



Report of the Adjudicator

Complaint number	#58744
Cited WASPA members	HyveMobile Membership no: 1518
Notifiable WASPA members	N/A
Source of the complaint	WASPA Compliance Department
Complaint short description	Non-compliant advertising Non-compliant subscription service
Date complaint lodged	2023-05-12
Date of alleged breach	2023-04-16, 2023-04-19 and 2023-04-24
Applicable version of the Code	17.4
Clauses of the Code cited	5.4, 5.5, 5.11, 8.8, 12.1,12.2, 23A.5 (a)(b)(c)(d)
Related complaints considered	#58745 and #58746
Fines imposed	R7 500 for the breach of clauses 5.4 and 5.5; R5 000 for the breach of clause 5.11; R7 500 for the breach of clause 8.8; R7 500 for the breach of clauses 12.1 and 12.2; R7 500 for the breach of clause 23A.5.
Other sanctions	N/A

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

Initial complaint

1. Whilst monitoring, testing services and conducting compliance checks of test results, the WASPA Compliance Department identified a service which they believed did not comply with the requirements as set out in the WASPA Code of Conduct (Code).
2. Initially the Member was notified that the emergency process would be used for this complaint. In response to the notification the Member made changes to the relevant services and the complaint was downgraded to a formal complaint.
3. Annexure A of the complaint stated that on 16 April 2023 a tester was browsing a gaming website with the following URL: <https://mixfreegames.com/poppy-playtime-chapter-1-game> using their test device on the MTN Network.
4. The tester clicked on an advertisement banner for Whatsapp Content and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Whats Trending from Hyve Mobile at R35.00 per week. The relevant screenshots were provided.
5. The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service from Hyve Mobile.
6. Annexure B of the complaint stated that on 16 April 2023 a tester was browsing a website with the following URL: <http://papaspizzeria.io/> using their test device on the MTN Network.
7. The tester clicked on an advertisement banner which had the following text displayed **“Get the latest content for Whatsapp”** and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Whats Trending from Hyve Mobile at R35.00 / week. The relevant screenshots were provided.

8. The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service from Hyve Mobile.
9. Annexure C of the complaint stated that on 16 April 2023 a tester was browsing a gaming website with the following URL: <https://www.ldplayer.net/games/heads-up-on-pc.html> using their test device on the MTN Network.
10. The tester clicked on an advertisement banner for Whatsapp Content and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Whats Trending from Hyve Mobile at R35.00 / week. The relevant screenshots were provided.
11. The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service from Hyve Mobile.
12. Annexure D of the complaint stated that on 16 April 2023 a tester was browsing a website with the following URL: <https://www.browsercam.com/heads-up-pc/> using their test device on the MTN Network.
13. The tester clicked on an advertisement banner for Whatsapp and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Whats Trending from Hyve Mobile at R35.00 / week. The relevant screenshots were provided.
14. The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service from Hyve Mobile.
15. Annexure E of the complaint stated that on 19 April 2023 a tester was browsing a website with the following URL: <https://indi-share.com/in/> using their test device on the MTN Network.
16. The tester clicked on an advertisement banner for Whatsapp and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Whats Trending from Hyve Mobile at R35.00 / week. The relevant screenshots were provided.

17. The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service from Hyve Mobile.
18. Annexure F of the complaint stated that on 24 April 2023 a tester was browsing a Youtube website with the following URL: <https://m.youtube.com/watch?v=hUVRMBPw0LM> using their test device on the MTN Network.
19. The tester clicked on an advertisement banner for Whatsapp and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Whats Trending from Hyve Mobile at R35.00 / week. The relevant screenshots were provided.
20. The tester elected to stop the test at this point, as there were multiple breaches of the Code during the subscription acquisition flow for the Whats Trending service from Hyve Mobile.
21. In summary it was submitted that:
 - a. The tester responded to an ad banner which appeared to be from the WhatsApp messaging platform (WhatsApp icon/logo, green call-to-action button, wording, etc.).
 - b. The WhatsApp advertisement banner, when clicked on, triggered the MTN confirmation page (NHCP) and therefore qualified as the 'call-to-action' but did not display any pricing information.
 - c. The reference on the MTN confirmation page to it being a subscription service with a related cost was not clear, nor prominent, and required closer examination. Although the pricing information was provided, it was displayed in such a way as to be missed/overlooked/not seen due to the placement and design (font colour, size, background, etc.).
 - d. The Whatsapp advertisement was misleading (as at that point it appeared to relate to the social media messaging platform WhatsApp), as clicking on it resulted in the MTN confirmation page (NHCP) being triggered for an unrelated subscription service (Whats Trending).
 - e. There was no subscription service landing page as required for a service on the MTN network.

