Antivirus".

The loading graph reached "100%" and a pop-up notification appeared with the following text:
"Opening Access Remember to click YES in the new window TO ACCESS".

The tester was redirected to the Cell C confirmation page. It is worth noting that the redirection was automated and therefore the call-to-action would be regarded as the “Continue” button from the pop-up message. (**Screenshot 6** of Annex A).

Based on the preceding pages and notifications, the tester believed that:

- The device could have a memory issue;
- The device needed to be scanned and updated;
- The device had potential viruses;
- The device was loading an antivirus

The tester clicked the “Yes” button on the Cell C confirmation page and the subscription acquisition process was completed. The tester was redirected to a page with the following text:
“games. Continue to get unlimited access to your content Loading Access to your Content”

A loading percentage graph displayed, it reached “100%” and an advertisement for a service called “stream” was displayed. The tester clicked on the X to close the ad banner. The service page displayed the following text:

“games. Continue to get unlimited access to your content Access now here 100% You can access now You’ll be redirected in 50s or you can click here to continue”

Below the text, “stream” with a big green “CONTINUE” button was displayed. It is worth noting that other text is displayed around the Continue button which is difficult to see.

The tester clicked on the “click here” link and was redirected to a portal with several apps to choose from and possibly subscribe. The tester was looking for the Antivirus application that was loaded on the test device. The tester used the search function and searched using the word “Antivirus”, the search yielded no results. The tester browsed on the portal to locate the Antivirus application that they subscribed to; the tester could not find an Antivirus application from the portal. The tester proceeded to check the airtime balance on the device by dialling *101#. The returned result from the USSD string was as follows:

“Balance: R94.42. Minutes: 900.00. Data: 1009.64MB ”.

The subscription fee of R28 had been deducted. The tester checked whether the relevant MSISDN had any active subscriptions by dialling *133*1#. The returned result from the USSD string displayed that the tester was subscribed to Baseplay Games. The tester checked if they had any messages, the tester did not receive a welcome message for the subscription service.

The tester successfully unsubscribed from the services. The tester stopped the video at 13:17.23.

In essence the complaint was that:

1. In Test 1 and Test 2: the WASPA tester was in fact browsing on a waptrick website or a mobile application for music, games, videos, themes, wallpapers, files, etc albeit responding to banner advertisement(s) stating that the phone could have a security issue(s) and require an app service to resolve the issue(s) .
2. The promotional material design brings about an unnecessary level of fear and anxiety, pressuring the tester to respond to the ad banner ultimately leading however to a portal landing page for the Member's Baseplay Games (Games, Apps, Videos & Community).
3. The portal landing page is designed in such a way to intentionally mislead the tester and to create more fear and anxiety by using words like "Scanning for viruses and threats..." and "Loading Antivirus", displaying warning notifications, and displaying the percentage loading graph, etc..
4. In the case of Test B: the portal landing page automatically redirected to the network confirmation page without an explicit response from the tester, therefore the warning notification pop-up is the 'call-to-action'
5. The call to action does not display any pricing information (per video recording of test provided by complainant).
6. The tester did not have access to the customer support number or a link to the full terms and conditions.
7. In the case of Test B, the tester confirmed the subscription to the portal Baseplay Games on the Cell C confirmation page and was redirected to an advertisement banner for another service called "stream". The tester closed the "stream" ad banner and the information displayed on the page required the tester to click on a link to be redirected to the portal that they subscribed to.
8. In addition, the big green "CONTINUE" button on the same page is misleading as it relates to the "stream" service and not the Baseplay Games portal.
9. The tester was subscribed to a portal containing a number of games and apps (separate subscription services for each).
10. The tester could not find the antivirus application which was supposedly installed on the test device. No mention is made of any antivirus or virus cleaning/removing service. (In the case of Test B).
11. The tester did not receive a welcome message after successfully subscribing to Baseplay Games (per video recording of test provided by complainant).
12. The tester was misled to believe that their phone is slow and might contain a virus as advertised and was then deceived into a subscription for a portal that does not have anything to do with the predominantly advertised virus scanner/cleaner.
13. The tester tried to get access to the service which will clean the device and remove viruses, the antivirus that was allegedly loaded did not report any results found to be causing the test device to be slow.

The complainant contends that the Member has breached several clauses of the Code of Conduct (**4.9(c), 5.1, 5.4, 5.5, 5.6A, 5.7, 5.8, 5.11, 12.1, 12.2, 12.4, 12.5, 15.9A, 15.17, 15.18**) with the potential for serious consumer harm including significant financial implications, if not addressed immediately.

The WASPA Head of Complaint elected that the complaint should proceed to an emergency hearing. The member was notified of this hearing on 2023-04-21.

The member responded on 2023-04-23 to the emergency hearing notice advising that they had ceased the advertising in question and suspended the campaign. The emergency hearing was cancelled, and the complaint proceeded as formal.

