



REPORT OF THE ADJUDICATOR

Complaint reference number:	13243
WASPA member(s):	Smartcall Technology Solutions (SP) (0090) JP Consulting (IP) (1192)
Membership number(s):	See above
Complainant:	Competitor
Type of complaint:	Adult Subscription Service
Date complaint was lodged:	2011-05-30
Date of the alleged offence:	2011-0
Relevant version of the Code:	10.0
Clauses considered:	Clauses 5.1.3, 5.2.1, 8.2.3, 11.2.1, 11.3
Relevant version of the Ad. Rules:	N/A

Related cases considered: 10701 and
13244

Complaint

Complaint 13243 was logged by a complainant regarding an unsolicited sms message he received via an international gateway resulting in subscription service.

The lengthy complaint progressed as follows:

- The formal complaint was sent to the WASP on 2011-05-31. The SP was also notified of this complaint on 2011-05-31.
- The complainant provided additional information on 2011-05-31 which was forwarded to the IP and SP.
- The SP provided clarification on 2011-05-31.
- The complainant responded on 2011-06-11 directly to the SP and the secretariat.
- The SP provided a response on 2011-06-01.
- The complainant responded on 2011-06-02 directly to the SP and secretariat.
- The SP responded to the complainant on 2011-06-02.
- The complainant responded again on 2011-06-02.

- SP responded on 2011-06-02.
- The SP provided a further response to the complainant on 2011-06-02.
- The complainant responded to the secretariat on 2011-06-02.
- The secretariat advised the complainant on 2011-06-02 that according to VC's logs - he number was billed.
- The complainant responded on 2011-06-03 which was forwarded to the SP and IP.
- The complainant provided a further response on 2011-06-06.
- The secretariat provided clarification to the complainant on 2011-06-07.
- The complainant responded again on 2011-06-09.
- The SP provided a response on behalf of their IP company on 2011-06-12.
- The complainant refused resolution on 2011-06-13 and 2011-06-14 and requested further information from the IP.
- The SP responded on 2011-06-27 advising that they will provide a response.
- The WASP secretariat followed up with the SP on 2011-07-08 and 2011-07-14.
- The SP provided a late response on 2011-07-27.

The Complainant alleges that he received and unsolicited wap push and sms advert for an adult chat service from the IP. The breaches of the code alleged were in respect of the clauses set out in the header to this report.

In summary the complaint sets out the following having been breached:

- Messages unsolicited;
- No opt-out in original message;
- Subscription process flawed;
- Automatic subscription; and
- Marketing of adult services directly in contravention of code.

Service provider's response

The SP referred the complaint to the IP. They also suspended the service immediately and the IP was suspended thereafter pending a full investigation by the SP.

Information provider's response

I will not repeat the IP's response verbatim as all parties involved have access to same. I will summarise the salient points thereof for further use of the report and for completeness.

The IP alleges that they at no point breached the Code. A particularly interesting aspect of their defence was that the company they utilised for doing their marketing breached the Code and thus they cannot be blamed. I feel it is worthwhile to address this point upfront. In my view if you are bound to comply with the Code in respect of all aspects of your offering of a service covered by the Code, and if you choose to outsource the provision of aspects of that service to a third party, you remain liable for all aspects of that service whether outsourced or not. If this were not the case WASPA members could merely outsource the entire service offering to a third party and avoid liability. I accordingly dismiss all arguments posited by the IP that they cannot be held liable for breaches of the code by their chosen service provider. It is the IP's responsibility to ensure compliance with the code by their

service provider's be this by contractual obligations being placed upon such organisations or be it by a thorough and continual due diligence process. Ignorance of the marketing company's actions is thus also an insufficient defence in my view.

