



Report of the Appeals Panel

Complaint number	#58765
Cited WASPA members	Baseplay Limited (Membership no. 1795)
Notifiable WASPA members	Basebone Pty Ltd (Membership no. 1344)
Appeal lodged by	Baseplay Limited (Membership no. 1795)
<i>Type of appeal</i>	Face-to-face appeal
Scope of appeal	<input checked="" type="checkbox"/> Review of the adjudicator's decision <input checked="" type="checkbox"/> Review of the sanctions imposed by the adjudicator
Applicable version of the Code	17.4
Clauses considered by the panel	5.1, 5.2, 5.4, 5.5, 5.6A, 5.11, 8.8,12.1,15.9A
Related complaints considered	#53300; #58648
Amended sanctions	The Appeal Panel upholds the Members appeal in respect of the breaches of clauses 5.2, 5.4, and 12.1 of the Code. The Appeal Panel dismisses the Member's appeal in respect of the breaches of clauses 5.5, 5.6A, and 15.9A of the Code.

Appeal fee	50% of the appeal fee to be refunded
Is this report notable?	Not notable
Summary of notability	

1. Initial complaint

The initial complaint was set out by the adjudicator in the original adjudication and is reproduced here for the sake of convenience:

- 1.1. *“This complaint was lodged by the WASPA Compliance Department on 16 May 2023, and the member was notified of the complaint by the WASPA Secretariat on 17 May 2023.*
- 1.2. *The WASPA Compliance Department included both comprehensive notes of its examination of the member’s service, as well as a video recording of the examination in its formal complaint. The report is comprehensive but can be summarised as follows:*
- 1.3. *On the 25th of April 2023 at 12:01, a WASPA Compliance Department tester (“the tester”) used a Samsung Galaxy J4 Pro test device to conduct manual tests on the MTN network. Before the tester proceeded, the airtime balance was established, confirmed that there were no active subscriptions, and cleared the browsing history on the mobile device.*
- 1.4. *The tester then browsed on a website with the url: waptrick.one and successfully responded to an advertisement banner on the website for a new update/Updater for WhatsApp by clicking the “open” button.*
- 1.5. *This action triggered a page which prompted the tester to “START” the process. The tester clicked on the “START” button, this action however triggered a landing page for games (Games, Apps, Videos & Community).*

- 1.6. *The landing page automatically redirected to the MTN Network Hosted Confirmation Page without an explicit response from the tester, therefore the page with the “START” button qualifies as the ‘call-to-action’ (“CTA”) and does not display any pricing information. The tester also did not have access to the customer support number.*
- 1.7. *The tester confirmed the subscription to Baseplay Games on the MTN confirmation page (with the page still indicating at the top that this confirmation would lead to the Whatsapp updater) and was redirected to the MTN “Thank you” page.*
- 1.8. *With the expectation of accessing the service, the tester clicked on the “Continue” button and was redirected to a landing page. The landing page displayed an advertisement banner for another service called “mastery”. The tester closed the “mastery” ad banner and the information displayed on the page required the tester to click on a link to be redirected to the service that they subscribed to. In addition, the big green “SUBSCRIBE” button on the same page is misleading as it relates to the “mastery” service and not the service subscribed to.*
- 1.9. *The tester was subscribed to a games portal containing several games and apps. The tester received a welcome message and the link to access the service redirected the tester to a landing page where “stream” was advertised. The tester clicked on the link from the landing page with the expectation of accessing the “WhatsApp” service, however the test was redirected to a portal. The tester downloaded the app “Whats App Updater App” from the portal (BaseplayAppUpdater.apk). The tester was presented with a different app called “Chat App Updater”, the tester installed an update to the app. The “Chat App Updater” opened and displayed a message “No app found to update”.*
- 1.10. *The tester then confirmed that the subscription fee of R39.99 had been deducted and that the tester was now subscribed to Baseplay Games. The tester then cancelled the subscription.*
- 1.11. *In summary, the WASPA Compliance Department believes that the tester:*
 - 1.11.1. *was misled to believe that they were updating their WhatsApp;*
 - 1.11.2. *was deceived into a subscription for a portal that does not have anything to do with the predominantly advertised WhatsApp;*
 - 1.11.3. *tried to get access to the WhatsApp Updater service but was presented with an app called Chat App Updater instead.*
 - 1.11.4. *was not provided with information on how to use the service; and*
 - 1.11.5. *once subscribed, was not redirected to information relating to the service but was prompted to subscribe to other services instead.*

1.12. *WASPA's Compliance Department thus believes that the member has breached several clauses of the WASPA Code of Conduct ("the code") (stated at section 5 below) and believe that this portal could potentially cause serious consumer harm with huge financial implications, if not corrected immediately."*

2. Sections of the Code of Conduct considered

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

5.2. Services must not be unreasonably prolonged or delayed.

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.