Member's response

The Member asserts that Baseplay Games consists of over 1000 Games, Apps, Video Reviews, and Articles. Within the portal consumers are offered a suite of Apps for varying purposes that mobile phone users can use to enhance performance of their device, such as Phone Cleaner Apps, or even protect them from experiencing malware, ransomware or viruses - such as Anti-Virus Apps. All these *Apps are available to their customers and can be downloaded onto their device* accordingly.

In essence the Member submitted in response to the complaint:

1. The intention of the relevant advertising was to *promote the Phone Cleaner App* with no intention to mislead the customer. The portal offers a variety of Apps aimed at improving performance and protecting a device. The Member accepts the claim of breach in relation to clause 4.9 however concerning the wording of the advertising specifically with the use of the word(s) "virus" that could cause anxiety. On notification from WASPA, the Member immediately took the decision to suspend the campaign in question on April 21st 2023.
14. In re clauses 5.1, 5.4 and 5.5 the Member disputes breach of these clauses in that Phone Cleaner App, the service that was promoted, is available within the Baseplay catalogue. The Member submitted a link to the Phone Cleaner App.
<https://baseplay.co/games/apps/utility/item/phone-cleaner-app>
15. The Member disputes breach of clause 5.6A in that on subscription the user can either wait to be redirected to the portal or they can click to go immediately and arrive at the apps area of the portal where the app in question will be available This action can be seen clearly in the video submitted.
16. The Member disputes breach of clauses 5.7 and 5.8. The Member submits that any potential and current users of Baseplay have full access to the terms and conditions before and after subscribing to the services. These terms can be accessed in various ways. Any user can access the website or portal (as the service is also available to Freemium users but Premium content is locked until a subscription is initiated), additionally the promotional material carries the required information as set out by the WASPA Code of Conduct, that being:
 - Link to full T&Cs is provided on the landing page prior to subscription;
 - Link to T&Cs can be found within the portal once subscription has been completed;

- Any user can access <https://baseplay.co/terms> to read the full terms and conditions of the service.
17. The Member disputes breach of clause 5.11 in that the Customer Support number is readily available to potential users and customers alike. In fact in many cases the Mobile Network Operators also provide mechanisms that allow customers to interact with them during the subscription process.
 18. The Member disputes breach of clause 8.9, is unsure of the violation in that their services and promotional material carry the applicable CTA's as set out by WASPA and/or the Mobile Network business rules.
 19. The Member queried the breach of Clause 12.1 as the clause makes reference to a web page. The Member submits that this clause is not applicable to the Member's promotional materials.
 20. The Member submits that clause 12.2 is inaccurately cited and the Member is not in breach as the pricing information is adjacent to the call-to-action button at all times.
 21. The Member disputes breach of clauses 12.4 and 12.5 as potential and current users have access to the full terms and conditions at every step of the subscription process including on the Baseplay portal when not subscribed.
 22. The Member disputes breach of clause 15.9A referring to the video submitted as evidence. According to the Member, on completion of subscription the user was informed that they would be redirected to the portal or can click on the link to the Baseplay site.
 23. The Member submits that the WASPA Code of Conduct does not prevent adverts displayed to a consumer (common practice in e-retail, and is permitted by Mobile Networks). The customer is being redirected to the service to which they subscribed to therefore, the Member disputes breach of clauses 15.17 and 15.8.
 24. The Member disputes breach of clauses 15.17 and 15.18 and queries which network test is raised as a violation:
 - For Test 1: the welcome message is sent by the Network. and is clearly displayed in WASPA's documentation.
 - For Test 2: the welcome message was sent by Baseplay, as requested in clause 15.17. The Member supplied the logs and content.
 25. The Member submitted further that the MSISDN of the tester is actually in fact listed on the WASPA DNC (Do Not Contact) database. Our Messaging provider via our Aggregator (Itouch, a WASPA Member) checks the database before sending any message and does not send any message to any MSISDN if that MSISDN is on the

WASPA DNC list. Therefore complying with the WASPA Code of Conduct. The Member queried why is a MSISDN being used by a tester for subscription based services added to the DNC list; and 'a fundamental flaw' with the rules of the DNC list. The Member raises this as an issue to be resolved for delivery of legitimate service messages.

26. The Member in summary agrees that a breach of clause 4.9(c) has occurred and disputes violation of other clauses cited. The Member considers the addition of the disputed clauses as a means of elevating the complaint, the testing flawed in the review of the 'flow' prior to the assigning of clauses violated.