The IP denies breaching sections due to the following defences:

1. Breach of section 8.2.3: unsolicited advert for adult content service
 - a. The deny breaching this section due to the fact that the alleged unsolicited direct message advertised a portal which contained the adult service amongst other services and was not an advert for the adult service itself; and
 - b. The service still contained the required subscription and age confirmation steps.
 2. Breach of section 5.2.1: unsolicited advert
 - a. They had no knowledge of these messages being sent and were not aware that they did not comply with the Code.
 3. Breach of section 5.1.3: no opt out instructions
 - a. They had no knowledge of these messages being sent and were not aware that they did not comply with the Code.
 4. Breach of sections 11.2 and 11.3: subscription process via sms or wap
 - a. They claim the Complainant requested further information of the services;
 - b. The Complainant sent the link to the SP and the SP subscribed the Complainant via and opt-out process;
 - c. No further messages were sent (welcome and notification of subscription) due to the service being suspended.
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Sections of the Code considered

5.1. Sending of commercial communications

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:
(a) the recipient has requested the message;
(b) the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or

(c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

8.2. Prohibited practices

8.2.3. Adult services may not be marketed via direct communications with a customer of non-adult services, unless that customer has explicitly given permission for such marketing to take place and the customer has confirmed that they are, in fact, an adult.

11.2. Subscription process

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

11.3. Subscription initiated via web or WAP

11.3.1. If a subscription service is initiated by entering a customer's mobile number on a web page or WAP site, then a separate confirmation message must be sent to the customer's mobile handset in order to prove that the number entered matches the customer's mobile handset number. This message may either:

- (a) contain a PIN which is then confirmed or validated on the web page, or
- (b) contain a URL with a unique identifier, which, when clicked, validates the handset number.

11.3.2. For any subscription services that are initiated via WAP, it is a requirement for the service provider who has a direct contract with the network operator to display a WAP confirmation page to the potential subscriber. This confirmation page must be displayed after the subscriber has first indicated an interest in the subscription service by clicking on a "join" or similar link.

11.3.3. The WAP confirmation page must display the following information in a clear and easy to read manner:

- (a) The name of the service and an indication that it is a subscription service
- (b) The price and frequency of billing
- (c) A phone number for customer support

11.3.4. Where it is necessary for a consumer to confirm that their MSISDN may be made available to an application, this may be done by including the following wording on the WAP confirmation page: [Application name] has requested that your mobile number be made available.

11.3.5. The information listed in 11.3.3 and 11.3.4 above must be presented as text and not as an image.

11.3.6. The WAP confirmation page described above must also present a confirmation button. It must be clearly communicated to the customer on the confirmation page that clicking the confirmation button will initiate a subscription service.

11.3.7. The WAP confirmation page may not contain any marketing messages or other content that is likely to distract the customer from the required confirmation information and process.

11.3.8. The WAP confirmation page must offer all languages used in the promotional material for that service.

Decision

The IP has not complied with the provisions of the Code. Generally, I feel that their argument of ignorance or lack of liability for the actions of their appointed third party contractors does not hold as a valid defence.

I furthermore find that their argument in terms of clauses are not valid as set out below. I will set out the clauses and their arguments for ease of reference:

1. Breach of section 8.2.3: unsolicited advert for adult content service
 - a. The deny breaching this section due to the fact that the alleged unsolicited direct message advertised a portal which contained the adult service amongst other services and was not an advert for the adult service itself; and
 - b. The service still contained the required subscription and age confirmation steps.

Decision: This clause has been breached. The fact that other services were also advertised on this portal does not get around the fact that this message marketed a portal containing adult services.

2. Breach of section 5.2.1: unsolicited advert
 - a. They had no knowledge of these messages being sent and were not aware that they did not comply with the Code.
3. Breach of section 5.1.3: no opt out instructions
 - a. They had no knowledge of these messages being sent and were not aware that they did not comply with the Code.

Decision: As stated above, ignorance of the actions of your appointed third party service provider is no defence for your service failing to comply with the Code in all respects.

4. Breach of sections 11.2 and 11.3: subscription process via sms or wap
 - a. They claim the Complainant requested further information of the services;
 - b. The Complainant sent the link to the SP and the SP subscribed the Complainant via and opt-out process;
 - c. No further messages were sent (welcome and notification of subscription) due to the service being suspended.

Decision: I am not going to find on the issue of automatic subscription due to the fact that on request of a complaint by the Complainant the SP tested the link sent and the

Complainant was subscribed through the testing of the service. However, the confirmation of subscription versus the confirmation of age as set out in the chat advert were not clear but were in fact confusing and as such were not in line with the requirements of the Code.

Sanctions

SP: None

IP: I fine the IP R15 000 payable immediately to WASPA. A suspended fine of R10 000 is held in abeyance provided the IP doesn't infringe the Code in this manner again within 6 (six) months of this ruling (case 13339 excepted).