5.11. 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.

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.

3. Adjudicator's findings

3.1. The adjudicator discussed the following clauses of the WASPA Code of Conduct (CoC) in the adjudication: 5.1, 5.2, 5.4, 5.5, 5.6A, 5.11, 8.8, 12.1, and 15.9A

3.2. The adjudicator found that the Member had not breached clauses: 5.1, 5.11, and 8.8.

3.3. The adjudicator found that the Member had breached clauses: 5.2, 5.4; 5.5; 5.6A; 12.1 and 15.9A of the Code and fined the Member:

3.3.1. R 5 000.00 for a breach of 5.2;

3.3.2. R 10 000.00 for a breach of 5.4;

3.3.3. R 10 000.00 for a breach of 5.5;

3.3.4. R 10 000.00 for a breach of 5.6A;

3.3.5. R 5 000.00 for a breach of 12.1 and

3.3.6. R 5 000.00 for a breach of 15.9A.

3.4. This amounted to a total fine of R45 000.00.

3.5. The adjudicator's adjudication is sufficiently terse to allow it to be quoted verbatim (note that the sections which were not found to be breached have been excluded):

“Clause 5.2

6.4 With regards to whether the services are unreasonably prolonged or delayed, I am not of the opinion that this hinges on poor connectivity issues, but rather on whether there are too many intervening pop-up adverts and landing pages before the tester reaches the app subscribed for. Although there is no precedent or definition for what “unreasonably prolonged or delayed” refers to, this can be gleaned from clause 15.9A and the fact that there are multiple pop-up adverts and confirmation pages before the tester is redirected to the service or information related to the specific service subscribed for (which never happened), would infer that the services are unreasonably prolonged or delayed.

6.5 Accordingly, I find a breach of this clause.

Clause 5.4

6.6 With regards to whether the member had honest and fair dealings with the tester (a customer as the transaction was entered into), I am of the opinion that, although the member can, potentially, provide the service subscribed to, the tester was deceived into a subscription for a portal that does not have anything to do with the predominantly advertised “Updater for WhatsApp”. Further, the tester was misled that they were downloading an app specifically related to updating Whatsapp and not a broader “Chat Updater”. Finally, the fact that there are multiple pop-up adverts and confirmation pages before the tester is redirected to the service that appear in such a way that they may encourage the customer to mistakenly subscribe to additional services, does not constitute honest and fair dealing with the customer.

6.7 Accordingly, I find a breach of this clause.

Clause 5.5

6.8 In advertising for a different named app that was ultimately provided, ultimately subscribing the customer to a portal that does not have anything to do with the predominantly advertised “Updater for Whatsapp”, providing no information on how to use or access the app and having a confusing CTA (“Start”) with insufficient information at that stage, I find that the member engaged in information provision that could be considered ambiguous and omitted other information.

6.9 Accordingly, I find a breach of this clause.

Clause 5.6A

6.10 The confusion around how to access the app and how it would work (automatic update or not) all stemmed from the fact that, once subscribed, there was no information provided on how to use or access the service.

6.11 Accordingly, I find a breach of this clause.

Clause 12.1

6.15 Clause 12.1 stipulates that, amongst other things “... where there is a call-to-action, pricing information must be clearly and prominently displayed adjacent to the call-to-action.” Whilst the member suggests that the landing page with the “subscribe” button is

the CTA and this has pricing information, I am convinced that this page automatically redirected the tester to the MTN Network Hosted Confirmation Page without an explicit response from the tester. Therefore the previous page with the "START" button qualifies as the CTA and does not display any pricing information.

6.16 Accordingly, I find a breach of this clause.

Clause 15.9A

6.17 As has been previously mentioned, following confirmation of the subscription, there are multiple pop up adverts and confirmation pages before the tester is redirected to the service. The customer is, thus, clearly not only redirected to information related to the specific service after subscription confirmation.