Complainant's response

The complainant responded in essence as follows:

1. The complainant confirms that violation of clause 4.9(c) is not in dispute.
2. The complainant notes the suite of Apps offered by the Member including enhance performance of the device and/or protect the device from viruses.
3. The complainant refers once again to Test 1 and Test 2 results.
4. In re Test 1 and Test 2 results and the Member's response, the complainant disputes that the Phone Cleaner App was the service promoted during the subscription acquisition flow. **At no point during the subscription acquisition flow** did the consumer see Phone Cleaner App (albeit available on the Baeplay catalogue) as the service being promoted nor was there any reference to Phone Cleaner App service.
5. The complainant identifies that link provided in the Respondent's response for *Phone Cleaner App* (<https://baseplay.co/games/apps/utility/item/phone-cleaner-app>), is not the same link used when the consumer was redirected to the Apps portal (<https://baseplay.co/games/apps/utility/item/download-now>). On this basis the complainant queries how the Member's services is able to identify issues with the consumer's phone and indeed no consent for software conducting such tests. The complainant views this as violation of clause 5.5 of the Code.
6. The complainant submits that clause 5.1 is violated in terms of Test 2 in that: the consumer responded to an advertisement banner on a specific issue with their phone and on subscription was not able to access the corresponding service.
7. The complainant submits that clause 5.4 is violated in terms of Test 1 and Test 2 by the Respondent's own submission in that the intention of the marketing for the service wasn't clear and concise. Further, the promoted service was not delivered on subscription.
8. With regards to the violation of Clause 5.6A, the complainant submits that whilst the Member's service offers an array of Games, Apps, Video Reviews, and Articles, the promoted '*Antivirus*' service was not available despite a significant search by the complainant.

9. The complainant submits that violations of Clauses 5.7 and 5.8 occur with Test 2 disputing full access to the Member's terms and conditions of service. The complainant's submission is that the potential customer responded to an advertisement banner claiming that the phone had issues, inducing an unacceptable sense of fear or anxiety. The call-to-action triggered the automated redirection to the Network Hosted Confirmation Page (NHCP), but there was no interaction with a web page with the full terms and conditions prior to the subscription activation. In addition, once the subscription acquisition flow was completed, the customer was never presented with a web page containing the full terms and conditions.
10. In re violation of clause 5.11 and Test 2, the complainant disputes that the customer support number is readily available to potential users and customers at any point during the subscription acquisition flow nor is such available on The Network Hosted Confirmation Page nor is there a link to the full terms and conditions of the service.
11. With regards to violation of Clause 8.9 and Test 2 the complainant highlights the definition of call-to-action definition for clarity for the Member submitting that the term is not fully appreciated by the Member. Clause 8.9 states:

*"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."*

12. With regards to the violation of Clause 12.1 and Test 2, the complainant submits that the "Continue" link from the pop-up triggered the Cell C Network Hosted Confirmation Page (as per the call-to-action definition) i.e. automatically redirected. The complainant confirms the general definition of a web page as in Clause 2.6 of the Code:
*"A **web page** is a document on the world-wide web, and includes pages accessed by a mobile phone using protocols including but not limited to WAP and HTTP."*

Under this definition the page was a web page and did not display the pricing information adjacent to the call-to-action in breach of clause 12.1 of the Code. Further for the purposes of clause 12.2 violation and with regards to Test 2 and clause 8.9 of the Code and the pricing information is adjacent to the call-to-action button at all times.

13. The complainant disputes visavis breach of Clause 12.4 and Test 2 that potential and current users have access to the full terms and conditions at every step of the subscription process. The complainant submits that the Test 2 video shows that the confirmation page/step does not contain a link to the terms and conditions, triggering the display of the minimum terms and conditions.
14. In re breach of clause 12.5 and Test 2 the complainant's submission is that the customer support number and a link to the full terms and conditions for the service were not displayed to the consumer during the subscription acquisition flow. Rather an automatic redirect from the call-to-action to the Network page.

15. With regards to breach of clause 15.9A and Test 2 the complainant notes that the subscription process is followed by information for another service (“stream”). Two options are presented to the consumer on the advertisement banner of ‘stream’, to “Continue” OR to close the ad banner. Had the consumer opted to “Continue”, the consumer would have started another subscription acquisition flow for a service called “stream”. The redirect misleads consumers into subscribing to other services (“stream”). Further, the design of the big green “CONTINUE” button, surrounded by light grey font pricing information on a white background which is not clear and visible, is misleading and does not have any information related to what the customer subscribed to. Further the customer while waiting (for an estimated minute) to be redirected to the service they subscribed to, unrelated promotional material is displayed to the customer to ‘trick’ them into subscribing to more services in breach of clause 15.9A of the Code.
16. The complainant clarified that Test 2 is relevant for the violation of clause 15.17 and clause 15.18 in that the tester did not receive a welcome message after successfully subscribing to Baseplay Games – despite indication from the Member that such message was sent. The complainant confirmed that the relevant MSISDN is registered on the WASPA DNC for monitoring direct marketing compliance.
17. The complainant referred to clause 16.5 of the Code that provides:

16.5A. Members must take reasonable steps to block only direct marketing messages to numbers listed in the WASPA Do Not Contact registry and must not automatically block all messages (e.g. transactional and commercial) to those numbers.
18. The complainant’s submission is that the Respondent and their messaging provider failed to determine the type of message and blocked all messages in breach of clause 15.17 and 15.18 of the Code.
19. The complainant further notes a positive obligation on the Respondent to ensure that any client, supplier, or sub- contractor – is aware of the requirements of the Code and requests that the adjudicator consider sanctions for the breach of clause 16.5A of the Code. Further, the Compliance Department conducted numerous manual tests of other member services using the same MSISDN, and the complainant shared examples of welcome messages received on the MSISDN.