- f. There was no customer support number.
22. The Complainant submitted that the subscription acquisition flow for the Whats Trending subscription service charged at R35.00 per week did not comply with the provisions of the Code and that the following clauses of the Code had been breached: Clauses 5.4, 5.5, 5.11, 8.8, 12.1, 12.2, and 23A.5 (a)(b)(c)(d).
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Member's response

23. The Member submitted that they first received the three complaints (#58744, #58745 and #58746) as emergency procedure notices on Friday, 12 May 2023. On the same day they agreed with WASPA to pause all performance marketing on their MTN services whilst they investigated the details of all the complaints and it was agreed that the complaints would be dealt with as formal complaints.
24. The Member submitted that the nature of the three complaints for #58744, #58745 and #58746 were the same (GoogleAds banners, one-click flow, pricing colour and font, and alleged no customer support number). The Member submitted that, regardless of it being different services on the same channel, they believed that the complaints had been duplicated and the principle of double jeopardy applied in that the same complaints had been brought more than once on the same facts. The Member submitted that the three complaints, received on the same day, ought to have been treated as a single complaint.
25. The Member confirmed that, having investigated the complaints referred to Annexures A to D above in regard to the one-click flow from the Hyve Google Ads banner to the MTN Network Hosted Confirmation Page (NHCP), this was an issue on the MTN DEP system. They agreed that a one-click flow should not have happened. The fault was reported to MTN and MTN implemented a fix to a double opt-in flow (landing page>confirmation page) on 31 May 2023 for use by 1 June 2023. The Member submitted that on all three complaints the breach of rule 23A.5 of the Code was not intentional, nor caused on the part of Hyve. The Member submitted that all three of these complaints originated as a result of the above and submitted that they would not exist if this had not occurred and respectfully asked that the complaints be dismissed accordingly.

26. With reference to Annexure E the Member submitted that Hyve's Google Ads banner is placed on a legitimate website inside the Google network (ie YouTube). It appears that the tester was previously browsing adult sites, but never related to the place where Hyve's Google Ads banner was placed. The Member disagreed that the Whatsapp banner was misleading. The banner clearly advertised **Whatsapp content**.
 27. With reference to Annexure F the Member submitted that Hyve's Google Ads banner is placed on a legitimate website inside the Google network (ie Indi-Share.com). It appears that the tester was previously browsing adult sites, but never related to the place where Hyve's Google Ads banner was placed. The Member disagreed that the Whatsapp banner was misleading. The banner clearly advertised **Whatsapp content**.
 28. The Member did not see an issue with the font colour, size or background for the pricing information on the confirmation page. They submitted that the pricing information was clear and prominent as well as being in line with the DEP.MTN dashboard parameter settings allowed for the font colour and background.
 29. The Member provided two images which were screenshots from the DEP.MTN dashboard. From image 1, if one selects a colour which is not appropriate, the system will not allow you to select the colour ie *"the color chosen is too similar or restrictive."* The Member submitted that this is the minimum opacity that the dashboard allows one to configure.
 30. The Member submitted that, as a general rule, they always select at least 2 levels up or more to ensure that the pricing information is clear and visible.
 31. The Member submitted that from image 2, it is clear that the dashboard allows the colour to be selected as it is now visible and clear. All the colours and fonts used for their services are within the allowed parameters set by MTN.
 32. The customer support number was provided in clause 1.6 of the Ts&Cs: <http://mycontent.mobi/mtn-tscs/>.
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Complainant's response

33. The Complainant submitted that they noted the Member's submission that they agreed to pause all performance marketing on their MTN services whilst they investigate this complaint.
34. The Complainant submitted that at the outset of this response, they believed it was crucial to point out that the core of the Member's submission related to, *inter alia*: duplication of complaints, one-click flow, pricing information font colour and the accessibility of the customer support number.
35. The Complainant disputed the Member's submission that the three complaints had been duplicated and ought to have been treated as a single complaint. The Complainant respectfully submitted that they had lodged three separate complaints against the Member and they responded to each complaint separately. The Complainant has cited different clauses for each complaint and requested that the adjudicator consider each case and impose sanctions on the merits of each complaint.
36. The Complainant submitted that this response relates to the Whats Trending subscription service of which the test results were conducted on 16, 19 and 24 April 2023. In addition, this was not the first time a formal complaint was lodged against the Member for the Whats Trending subscription service. Therefore, the Complainant respectfully submitted that they would not dismiss this complaint as they believed the Member was liable for this repeated non-compliant service.
37. The Complainant noted the Member's submission that they confirmed that there was an issue on the MTN DEP system. The fact remained that at the time of the test, the non-compliant flow occurred where the consumer clicked on an advertisement banner and was redirected directly to the MTN Network Hosted Confirmation Page (NHCP).
38. The Complainant submitted that not only did the single opt-in flow occur once, but it occurred multiple times from 16 April 2023 up until 12 May 2023 when the Member received this complaint and paused the marketing of the service. The Complainant submitted that it is noteworthy to mention that the Member receives the same test results from the same monitoring tools that the Compliance Department uses and they believed that the Member was aware of this single opt-in flow and failed to take the necessary action of informing the affected network.