6.18 Accordingly, I find a breach of this clause."

4. Appeal submissions

- 4.1. The Member elected to appeal the decision of the adjudicator both in terms of their findings on the clauses breached and the sanctions imposed. As set out in Clause 24.56 the Member requested a face-to-face appeal and subsequently provided a submission, to which the complainant replied, and a final submission. The face-to-face appeal in complaint #58765 was combined with the appeal in complaint #58648.
- 4.2. The Member duly provided its "Heads of Argument" in which it challenged the result of the adjudicator in this complaint on the following grounds:
 - 4.2.1. The adjudicator had misinterpreted clauses 5.2, 5.4, and 5.5 of the CoC;
 - 4.2.2. Challenged the finding of clause 12.1 as the adjudicator in complaint 58648 had dealt with a similar advertisement and had not found the Member to have breached clause 12.1, and
 - 4.2.3. Challenged the fairness of the procedure of the complainant added a breach of clause 5.6A after the Member had already provided their response,
 - 4.2.4. Alleged that the complaint should have been withdrawn in terms of clause 24.15B(b) and (c) in that the complaint was prima facie without merit and was vexatious.

- 4.3. The dispute regarding the interpretation of clauses 5.2, 5.4 and 5.5 were expanded upon by the Member and deserve some further attention:
- 4.3.1. Clause 5.2: The Member alleged that any delay in the confirmation page would be more properly dealt with in terms of clause 15.9A and not in terms of clause 5.2. The Member further submitted that the pop-up advert was not a “subscription” and is not a Network Hosted Confirmation page.
- 4.3.2. Clause 5.4: The Member referred to the Consumer Protection Act (CPA) when considering clause 5.4 and submitted that the Member provided transparent information, non-deceptive marketing, fair billing and charges, consent-based services, privacy protection, effective complaint handling and complied with the WASPA code of conduct and the CPA and as a result was dealing in a fair and honest manner with consumers. The Member further was concerned that the definition of “fair” and “honest” was not in the WASPA Code of Conduct and as a result it was likely to result in subjective opinions and be impossible for Members to comply with.
- 4.3.3. Clause 5.5: The Member disputed that it used false and deceptive marketing in that its Chat updater included updating the Whatsapp platform (as well as other platforms) and so it was wider (and potentially more useful) than just a Whatsapp updater. The Member further submitted that information on how to use the service was available when selecting the product in the Member’s portal.
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5. Complainant response

- 5.1. The Complainant provided a response in which they acknowledged that clauses 5.1, 5.2 and 8.8 were not breached which was described as “disappointing”. The complainant made the following submissions:
- 5.1.1. There is no legal requirement for the result of complaint 58648 to be the same as this complaint,
- 5.1.2. Clause 5.2: the complainant repeated the adjudicators position that it was the pop-up advertisements, not a slow connection which caused a breach of this clause,

- 5.1.3. Clause 5.4: The complainant drew the Member's attention back to the issue was that the advertisement was deceptive in that there was no "Whatsapp updater" app, but rather a "Chat App Updater". Moreover, the app does not actually update the Whatsapp app, but simply informs the user that an update is available, which the complainant notes the Whatsapp app will itself do.
- 5.1.4. Clause 5.5: The complainant submits that the advertisement to update Whatsapp is deceptive as it appears to be authorised by Whatsapp by using the WhatsApp logo and further – as noted above – that the Chat Updater app does not update Whatsapp but simply informs the user that an update is available.
- 5.1.5. Clause 12.1: The complainant disputes that the ruling in adjudication 58648 was correct and contends that this adjudication correctly found that the pricing information was not clear nor prominent.
- 5.1.6. Procedural fairness: The complainant contends that the Member did not place any evidence before the adjudicator and still has not placed any evidence before the appeal panel as to why the complaint was vexatious. The complainant further indicated that the Member had many chances to the refute the charges put against the Member.
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6. Member response

6.1. The Member then responded to the complainant as follows:

- 6.1.1. Clause 5.1: The complainant was directed to the "Chat App Updater" after the complainant had completed the subscription. The Member indicated that other apps in addition to WhatsApp – such as Facebook – are also covered by the Chat App updater service. It is worth noting that the Adjudicator did not find that the Member had breached clause 5.1 and as a result it was strange that the Member discussed this issue at all.
- 6.1.2. Clause 5.2: Rather oddly, the Member repeated its point regarding the poor connectivity of the complainant's mobile phone, despite the complainant making it clear that this was not the point, but the issue was instead the interposition of the pop-up adverts before the complainant was directed towards the service the complainant had just subscribed to.