Member’s further response

The Member responded in essence as follows:

1. Breach of clause 4.9(c) of the WASPA Code of Conduct (WASPA CoC) is not in contention.

2. No further comment to the point in which WASPA takes note that the Baseplay Games service also includes a suite of Apps for varying purposes that mobile phone users can use.
3. The Member takes issue with the breach allegations not specifying the Annexures or specific Tests to which they relate.
4. The Member clarifies that the utility Phone Cleaner App is promoted by many Content Providers as a value added service (VAS) or digital stores. The Member indicates that the image below clearly states Cleaner Apps. Albeit admission to breaching clause 4.9(c), the Member disputes that the tester was not aware that this product was not a Cleaner App, based on the presented image below submitted to us in the original complaint.



5. The Member confirms that the availability of the Phone Cleaner App within the Baseplay Games catalogue is not in dispute but there the complainant takes issue with there being no interaction with service during the acquisition flow. The Member submits that this interaction occurs when subscription is complete and they had been redirected to the relevant area of the portal. It is common business practice to offer the service upon completion of joining the service not before.
6. The Member confirms that the link to the Phone Cleaner App clarifies availability in the service catalogue however the link provided by WASPA in their further response, was never previously supplied and is not relevant to the complaint. The initial complaint suggests that the tester was redirected to the App section of the portal but the tester was searching for an anti-virus App – not promoted by the Member in South Africa.
7. The Member submits that standard marketing practices use terminology such as 'Could Have' 'Maybe' 'Is your'etc and disputes breach of clause 5.5 The Member would understand a breach the clause 5.5. of the Code had the advertising stated 'Your Phone Memory is Full Download our Cleaner App now to clear up space'".

8. The Member challenges the complainant's assertion that merely responding to the advert and subscribing to the service will automatically have an improvement of a (phone) service - in this case speed. The Member should not be liable for a user actually accessing and downloading the item requested and disputes breach of clause 5.1.
9. The Member disputes takes issue with the assertion that completing the subscription failed to deliver optimal performance to the device referencing arguments above and disputes breach of 5.4.
10. The Member confirms that an anti-virus App is not offered, rather the Phone Cleaner App that wasn't promoted clearly and terminology such as virus was used in error.
11. The Member submits however that the complainant's insistence that an anti-virus App is offered in the promotional material is misleading to the adjudicators. The image provided shows that the Cleaner App is being promoted.
12. Referring to clause 5.7 the Member submits that:
 - the Terms and Conditions (Terms) can be found at <https://baseplay.co/terms>
 - The Terms detail all the requirements set out in clause 5.8 of the WASPA Code.

The Member takes issue with the complaint that the customer must interact with the Terms before subscribing to a service and asserts that the Terms 'readily available'. The Member asserts that the Terms are on the Landing Pages, within the footers of some of the Network Operators pages, hardcoded into the area by the Operator, as well as on the Member's website. The Member raises concerns with the complainant's appreciation of this clause in practice.

13. The Member raises a concern with the complainants understanding of 'Flows' and the application of the WASPA Code in this context. The Member submits that clause 5.11 of the WASPA Code states 'Customer Support must be easily available....' and the Customer Care number is not necessarily required as part of the Flow, and in fact is available in the Member's Terms.
14. With regards to the customer care information on the Network Hosted Confirmation Page (as with all networks), the Member asserts that this is controlled by the Network not the WASP and the details are in accordance with Network requirements.
15. The Member queries the concern with the Call to Action (CTA) with the submission that the CTA conforms with the definition.
16. The Member submits that there is no prior WASPA indication that the pricing information was not clearly or prominently displayed to a consumer or indications of an issue in this regard notwithstanding frequent monitoring and testing by WASPA.
17. The Member referred to POP Up Advertising as not being a Web Page raising concerns with the complainant, WASPA's understanding of how to apply the code in this instance. WASPA's compliance team agreed to this point. Albeit browsing a website accessed by HTTP, POP Up advertising is not prevented unless the user preferences are adjusted. The Member submits that webpage to which WASPA referred was displayed on 3 separate occasions, the final time with all relevant pricing adjacent to the CTA, and the Member queries the basis of the allegation of breach of clause 12.1.

