



Report of the Adjudicator

Complaint number	#58746
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	2023-05-01 and 2023-05-06
Applicable version of the Code	17.4
Clauses of the Code cited	5.4, 5.5, 5.11, 12.1, 23A.5 (a)(b)(c)(d)
Related complaints considered	#58744 and #58745
Fines imposed	R5 000 for the breach of clauses 5.4 and 5.5; R5 000 for the breach of clause 5.11; R5 000 for the breach of clauses 12.1; R5 000 for the breach of clause 23A.5.
Other sanctions	N/A
Is this report notable?	Not notable.

Summary of notability	N/A
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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 1 May 2023 a tester was browsing on a website with the following URL: <https://crickettimes.com/2021/05/top-10-tallest-cricketers-of-all-time/> using their test device on the MTN Network.
4. The tester clicked on an advertisement banner which displayed the following text: **“NEXUS GAMER BF5 The best tips and tricks”** and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Nexus Gamer from Hyve Mobile at R79.00 / month. 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 Nexus Gamer service from Hyve Mobile.
6. Annexure B of the complaint stated that on 1 May 2023 a tester was browsing a website with the following URL: <https://bestringtones.net/ringtone/numbers-song-for-kids-best-ringtones.html> using their test device on the MTN Network.
7. The tester clicked on an advertisement banner which displayed the following text : **“NEXUS GAMER Be the Best at BF5 The best tips and tricks NexusGamer”** and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Nexus Gamer from Hyve Mobile at R79.00 / month 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 Nexus Gamer service from Hyve Mobile.
9. Annexure C of the complaint stated that on 6 May 2023 a tester was browsing on a website with the following URL: <https://apk-mod.net/en/games/3619-ptichiy-ray-v146-mod-mnogo-monet.html> using their test device on the MTN Network.
10. The tester clicked on an advertisement banner which displayed the following text: **“Call of Duty tips and tricks Tricks to do an Ace Nexus Gamer”** and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Nexus Gamer from Nexus Gamer 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 Nexus Gamer service from Hyve Mobile.
12. Annexure D of the complaint stated that on 6 May 2023 a tester was browsing on a website with the following URL: <https://www.digitbin.com/apps-stream-movies-online-android/> using their test device on the MTN Network
13. The tester clicked on an advertisement banner which displayed the following text: **“Nexus Gamer Call of Duty tips and tricks”** and the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a subscription service called Nexus Gamer 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 Nexus Gamer service from Hyve Mobile.
15. Annexure E of the complaint stated that on 6 May 2023 a tester was browsing on a website with the following URL: <https://www.apkvisit.com/gift-center-earn-game-codes/> using their test device on the MTN Network
16. The tester clicked on an advertisement banner which displayed the following text: **“Call of Duty guide All Secrets to Excel at Call of Duty NexusGamer”**, the ad banner directed the tester directly to the MTN Network Hosted Confirmation Page (NHCP) for a

subscription service called Nexus Gamer 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 Nexus Gamer service from Hyve Mobile.
 18. In summary it was submitted that:
 - a. The tester responded to a gaming advertisement banner which appeared to be from Nexus Gamer.
 - b. The Nexus Gamer 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. There was no subscription service landing page as required for a service on the MTN network.
 - d. There was no customer support number.
 19. The Complainant submitted that the subscription acquisition flow for the Nexus Gamer subscription service charged at R79.00 per month and/or 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, 12.1 and 23A.5 (a)(b)(c)(d).
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Member's response

20. 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.
21. 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.

22. The Member confirmed that, having investigated the complaints referred to Annexures A to E 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.
23. The customer support number was provided in clause 1.6 of the Ts&Cs: <http://mycontent.mobi/mtn-tscs/>.

Complainant's response

24. 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.
25. 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 and the accessibility of the customer support number.
26. 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.

27. The Complainant submitted that this response relates to the Nexus Gamer subscription service of which the test results were conducted on 1 and 6 May 2023. The Complainant respectfully submitted that they would not dismiss this complaint as they believed the Member was liable for this non-compliant service.
28. 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).
29. The Complainant submitted that not only did the single opt-in flow occur once, but it occurred multiple times from 1 May 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.
30. 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 Nexus Gamer subscription service at R35 per week and/or R79 per month?
31. 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/or R79 per month 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. Therefore, the Member was in breach of clause 5.4 and 5.5 of the Code.
32. 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.

33. 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 Complainant submitted that the Code is clear about the pricing information and the call-to-action and they respectfully submit that the Member's pricing information fell short of the requirements. The Member is therefore in breach of clause 12.1 of the Code.
34. 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.
35. 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.
36. 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

37. I have considered the initial complaint, the Member's response and the further response from the Complainant.

38. At the outset it is not clear why the Member mentioned the principle of double jeopardy in their response.
39. 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.*
40. 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.
41. 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.
42. I agree with the Complainant that each service offered by the Member forms the subject of a different complaint.
43. 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.
44. As far as the Nexus Gamer 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:
- 44.1. Clause 5.4 by not having fair dealings with their customers;
- 44.2. Clause 5.5 by knowingly disseminating information that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission;
- 44.3. 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;

- 44.4. 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;
 - 44.5. 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.
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Sanctions

- 45. In determining appropriate sanctions against the Member for its breach of the WASPA Code of Conduct, the following has been taken into consideration:
 - 45.1. any previous successful complaints made against the Member in the past three years;
 - 45.2. any previous successful complaints of a similar nature;
 - 45.3. the nature and severity of the breach; and
 - 45.4. any efforts made by the Member to resolve the matter.
 - 46. No previous complaints against the Member for the Nexus Gamer service have been brought to my attention.
 - 47. Taking all factors into account the Member is fined as follows:
 - 47.1. R5 000 for the breach of clauses 5.4 and 5.5;
 - 47.2. R5 000 for the breach of clause 5.11;
 - 47.3. R5 000 for the breach of clauses 12.1;
 - 47.4. R5 000 for the breach of clause 23A.5;
 - 48. Consequently the Member is to pay an amount of R20 000 within the timeframe set out in clause 24.41 of the WASPA Code of Conduct.
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Matters referred back to WASPA

N/A