- 6.1.3. Clause 5.11: The Member expressed mystification as to why the adjudicator found that the customer support contact details were not available as the terms of service are available on the Landing Page and the Welcome Message clearly displays the customer service modules, which include email, telephone and an automated system to unsubscribe.
- 6.1.4. Clause 8.9 (sic), 12.1, 15.9A: The Member refers to these sections and indicates that the Member requires the potential customer to go through more steps than is required by WASPA and as such does more to protect the consumer. Moreover, the landing page and confirmation page are hosted by MTN and are approved by MTN and follow their requirements. It is unclear why the Member refers to clause 8.9 and – presumably – the intention was to refer to clause 8.8.
- 6.1.5. The Member further submitted that they had been unable to replicate what the complainant found.
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7. Face-to-Face Hearing

- 7.1. The face-to-face hearing occurred on the 29th July 2024 and was duly transcribed with the record of the transcription exceeding 100 pages. In order to keep this Appeal Panel ruling to a manageable length the relevant submissions will be provided within the “deliberations and findings” section below.
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8. Deliberations and findings

PROCEDURAL ISSUES

- 8.1. This panel members of this appeal report have had the benefit of perusing the report in appeal 58648 in which several procedural issues were addressed, and the appeal panel aligns themselves with the statements made on these issues. In addition to the above, this appeal report considers procedural delays in bringing of a face-to-face appeal.

8.2. Procedural delays in the bringing of the face-to-face appeal

- 8.2.1. Before considering the clauses of the WASPA Code of Conduct that the adjudicator found the Member to have breached, it is convenient to consider some procedural aspects relating to the face-to-face appeal which was held on the 29th July 2024, some 440 calendar days or approximately 14,5 months after the initial complaint was lodged.
- 8.2.2. During the face-to-face hearing the Member indicated that various factors contributed to the delay in the face-to-face hearing. The following is the timeline for an appeal (all days are working days):
- 8.2.2.1. 10 days to appeal the decision,
 - 8.2.2.2. 5 days to pay the invoice for the appeal fee,
 - 8.2.2.3. 15 days for the Member to provide a submission
 - 8.2.2.4. 10 days for the Complainant to reply
 - 8.2.2.5. 10 days for the Member to reply to the Complainant
- 8.2.3. The report was released around the 31 July 2023 and as a result, the exchange of documents would normally be completed by approximately 10th October 2023 (note that the Member may request extensions which are granted at the discretion of WASPA). Despite this, the face-to-face appeal occurred 294 calendar days (200 working days) later.
- 8.2.4. Section 24.57 of the WASPA Code of Conduct indicates that: “An extension to this time period may be given at the discretion of WASPA” and the extension of time was clearly granted to the Member multiple times in order for the Member to appear approximately 10 months later. As the Member requested – and WASPA granted – these extensions of time, it is not possible to fault the behaviour of the Member for the extensions of time. However, this case does raise the possibility of a Member being able to delay the appeal of a matter (and the accompanying fine) for an indefinite period if WASPA were to continue to allow extensions of time.
- 8.2.5. The WASPA Code of Conduct is not helpful when considering requests for postponements. In order to avoid undue delays, the appeal panel recommends that WASPA consider rules dealing with the procedure to request and grant/deny postponements.

SUBSTANTIVE ISSUES

- 8.3. The following clauses were alleged to have been breached and are dealt with in the same order:
- 8.3.1. 5.2 – Service must not be unreasonably delayed
 - 8.3.2. 5.4 – Fair and honest dealings
 - 8.3.3. 5.5 – Duty not to provide false or misleading information
 - 8.3.4. 5.6A – Information on how to access and how to use services
 - 8.3.5. 12.1 – Pricing information must be clear and prominent next to call to action
 - 8.3.6. 15.9A – Once subscription service confirmed no redirection to additional services

9. Clause 5.2 – Service must not be unreasonably delayed

- 9.1. In the adjudication the adjudicator found that the multiple pop-up adverts caused a delay in the provision of the service which resulted in the service being unreasonably delayed.
- 9.2. Clause 5.2 of the CoC is provided under the heading of “Customer Relations” and the subheading of “Service Levels”. Clearly the intention of this section is to ensure that the Member provides the service to the customer timeously. Thus, for instance, if the Chat Updater app took 1 hour to respond to the customer’s request to update their chat applications, then this delay would clearly breach section 5.2 of the CoC. However, the answer to whether the delay is “unreasonable” becomes harder to determine as the length of the delay decreases.
- 9.3. Despite repeated requests to address the issue of the pop-up advertisements interrupting and slowing down the subscription service, the Member continued to persist in addressing the complainant’s mobile connectivity, even during the face-to-face appeal hearing, which was unfortunate.
- 9.4. The Member further submitted that clause 15.9A was applicable, rather than clause 5.2 of the CoC. It is clear from the evidence that the pop-up advertisements are presented during the subscription process and do not form part of the normal services of the Member. Bearing in mind that the overall intention of section 5.2 is to provide minimum service levels that a Member when providing a service, the Appeal Panel agrees that any delay in the subscription process should more appropriately be dealt with by section 15.9A. As a result, the appeal regarding the breach of clause 5.2 is **upheld**.
- 9.5. Since an alleged breach of clause 15.9A also forms part of this appeal no further comment need be made on this clause of the CoC.

