



Report of the Adjudicator

Complaint number	#60142
Cited WASPA members	YellowDot Mobile (Membership no. 1950)
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Non-compliant promotion of subscription service
Date complaint lodged	2024-05-03
Date of alleged breach	2024-03-13; 2024-04-12
Applicable version of the Code	v17.7
Clauses of the Code cited	5.1, 5.4, 5.5, 8.8, 21.3, 21.4, 21.5 and 21.11
Related complaints considered	n/a
Fines imposed	Member fined following amounts: R5 000 for breach of clause 5.1; R5 000 for breach of clause 5.4; R10 000 for breach of clause 5.5; R5 000 for breach of clause 8.8;

	R10 000 for breach of clause 21.3; and R10 000 for breach of clause 21.11.
Other sanctions	n/a
Is this report notable?	n/a
Summary of notability	n/a

Initial complaint

1. Whilst monitoring, testing services and conducting compliance checks of test results, the WASPA Compliance Department (“Complainant”) identified services which do not comply with the requirements as set out in the WASPA Code of Conduct (“Code”).
2. The Complainant’s tester conducted two separate tests on 13 March 2024 on the Telkom network and provided an outline of the test results, together with screenshots as evidence of various alleged breaches of the Code.
3. While browsing two different adult content websites, the tester clicked on an explicit (X18) adult content video with the intention to watch the selected video. The tester was instead directed to the landing page for a non-adult subscription service called ‘Big Cash’, charged at R5.00 per day. The tester elected to stop the tests at that point.
4. The Complainant’s tester conducted another separate test on 12 April 2024 on the MTN network and provided an outline of the test results, together with screenshots as evidence of various alleged breaches of the Code.
5. While browsing on an adult content website, the tester clicked on an explicit (X18) adult content video with the intention to watch the selected video. The tester was directed to another page with explicit (X18) adult content videos and clicked on a pop-up banner advertisement stating: *“See free videos. Petite babe worships big dick.”*
6. The tester was then directed to another page and clicked on the “PLAY VIDEO” button, with the expectation to watch the free explicit (X18) adult content video. The tester was directed to an age verification page and clicked on the “YES” button to confirm that they were an adult.

7. The tester was then directed to the landing page for a non-adult subscription service called 'YDot Games'. The tester then clicked on the "subscribe" call-to-action button and was directed to the confirmation page for a non-adult subscription service called 'YDot Games', charged at R5.00 per day. The tester elected to stop the test at that point.
 8. No adult content was available to subscribers of this service.
 9. The Complainant alleges that the Member has breached the provisions of clauses 5.1, 5.4, 5.5, 8.8, 21.3, 21.4, 21.5 and 21.11 of the Code.
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Member's response

10. The Member responded to the complaint by stating that they had proactively dealt with these non-compliant promotional campaigns before receiving the formal complaint from WASPA. In particular, they had stopped the campaigns on MTN as soon as they became aware of it through communication with MTN and they had addressed the Telkom campaign issues with their third-party advertising agents when they became aware of the issue through the WASPA Heads-Up process.
 11. The Member stated that all their marketing was done by third party advertising agencies and these agencies were under strict instruction to only use approved marketing flows and advertising creatives and materials in full compliance with the WASPA Code of Conduct.
 12. The Member stated that in this case the appointed advertising agents had deviated from the agreed marketing creatives and materials, which resulted in unwarranted creatives being used for the promotion of the Member's service.
 13. The Member confirmed that they do not operate any adult services at all.
 14. The Member stated that the materials used for these promotional campaigns and depicted in the complaint were not supplied by the Member to their marketing agents.
 15. The Member stated that the marketing agencies involved had been sanctioned internally.
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Complainant's further submissions

16. The Complainant referred to clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code and submitted that there was a positive obligation on the Member to ensure that third-party

marketing agencies promoted and marketed the Member's services in accordance with requirements of the Code.

17. With reference to the Member's submission that it had already proactively dealt with the issues raised in the formal complaint, the Complainant submitted that the action taken by the Member was in response to being notified by MTN and WASPA regarding a different case and the Member's response should therefore be classified as remedial or corrective.
 18. The Complainant submitted that at the time the tests giving rise to this complaint were conducted, the service acquisition flow for the two services were non-compliant.
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Sections of the Code considered

19. Clauses 5.1, 5.4, 5.5, 8.8, 21.3, 21.4, 21.5 and 21.11 of the Code were cited in the formal complaint and considered.
 20. Clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code were also considered.
 21. No other relevant clauses were assigned by WASPA.
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Decision

22. The Member has acknowledged that the promotional campaigns that were the subject of this complaint were not compliant with the requirements of the Code.
23. The Member's submission that these promotional campaigns were conducted by third party advertising agencies was not disputed by the Complainant.
24. However, the Complainant correctly stated that the Member has a positive obligation, in terms of clauses 3.6 of the Code, to ensure that such third party agencies, who are not members of WASPA, market the Member's services in a manner consistent with the requirements of the Code.
25. In the absence of any submissions to the contrary, it must be assumed that the third party agencies engaged by the Member are not members of WASPA.
26. Clause 3.7 of the Code states that the Member is liable for any breaches of the Code resulting from services marketed by such third party agencies.