18. The Member submits that on subscription users are automatically directed to the product/service in which they have requested as per clause 15.9A of the WASPA CoC. The Member disputes that the user/consumer is redirected to additional Network Hosted Confirmation Pages albeit presented with other services as part of advertising (with a separate CTA and transaction).
19. The Member raises that WASPA, the complainant has not on prior occasions queried the advertising presented to a user upon completion of a subscription journey, nor complained about the time for the redirect. The Member submits that the time delay is for bonafide checks on subscriptions.
20. Similarly, the Member submits that WASPA has not raised a prior issue with compliance with clause 15.9A.
21. The Member disputes breach of clause 15.17 highlighting initial response that the Welcome Message was sent. The Member submits that clause 15.17, does not require that the Welcome Message is received by the user in which case the Member agrees that a breach would have occurred.
22. The Member disputes breach of Clause 15.18, as the welcome messages is in line with the format set out within this clause. The Member submits that WASPA errs in asserting a breach on the basis of the user not receiving the Welcome Message. The Member submits that there are varying reasons as to why a Welcome Message may not be received, for example (but not limited to), the SMSC failing, the message being stuck in a queue at Network Level or a user turning SMS notifications off.
23. The Member's investigations into the cause of the message not being delivered is due to the fact that the MSISDN was on the WASPA DNC list but the Member did send the message.
24. The Member raised concerns with WASPA having not identified an issue with the DNC list before and confirms that their Aggregator has subsequently, based on the information received, ensured that the supplier iTouch has set all messages that are sent by their clients as Service Messaging not marketing messaging, and therefore the DNC list would not apply.
25. The Member submits that there are other discrepancies in the complainant's various responses including reference to a link provided the subscription charge(d) amounts.

Sections of the Code considered

The following clauses of the WASPA Code of Conduct were cited in the complaint:

4.9. Members must not provide any services or promotional material that: (c) induces an unacceptable sense of fear or anxiety...

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

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.

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

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:

(a) the registered company name of the WASPA member providing the service;

(b) a customer support number;

(c) unsubscribe instructions (for subscription services);

(d) any handset compatibility requirements for the service;

(e) an indication that network fees may apply;

(f) an indication of how billing errors are handled;

(g) a statement that the service must only be used with the permission of the bill-payer (for paid services);

(h) a statement that the service must only be used with the permission of a parent or guardian (for children's services); and

(i) the following statement: "[member name] is a member of WASPA and is bound by the WASPA Code of Conduct. Customers have the right to approach WASPA to lodge a complaint in accordance with the WASPA complaints procedure. [member name] may be required to share information relating to a service or a customer with WASPA for the purpose of resolving a complaint. WASPA web site: www.waspa.org.za".

(j) a statement that the service must not be used: (i) to intentionally engage in illegal conduct, (ii) to knowingly create, store or disseminate any illegal content, (iii) to knowingly infringe copyright, (iv) to knowingly infringe any intellectual property rights, or (v) to send spam or promote the sending of spam.

(k) a statement that the member has the right to suspend or terminate the services of any customer who does not comply with these terms and conditions or any other related contractual obligations, and

(l) a statement that the member has the right to take down any content (hosted as part of the service) that it considers illegal or for which it has received a take-down notice.

5.11. Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to. (Example: support should not be limited to email if a significant number of customers do not have access to email).

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.

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.

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.

15.9A. Once a customer confirms a subscription to a specific service on the network hosted confirmation page, the customer must only be redirected to information related to that specific service, and may not be redirected to any additional network hosted confirmation pages in such a way that it encourages the customer to mistakenly subscribe to additional services.

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

The complainant and the Member have submitted detailed and comprehensive responses. I have reviewed these in detail. Below are my decisions reasoned on the evidence presented:

1. **In re: 4.9.** Members must not provide any services or promotional material that: (c) induces an unacceptable sense of fear or anxiety...

The Member does not dispute violation of this clause. Accordingly and on my own assessment of the wording of the Member's promotional material in Test 1 and Test 2 I **find that the Member's materials did induce an unacceptable sense of fear or anxiety in breach of clause 4.9, specifically 4.9(c).** Upon the notification from WASPA, the Member immediately took the decision to suspend the campaign in question. This was actioned on 21 April 2023.

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

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

In re 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.

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

Read with the Member's various responses, the Member's submission in the main is that the Phone Cleaner App promoted, is in fact available within the Baseplay catalogue providing a hyperlink as evidence and on this basis the Member has not violated clauses 5.1, 5.4 and 5.5.

Read with the complainant's various responses, the complainant ultimately takes issue with the promotional material referencing anti-virus services or services to protect or secure the user's data or phone; and these services not being the service actually provided by resulting subscription. This is the basis of the alleged violation of clauses 5.1, 5.4 and 5.5. The complainant attaches and references the various promotional materials and refers in detail to the wording and presentation.

The Member disputed breach of clause 5.6A in that once the subscription is completed, the user can either wait to be redirected to the portal or they can click to go immediately and arrive at the apps area of the portal where the app in question will be available – in fulfilment of clause 5.6A.

The complainant noted that the antivirus app promoted was not available in the catalogue of apps at the time of subscribing to the service as the complainant was unable to locate a pertinent antivirus service.