10. Clause 5.4 – Fair and Honest dealings

10.1. The breach of clause 5.4 needs to be dealt with carefully as a close inspection of the adjudicator's report indicates that there are three allegations of unfair dealings by the Member, to wit:

10.1.1. The Baseplay portal was an entirely different service to the "Updater for Whatsapp" and so the advertisement was deceptive;

10.1.2. The "Chat Updater" app was not an "Updater for Whatsapp" but rather an updater for several social media platforms, which was not honest or fair; and

10.1.3. The multiple pop-up adverts during the subscription process encourage subscribers to the "Updater for Whatsapp" service to mistakenly subscribe to additional services, which is not honest or fair.

10.2. The Member responded to these allegations as follows:

10.2.1. When the customer is subscribed to the "Updater for Whatsapp" service, they are automatically subscribed to the entire Baseplay portal and have access to all the services on the portal at no additional cost. This means that the Member unilaterally provides significantly more value to the customer by giving the customer access to hundreds of apps on the Baseplay portal at no additional cost.

10.2.2. The Baseplay portal contains an app which does provide an update for WhatsApp but overperforms and also provides notification of updates for several other social media platforms such as Facebook. As such the service provided to the customer is actually more valuable than the service which is advertised which should be seen as the advantage of the customer.

10.2.3. Although the pop-up advertisements do appear, these are advertisements to encourage the customer to use additional services on the Baseplay portal that the customer has already subscribed to and which the customer can use at no additional cost (note that this is disputed). Since the customer is subscribed to the entire Baseplay portal rather than just the "Updater for Whatsapp" and further that this automatic subscription is to the benefit of the customer and at no additional cost, the Member cannot understand how such an arrangement could be seen as dishonest and unfair.

10.3. At the outset it should be noted that the appeal panel had access to the above submissions by the Member and the adjudicator in this matter did not. It is unclear why the Member did not clarify the functioning of the subscription services in its four submissions in this matter. Indeed, it was only during the Face-to-Face hearing that the

functioning of the subscription service and the additional value provided to the customer was explained. This failure to provide the necessary information before the adjudicator should be placed squarely at the feet of the Member.

- 10.4. Even if the appeal panel were to accept that the “Chat Updater” was a better service as it updated multiple social media platforms, the question remains as to whether a reasonable customer will be confused when they are referred to a “chat updater” when they had requested an “updater to Whatsapp”. The Member pre-supposes that the ordinary consumer would be aware that “Whatsapp” was a “chat” application and would naturally assume that the updater for Whatsapp would be located within the “Chat Updater” app. All of the above assumes a level of sophistication on the part of the consumer, which is, in the view of the appeal panel, not possible to assume.
- 10.5. On the contrary, the appeal panel finds that the Member should assume a very low level of technical literacy on the part of the consumer and a repeated mislabelling of the service is likely to cause confusion amongst consumers. The Appeal Panel therefore **dismisses** the Member’s appeal in terms of clause 5.4.
- 10.6. As regards the additional services that are presented to the complainant during the subscription process, these services are more appropriately dealt with in terms of clause 15.9A which is dealt with below.

11. Clause 5.5 – Duty not to provide false or misleading information

- 11.1. The adjudicator found that the Member breached clause 5.5 in two ways, namely:
- 11.1.1. The customer was provided with access to the Baseplay portal, rather than “Updater for Whatsapp” and this Baseplay portal “does not have anything to do with the predominantly advertised “Updater for WhatsApp”, and
- 11.1.2. No information was provided to the customer to use or access the app.
- 11.2. Dealing with the initial finding, as the Baseplay portal contains the Chat Updater app, which in turn provides the notification of WhatsApp updates, it is possible to claim that the Baseplay portal includes the Updater for Whatsapp service. However, the Member should assume a very low level of technical literacy on the part of the consumer and a repeated mislabelling of the service is likely to cause confusion amongst consumers. For this reason the appeal panel **dismisses** the Member’s appeal in terms of this alleged breach of clause 5.5.