39. The Complainant submitted that had the Compliance Department not lodged this complaint; the question remains how many more consumers were going to experience a single opt-in flow for the Whats Trending subscription service at R35 per week?
40. The Complainant respectfully submitted that the Member failed and/or ignored to identify this issue on their systems and put the blame solely on the MTN DEP system. The Member benefited financially from the single opt-in flow of R35 per week and, while putting the blame on MTN, they failed to compensate consumers who were unfairly subscribed. By the Member's own submission, they agreed that a one-click flow should not have happened.
41. The Complainant submitted that the Compliance Department monitors mobile application services offered by WASPA members using third party monitoring tools. In addition, the Compliance Department conducts manual tests for users' experiences, expectations, acquisition flows and compares the findings against the requirements of the Code. The fact is that the consumer responded to an advertising banner which triggered the NHCP on the MTN network. The Member is therefore in breach of clause 23A.5 of the Code.
42. The Complainant submitted that the consumer experienced a single opt-in on the MTN network and, in accordance with the Code and industry acknowledged practises, pricing information must be displayed to potential customers on two respective occasions – adjacent to the call-to-action (banner advert or landing page) and confirmation page (NHCP) – during the subscription activation flow, before the service can be activated. The Member is therefore in breach of clause 12.1 of the Code.
43. The Complainant did not dispute that the advertisement banners used by the Member were placed on legitimate websites inside the Google network, however the name of the subscription service – Whats Trending – only appeared (if you look close enough) in ANNEXURE A and ANNEXURE C respectively. The advertisement banners in ANNEXURE B, D, E used the word "WhatsApp" and the image used in ANNEXURE F appears to be the WhatsApp messaging application icon/logo.
44. The Complainant submitted that although the Whats Trending subscription service offers stickers, wallpapers, images, etc... which can be used on the WhatsApp messaging application, the same stickers, wallpapers, images, etc... can also be used elsewhere on the device as once downloaded it forms part of the gallery.

45. The Complainant submitted that the Whats Trending subscription service was advertised to be related to the WhatsApp messaging application (WhatsApp icon/logo, “WhatsApp” wording), and the confirmation page was designed in such a way that it appeared to be directly linked to the WhatsApp messaging application and not the actual subscription service for Whats Trending. The Complainant submitted that this was misleading advertising of the member service and therefore the Member was in breach of clause 5.4, 5.5 and 8.8 of the Code.
46. The Complainant noted that the Member submitted that they did not see an issue with the font colour, size or background for the pricing information on the confirmation page. Furthermore, the Member demonstrated that they are in full control of the design elements on the confirmation page. The Complainant submits that they calculated the percentage difference between the “not appropriate” colour (#E6E6E6) and the colour used by the Member (#E2E2DF) and found that there was a 2% difference. In addition, when they calculated the percentage difference between each colour and a white background, the results were 10% and 12% respectively.
47. The Complainant provided an image representing the hex colour demonstrated by the Member as “not appropriate”. The Complainant provided a further image representing the hex colour used by the Member which had a 2% difference compared to the “not appropriate” colour.
48. The Complainant submitted that there are many colour comparison tools on the internet and in most cases, if not all, the side-by-side colour comparison of the two colours referred to above are similar. The Complainant submitted that for assistance in determining the difference between the two colours one could look at the following comparison: *Extracts from the online colour comparison website – <https://www.colorxs.com/compare/e6e6e6/e2e2df>*.
49. The Complainant submitted that while the MTN DEP dashboard parameter settings may allow non-visible hex colours to be used on the pricing information, they respectfully submitted that the Member deliberately elected to use the lightest colour option (2% difference from the “not appropriate” colour) which led to the consumer having to closely examine the pricing information. The Complainant submitted that the Code is clear about the pricing information and respectfully submitted that the Member’s pricing information fell short of the requirements and the Member was in breach of clause 12.2 of the Code.