The promotional material video shared by the complainant represents in my assessment ambiguity at best and false and deceptive information at worst. Both antivirus terminology and Phone Cleaner Apps terminology (that could include solutions for viruses) are used at different points of the subscription process. A reasonable consumer

would believe that continuing or proceeding to subscribe to the service would present some measure of response to the issue raised in the promotional material – not subscription to a catalogue of Games and Apps. The offer does not adequately correspond with the service and is misleading in design and representation. The Member agrees that the terminology used was not as intended and my assessment is that it was in fact misleading. **I find the Member in breach of clauses 5.1, 5.4 and 5.5 of the Code.**

Having assessed Test 2 (video) submitted in evidence:

The Member's portal may have included the Phone Cleaner App but this App was not readily available to access on subscription and the Member has not in my assessment met the requirements of 'ready access to information on how to use and access the service'. **I find the Member in breach of clause 5.6A of the Code.**

3. In re 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

In re 5.8. The full terms and conditions for any service provided by a member must contain: (detailed particulars set out in (a) – (l))

The Member's submission was that any potential and current users of Baseplay have full access to the terms and conditions before and after subscribing to the services: link on the landing page prior to subscription; link to T&Cs within the portal once subscription has been completed; and on <https://baseplay.co/terms> to read the full terms and conditions of the service.

The complainant notes that the potential customer responded to an advertisement banner; the call-to-action triggered the automated redirection to the Network Hosted Confirmation Page (NHCP). During this process and prior to the subscription, the potential customer never interacted with a web page containing the full terms and conditions. In addition, once the subscription process was completed, the customer was never presented with a web page containing the full terms and conditions.

On the evidence presented, my finding is that the full terms and conditions was not readily available to the potential customer at the **material time prior to subscription** or redirection or to the confirmation page. On the subscription confirmation page, the customer is presented with an acknowledgement of the Terms and Conditions as visible on the relevant Test video. The Member albeit providing information on the availability of the Terms and Conditions (sharing links to a webpage) has not evidenced accessibility of the Terms and Conditions to a potential customer **via a working hyperlink in the subscription process prior to subscription** to the Terms and Conditions. **I find therefore that the Member is in breach of clause 5.7 of the Code.** I have viewed the Terms and Conditions per the hyperlink provided by the Member. Given that these were not accessible to the potential customer it is impossible to assert

that the Member was able to access the full and complete terms and conditions. **I find the Member in breach of clause 5.8 of the Code.**

- 4. In re 5.11.** Customer support must be easily available, and must not be limited to a medium that the customer is unlikely to have access to. (Example: support should not be limited to email if a significant number of customers do not have access to email).

On the evidence presented, my assessment is that the Member has included customer support options in the Terms and Conditions. The inaccessibility of the Terms and Conditions however, means that the Customer does not have access to customer support information. **I find the Member in violation of clause 5.11.**

- 5. In re 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.

In re 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.

(Per clause 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.)

With regards to Test 2 and the video submitted in evidence, and for the purposes of subscription to the Baseplay Games services on offer, I find the pricing information suitably and fairly prominently displayed adjacent to the call to action. **I find the Member is not in breach of clauses 12.1 and 12.2.** In view of my earlier finding however that the service on the promotional material and the subscription service are not one and the same, I take issue with the clarity of the pricing information and whilst not a breach of the Code I urge the Member to consider the propensity for ambiguity between the promoted offer and the subscription pricing i.e. is it clear that the pricing presented to the user is for a catalogue of services and products rather than the service offer in the promotional material?

6. **In re 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.

In re 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.

For the purposes of assessing a violation of this clause, I turn to the material time of advertisement and the corresponding promotional material. This is content for which the Member is responsible. I rely on the Test 2 video submitted in evidence. I find that the content of the pop up advert *and the subsequent web page* are absent of the minimum terms and conditions: customer support number and the (hyper)link to the full terms and conditions web page. **I find the Member in breach of clause 12.4 and 12.5 of the Code.**

7. **In re 15.9A.** Once a customer confirms a subscription to a specific service on the network hosted confirmation page, the customer must only be redirected to information related to that specific service, and may not be redirected to any additional network hosted confirmation pages in such a way that it encourages the customer to mistakenly subscribe to additional services.

On the evidence presented (Test 2 video) I find that the advertising intervenes the subscription process and redirection to the suite of Baseplay Games catalogue of services, with the potential for mistaken additional subscriptions. **I find the Member does in fact seek to encourage subscription to additional services in breach of clause 15.9A.** Here I note that advertising to subscribers of a service is not the concern, clause 15.9A refers materially to the conclusion of the subscription process for a specific service and avoidance of intervening advertising midst the subscription process with the potential for mistaken additional subscriptions.

8. **In re 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.
- In re 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.

The Member submits that the complainant's perceived breach of clause 15.17 is a misinterpretation of the requirement to send a message to actual receipt of a message by the consumer/customer. On the evidence of the Member of the limitation on the part of their service provider in delivering the message and section 23 of the Electronic Communications and Transactions Act, 2002. (ECT Act) **I find the Member in breach of clauses 15.17 and 15.18 – despite indications from the Member that such message was sent.**

Section 23 of the ECT Act provides:

A data message- (a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee.

I regard the information system of the Member and the Member's service providers as being in control of the originator (the Member) or information systems for which the Member must ensure adequate oversight and control to manage their compliance with the Code. The welcome message was not sent as it had not successfully entered an information system outside the originator's control, being an information system for which the Member is accountable under the Code.