11.3. Turning to the second allegation (that there was insufficient information to assist the customer to use or access the app) a finding on this basis would duplicate the alleged breach of clause 5.6A which will be dealt with hereunder and so the Member's appeal in terms of clause 5.5 on this basis is also **upheld**.

12. Clause 5.6A – Information on how to access and how to use services

12.1. While the appeal panel has upheld the appeal by the Member in terms of clauses 5.4, the submission by the Member in terms of clause 5.6A is less convincing. Clause 5.6A requires that Members must ensure that customers have ready access to information on how to access the services, and how to use the services.

12.2. Thus, a member is required to not only ensure that the customer can find the app, but also once the app has been found, the customer has instructions on how the app should be used.

12.3. The Adjudicator found that the customer was not directed to the specific "Updater for WhatsApp" and further that an app named "Updater for WhatsApp" did not exist at all. Instead, the service that was meant to be used was "Chat Updater".

12.4. If recourse is had to the record of the complainant's investigation of the Member's service in this matter, it is clear that when the complainant clicks on the "Updater for WhatsApp" the complainant is ultimately directed to the subscription page and – once subscribed – the complaint is directed to the "WhatsApp Updater App" in the Baseplay portal which the complainant duly installs. Once installed, the app is now referred to as a "chat app updater" which, when run, provides a message which reads: "no app found to update". While the complainant did allege that the WhatsApp app was installed on the mobile phone used for the investigation, there is no indication in the video file provided that the Whatsapp app had in fact been installed. The Member contended that if the Whatsapp app on the mobile phone was up to date then the message of "no app found to update" would have been the correct response. Put differently the Member read the message of "no app found to update" as meaning that all chat apps were up to date, whereas the complainant read the same message to mean "we cannot find any chat services".

12.5. The Member submitted that information on how to use the app was available to an ordinary consumer in the form of a "I" button which the customer could click on in order to find instructions on how to use the app.

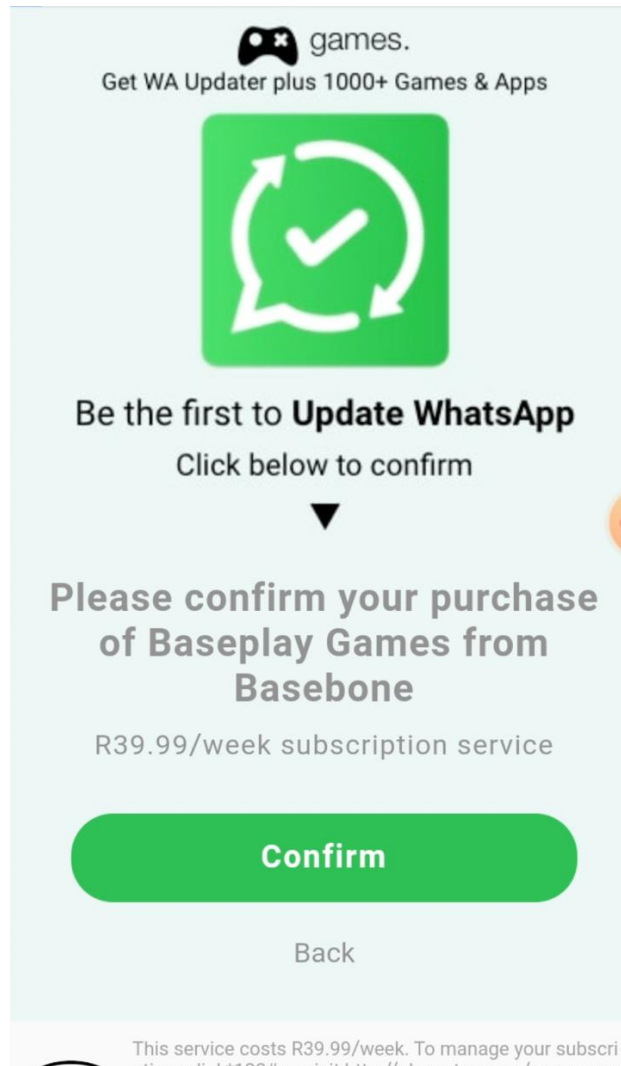
12.6. There was no indication within the video file of the “i” button that the Member alleged was available to users to explain the use of the Chat Updater app, even once the “no app found to update” message was displayed.