50. The Complainant noted that the Member submitted that the customer support number was provided in clause 1.6 of the Ts&Cs. The Complainant submitted that the customer support number was not displayed on the banner nor on the NHCP of the single opt-in flow. The consumer must first click on the link to the full terms and condition and read through the page to find the customer support number. The Complainant submitted that the customer support number was not easily available and the link to the Ts&Cs may be overlooked and therefore the Member was in breach of clause 5.11 of the Code.
51. The Complainant submitted that the Member would have complied with clause 5.8 (b) of the Code but this was not part of this complaint.
52. The Complainant respectfully submitted that the Member's service was in breach of several clauses of the Code, and that their original complaint sufficiently set this out. The Complainant further submitted that the actual breaches complained of should be considered and that the Member be sanctioned for not complying with the requirements set out in the Code.

Sections of the Code considered

- 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.*
- 5.11. *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).*
- 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.*
- 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.*

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;*
- (b) must contain a link to, or the URL of, the Ts&Cs for the service;*
- (c) must use only “subscribe” or “join” as the call-to-action;*
- (d) must not mislead by presenting examples of content not available as part of the service.*

Decision

- 53. I have considered the initial complaint, the Member's response and the further response from the Complainant.
- 54. At the outset it is not clear why the Member mentioned the principle of double jeopardy in their response.
- 55. Double jeopardy is a bedrock principle of criminal law. Section 35(3)(m) of the Constitution guarantees that: *“Every accused person has a right to a fair trial, which includes the right –*
 - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.*
- 56. There can therefore be no reliance on the principle of double jeopardy by the Member in this case as there has been no previous acquittal or conviction. The most the Member could rely on is a possible duplication of charges.

57. However, even a claim of duplication of charges cannot be successful as only one combined sanction is imposed for the contravention of the relevant sections of the Code on the different dates.
58. I agree with the Complainant that each service offered by the Member forms the subject of a different complaint.
59. The Member has agreed that a one-click flow should not have happened and put the blame solely on the MTN DEP system. However, the Member remains responsible for any breach of the Code by the service provider.
60. As far as the Whats Trending service that is provided by the Member I have to agree with the submissions by the Complainant as set out above and that the Member is in breach of the following clauses of the Code:
- 60.1. Clause 5.4 by not having fair dealings with their customers;
- 60.2. Clause 5.5 by knowingly disseminating information that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission;
- 60.3. Clause 5.11 by not providing its customers with an easily accessible customer care number. The customer support number was not displayed on the banner nor on the NHCP of the single opt-in flow. The consumer would first have to click on the link to the full terms and condition and read through the page to find the customer support number. I agree that the customer support number is therefore not easily available and the link to the Ts&Cs may easily be overlooked;
- 60.4. Clause 8.8 by misleading consumers into believing that the advertised service is for an entirely different service or for different content;
- 60.5. Clause 12.1 for not providing clear and prominent pricing information. Pricing information must be displayed to potential customers on two respective occasions – adjacent to the call-to-action (banner advert or landing page) and confirmation page (NHCP) – during the subscription activation flow, before the service can be activated;
- 60.6. Clause 12.2 for electing to use the lightest colour option (2% difference from the “not appropriate” colour) which would lead to the consumer having to closely examine the pricing information;

- 60.7. Clause 23A.5 by not having a landing page prior to the confirmation step and sending the customer directly to a confirmation page without the required information for a compliant landing page.

Sanctions

61. In determining appropriate sanctions against the Member for its breach of the WASPA Code of Conduct, the following has been taken into consideration:
- 61.1. any previous successful complaints made against the Member in the past three years;
 - 61.2. any previous successful complaints of a similar nature;
 - 61.3. the nature and severity of the breach; and
 - 61.4. any efforts made by the Member to resolve the matter.
62. I have taken note of a previous successful complaint of a similar nature against the Member in complaint #57571 lodged on 22 August 2022.
63. Taking all factors into account the Member is fined as follows:
- 63.1. R7 500 for the breach of clauses 5.4 and 5.5;
 - 63.2. R5 000 for the breach of clause 5.11;
 - 63.3. R7 500 for the breach of clause 8.8;
 - 63.4. R7 500 for the breach of clauses 12.1 and 12.2;
 - 63.5. R7 500 for the breach of clause 23A.5;
64. Consequently the Member is to pay an amount of R35 000 within the timeframe set out in clause 24.41 of the WASPA Code of Conduct.

Matters referred back to WASPA

N/A