The complainant confirmed that the relevant MSISDN is registered on the WASPA DNC for monitoring direct marketing compliance. However, as per clause 16.5 of the Code Members are to *block only direct marketing messages to numbers listed in the WASPA DNC registry and must not automatically block all messages (e.g. transactional and commercial) to those numbers.*

Sanctions

In arriving at the sanctions, I have considered prior Complaint #53300 against the Member (and the corresponding adjudication and appeal findings).

The Member is in breach of clauses 4.9 (c), 5.1; 5.4; 5.5; 5.6A; 5.11; 12.4; 12.5; 15.17; 15.18 and 15.9A of the Code.

Accordingly I fine the Member:

- R 15 000.00 for a breach of 4.9 (c)
- R 5 000.00 for breach of 5.1.
- R 10 000.00 for a breach of 5.4;
- R 10 000.00 for a breach of 5.5;
- R 5 000.00 for breach of 5.6A
- R 5 000.00 for breach of 5.11
- R 5 000.00 for breach of 12.4

- R 5 000.00 for breach of 12.5
 - R 5 000.00 for breach of 15.17;
 - R 5 000.00 for breach of 15.18; and
 - R 5 000.00 for breach of 15.9A (of the Code).
-

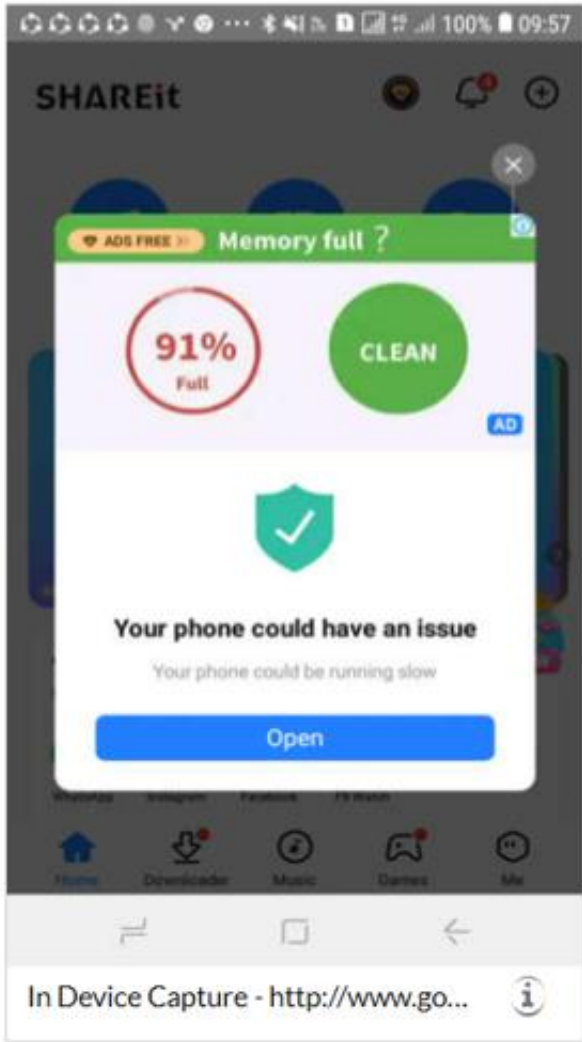
Matters referred back to WASPA

For further attention from WASPA:

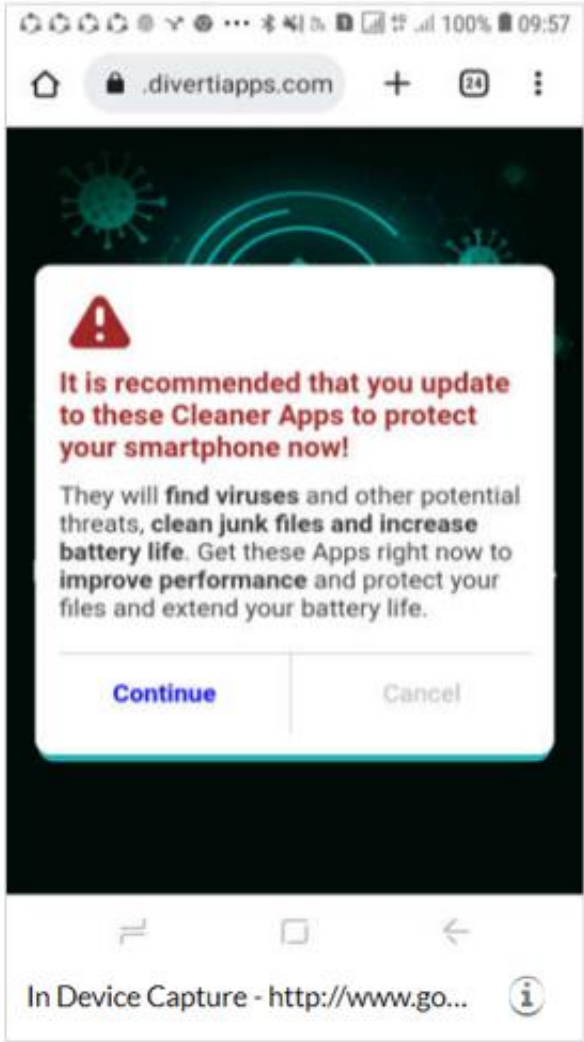
The Member submits that they are not the only content provider offering 'Antivirus' services, and similar promotional material. WASPA may independent of this complaint and adjudication advise the Member on steps that the Member may take to lodge a complaint against any member who, in the view of the Member, has acted contrary to the provisions of this Code.