12.7. Consequently, the appeal panel is required to decide whether there was ready access as to how to use the Chat Updater app, and in particular what the message of “no app found to update” actually meant as it was clearly an ambiguous statement. Bearing in mind the failure of the Member to provide evidence to support its allegation that instructions are available to the customer to explain how to use the app and bearing in mind the video evidence confirms that if such information was available, it was certainly not immediately obvious how this information would be obtained. However, from the record before the panel, it appears that use of the app itself is intuitive, and thus the Member is not remiss in omitting use instructions.

12.8. However, the fact remains that a consumer would have difficulty in linking the “WhatsApp Updater App” advertised by the Member, with the “Chat Updater” buried in the bowels of the Baseplay portal and would probably not know (without being prompted) to use the latter to perform the advertised function of the former. Consequently, the Appeal Panel **dismisses** the appeal by the Member and finds that the Member failed to provide information on how to access the app as required by clause 5.6A of the CoC.

13. Clause 12.1 – Pricing information must be clear and prominent next to call to action

13.1. The allegation that the pricing information for the service was not available in breach of clause 12.1 is a more complex issue than it at first appears to be. If recourse is had to the video, it is quite clear that the words “Subscription R39.99/week” appear first on the “subscribe” page and this is repeated on the subsequent page where the complainant is requested to “confirm” the subscription. The video also makes it clear that the complainant actually depresses the “confirm” button and a screenshot of this screen is inserted below.



13.2. The adjudicator in this matter indicated that clause 12.1 was not breached due to there being no pricing information on the page, but rather because it was not necessary for the complainant to depress the “confirm” button in order to be subscribed. Put differently the complainant was auto subscribed. This allegation is not borne out by the evidence provided. Moreover, if the complainant was auto subscribed then the correct clause of the CoC would be 15.9 of the CoC which requires that, “the confirmation step may not be performed in an automated manner...”.

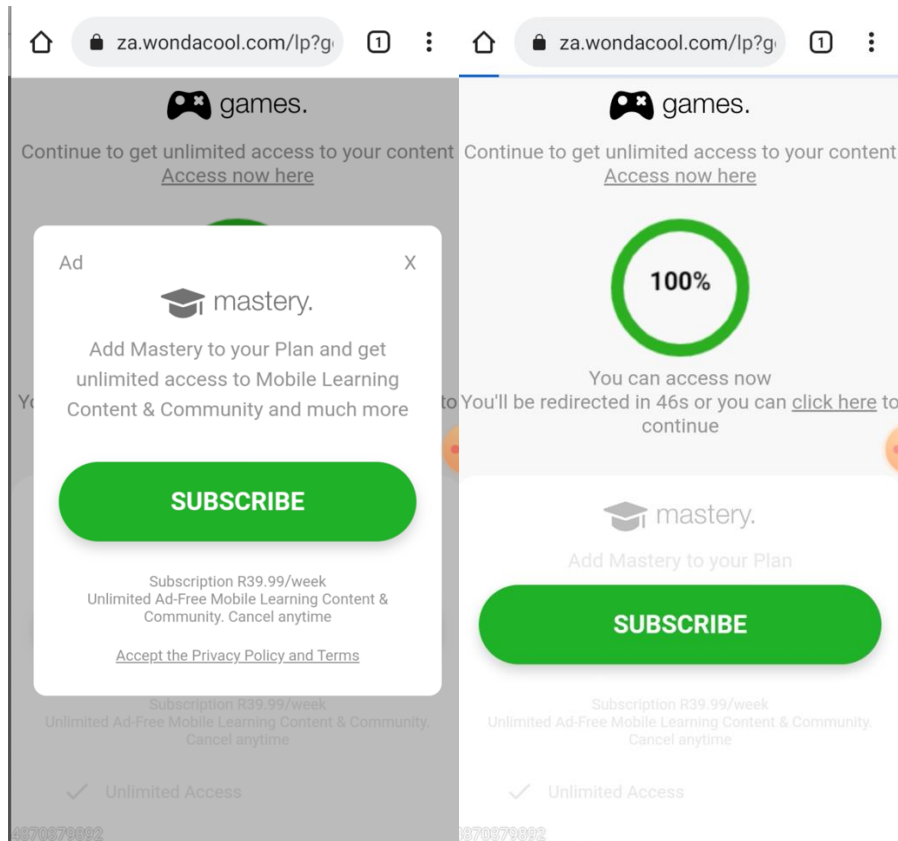
13.3. As a result, the Member’s appeal in terms of clause 12.1 is **upheld**.

14. Clause 15.9A – Once subscription service confirmed no redirection to additional services

14.1. Clause 15.9A of the CoC requires that once a customer confirms a subscription to a specific subscription service then the customer “*must only be redirected to*

information relating to that specific service and may not be redirected to any additional network hosted confirmation pages in such a way that is encourages the customer to mistakenly subscribe to additional services”.