27. Clause 3.7 also provides that if the Member can demonstrate that they have taken reasonable steps to ensure that these agencies market the Member's services in a manner consistent with the requirements of the Code, this must be considered as a mitigating factor when determining the extent of the Member's liability for any breaches of the Code.
28. With regard to the specific clauses of the Code that the Complainant alleges have been breached and after carefully reviewing the complaint and supporting evidence, I have made the following findings:
- 28.1 The Member has stated that it does not offer any adult services. It therefore follows that the Member was not able to provide the adult video content offered in these promotional campaigns. I am satisfied that there has been a breach of clause 5.1 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
- 28.2 When the advertising used to promote the Member's subscription service is viewed in its totality, I am satisfied that the representation made in the promotional material that adult video content can be viewed by clicking on the relevant thumbnails presented are clearly false. Similarly, the use of adult video content, which is highly salient, to market a gaming service is not fair to customers. I am satisfied that there has been a breach of clause 5.4 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
- 28.3 The fact that adult content has been used to promote a non-adult subscription service is inherently deceptive and likely to mislead consumers by ambiguity. The manner in which this advertising has been conducted was also intentional. I am satisfied that there has been a breach of clause 5.5 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
- 28.4 The adult video content that is promoted in the relevant advertising is clearly not the same content that is provided to customers as part of the Member's subscription service. The advertising misleads consumers into believing that it is for an entirely different service or for different content. I am satisfied that there has been a breach of clause 8.8 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
- 28.5 It is clear from the undisputed evidence provided by the Complainant that the relevant advertisements do not clearly indicate that they are for an adult service and they do not contain the words "18+". There has been a breach of clause 21.3 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.

- 28.6 It is not clear why clause 21.4 of the Code was cited by the Complainant in their complaint. This clause is not relevant to the current complaint because the URLs provided by the Complainant appear to direct visitors to web pages that are of an adult nature. The promotional material used was therefore in the context of the publications or other media in which they appeared. The complaint in respect of an alleged breach of clause 21.4 of the Code is therefore dismissed.
- 28.7 The Complainant did not provide any evidence to support an allegation that the Member (or any supplier, affiliate or sub-contractor engaged by the Member) failed to take reasonable steps to ensure that only persons of 18 years of age or older had access to adult content services. The test results did not indicate that any adult content services were accessed by or made accessible to the tester after they completed the subscription flow. The complaint in respect to an alleged breach of clause 21.5 of the Code is dismissed.
- 28.8 The relevant advertisements used depict screenshots of adult content that would be classified as “XX” or “X18” by the Film and Publication Board. There has been a breach of clause 21.11 of the Code for which the Member is responsible, and the complaint is accordingly upheld in this regard.
29. To summarize my findings, the Member is found to have breached clauses 5.1, 5.4, 5.5, 8.8, 21.3, and 21.11 of the Code. The complaints in respect of clauses 21.4 and 21.5 are dismissed.

Sanctions

30. When determining the appropriate sanctions to be imposed for the various breaches of the Code, the following factors must be taken into consideration:
- 30.1 Whether any previous successful complaints have been made against the Member in the past three years?
- 30.2 Whether any previous successful complaints of a similar nature have been made against the Member?
- 30.3 The nature and severity of the breach.
- 30.4 Whether any efforts were made by the Member to resolve the matter.
31. Furthermore, when considering the extent of the Member’s liability for the various breaches of the Code and the appropriate sanctions to be imposed, it must be

considered whether the Member has demonstrated that it took reasonable steps to ensure that the advertising agencies appointed by them do market their services in a manner consistent with the requirements of the Code. If so, this will be considered as a mitigating factor when determining such sanctions.

32. No previous complaints have been made against the Member. This is taken into account as a mitigating factor.
33. Taking into account the precedent set by WASPA adjudicators and appeal panels in previous complaints, it has been widely accepted that the use of adult content to promote non-adult services, as well as the failure to include required notifications in promotional material that depicts adult content, must be viewed in a very serious light, based on the potential risk of harm to consumers, especially children.
34. In its response to the complaint, the Member stated that:
 - 34.1 it had immediately stopped these non-compliant campaigns once it was alerted by MTN and WASPA through a Heads-Up;
 - 34.2 the advertising agencies engaged to market its services were under strict instruction to only use approved marketing flows and advertising creatives and materials in full compliance with the WASPA Code of Conduct;
 - 34.3 with these campaigns, the appointed advertising agents had deviated from the agreed marketing creatives and materials, which resulted in unwarranted creatives being used for the promotion of the Member's service; and
 - 34.4 the marketing agencies involved had been sanctioned internally.
35. The Member's statements in this regard were not challenged by the Complainant.
36. I am therefore satisfied that the Member did take certain steps to ensure that the agencies engaged by them were instructed to advertise their services in accordance with the requirements of the Code. I am also satisfied that upon being alerted to the existence of these non-compliant campaigns, the Member immediately stopped them.
37. However, what is of some concern, taking into account the severity of the various breaches, is that the Member sees the conduct of the agencies involved here merely as a "deviation" from the instructions given to them by the Member.
38. It is apparent from the manner in which these campaigns were conducted by these agencies that this was done intentionally and with a blatant disregard for the requirements of the Code.

39. What is even more alarming, taking into account the serious risk of harm to consumers, particularly children, is that the Member appears to have not immediately terminated the services of these advertising agencies and has instead chose to simply sanction them internally. The details of the internal sanctions imposed were not provided by the Member.
40. In light of all of the foregoing factors, the following fines are to be paid by the Member:
- 40.1 R5 000 for breach of clause 5.1;
 - 40.2 R5 000 for breach of clause 5.4;
 - 40.3 R10 000 for breach of clause 5.5;
 - 40.4 R5 000 for breach of clause 8.8;
 - 40.5 R10 000 for breach of clause 21.3; and
 - 40.6 R10 000 for breach of clause 21.11.
41. The Member is also strongly encouraged to terminate the services of the advertising agencies involved in conducting the non-compliant promotional campaigns referred to in this complaint.
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