Annex A:

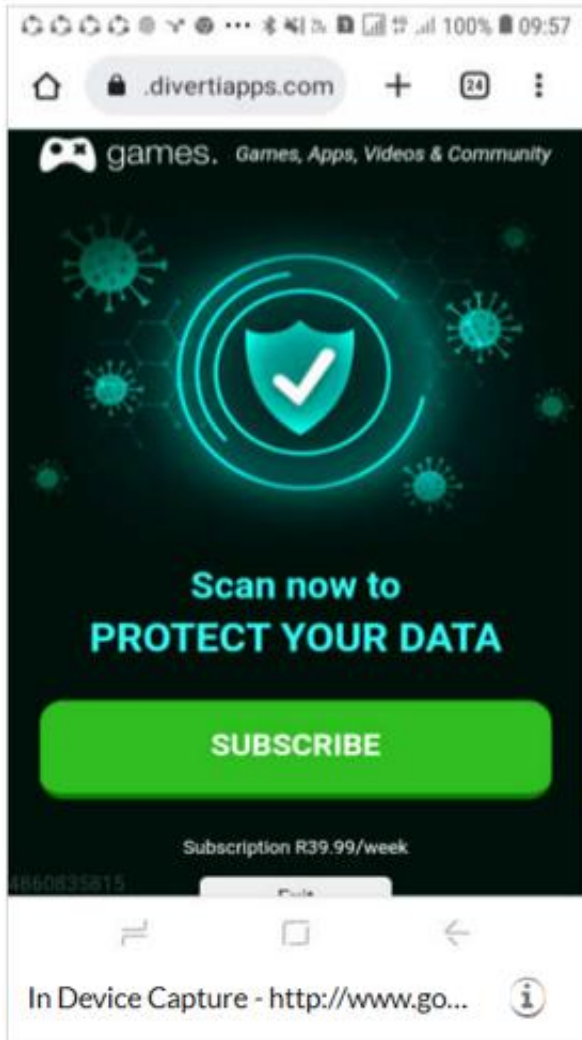
Screenshot 1:



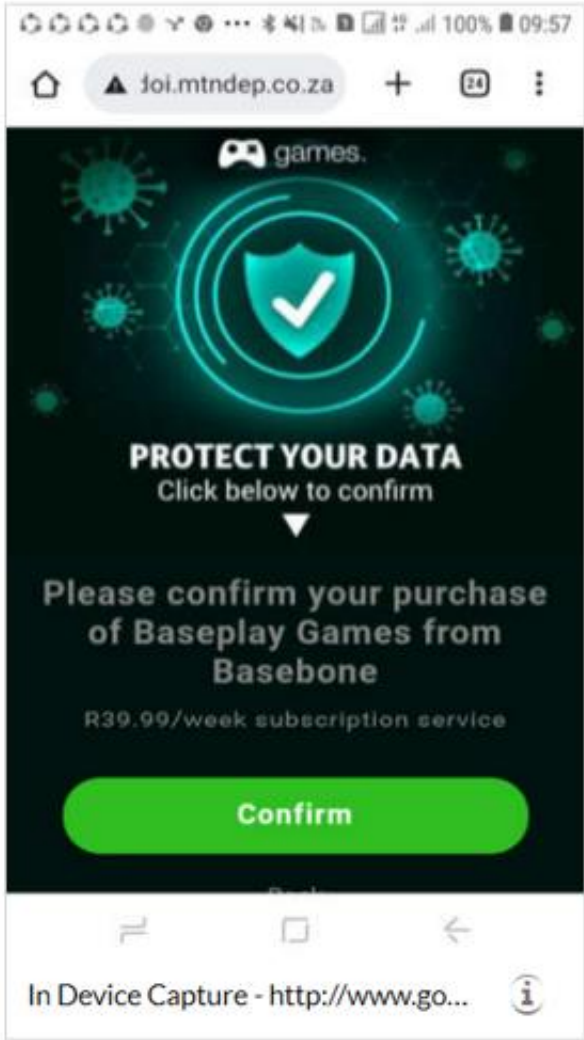
Screenshot 2:



Screenshot 3:



Screenshot 4:



Screenshot 5:



Screenshot 6:

Wednesday, 12 April 2023



Y'ello. Thank you for
subscribing to Baseplay
Games at R39.99/
week or lesser amount.
Visit now [http://mtn
.to/622460848](http://mtn.to/622460848). To
manage your subscrip-
tions dial *123# or visit
[https://mtnapp.mtn.co
.za/webaxn?67024025](https://mtnapp.mtn.co.za/webaxn?67024025).
Ts&Cs www.mtn.co.za

09:58