- 14.2. The Adjudicator found that the multiple pop-up adverts were evidence of information relating to other services rather than the specific service that was subscribed to. The images provided below set out the first pop up advertisement (left hand side) and the subsequent redirection to the service which occupied the upper half of the screen, while the advert to the “Mastery” subscription service is repeated on the bottom half of the screen accompanied by a large “subscribe” button.
- 14.3. The determination as to whether clause 15.9A has been breached by the Member is dependent on the manner in which this Appeal Panel interprets the import of clause 15.9A:
- 14.3.1. In this matter both the complainant and the Adjudicator interpreted clause 15.9A to mean that the only information that the subscriber may see must be information relating to the “Whatsapp Updater” service and any information of any other nature would breach clause 15.9A of the CoC.
- 14.3.2. In contrast the Member indicated that the purpose of clause 15.9A was to prevent customers from “being redirected to any additional network hosted confirmation pages” as set out in the second part of the sentence and it submitted that neither the pop-up advert nor the subsequent page where the “Mastery” service was repeated were hosted by the MTN network and thus not “network hosted confirmation pages”. More specifically – the Member submitted – the purpose of clause 15.9A was to prevent a situation where customers were stuck in a never-ending subscription confirmation loop where the customer could subscribe to 20 different subscription services in a short period of time, rather than the first subscription service the customer had intended to subscribe to.
- 14.3.3. The Member further submitted that the customer would not be mistakenly subscribing to additional services as both the “Mastery” service and the “Whatsapp Updater” service were available in the Baseplay website and the customer was subscribed to the Baseplay portal, not the individual services of the “Whatsapp Updater” and the “Mastery” service. As such the information provided regarding the “Mastery” service was in fact information about the service that the customer has subscribed to.



14.4. If the customer was already subscribed to the Baseplay portal and if the Baseplay portal included the “Mastery” stream, then both the pop-up advert (left hand side image) and the “subscribe” to this service page (right hand side image) would be acceptable. However, on balance it is difficult to sustain the Member’s submission that the Baseplay portal was the same as the Mastery educational vertical for the simple reason that the complainant is requested to “add Mastery to your Plan...” clearly indicating that the Mastery service was not already subscribed to. Additionally, the fact that this service is not free but rather is a “subscription: R39.99/week” provides a second indication that this is a second subscription in addition to the first subscription that the complainant had subscribed to.

14.5. The alleged breach of clause 15.9A in this complaint 58765 is markedly similar to the experience of the complainant in complaint 58685, with the only real exception being that the service in complaint 58685 was a “Stream” rather than “Mastery” subscription service and cost R39.99/week rather than R15.00 per day. In particular the appeal panel confirms the finding in that matter that the intention of clause 15.9A was to oblige Members to direct the customer to the service they had just subscribed to. The

intention of clause 15.9A is confirmed by the manner in which clause 15.9A was subsequently amended in the CoC version 17.9 to remove the reference to “network hosted confirmation pages”.

- 14.6. Based on the foregoing, the panel agrees with the finding of the Adjudicator that the Appellant has breached clause 15.9A of the Code and the appeal against the findings of the Adjudicator in this regard is **dismissed**.
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15. Appeal results and Amendment of sanctions

The Appeal panel hereby amends the result of complaint 58765 as follows:

- 15.1. The findings that the Member breached clauses 5.2, and 12.1 are hereby **dismissed**.
- 15.2. The findings that the Member breached clauses 5.4, 5.5 and 5.6A, 15.9A are hereby **upheld**.

The panel notes that clause 5.4 of the Code is of broad ambit, and clause 5.5 is of far narrower application. While the Member has infringed both these clauses, the infringement relates to the same conduct by the Member; accordingly, the panel deems it appropriate to impose one sanction for the Member’s breach of both these clauses.

The Appeal Panel has had sight of the comments on the size of the sanctions as found in complaint 58685 and aligns itself with those comments. More specifically, the fines in this matter for the breach of clauses 5.4, 5.5, 5.6A, 15.9A are as follows:

- 15.2.1. R 20 000.00 for a breach of 5.4 and 5.5 (increased from R10 000 fine)
- 15.2.2. R 10 000.00 for a breach of 5.6A; (no change)
- 15.2.3. R 5 000.00 for a breach of 15.9A. (no change)
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16. Appeal fee

The Appeal Panel hereby directs that half the appeal fee should be refunded to the Member.
