

<b>WASPA Member (SP)</b>	iTouch
<b>Information Provider (IP)</b>	N/A
<b>Service Type</b>	Various breaches
<b>Source of Complaint</b>	Anonymous
<b>Complaint Number</b>	#4345
<b>Code of Conduct Version</b>	5.7
<b>Advertising Rules Version</b>	1.6
<b>Date of Adjudication</b>	14/07/2008

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## **Complaint**

The Complainant in this matter raised various issues and it is in the opinion of the Adjudicator that it be produced in full here:

“Below is actual usage and responses received from this service:

SMS message received on +27836017015 on 11/05/2008 at 10h16 and on 18/05/2008 at 10:11:

“EXCLUSIVE OFFER ! wild uncensored hardcore vids Get them now from the hottest & sexiest LESBIAN club!sms MOV to 39999 (R10/5daysSubscriptionServicesmsOUTto39999)”

I then text messaged the service (MOV to 39999) on 14/05/2008 at 17h10 from mobile number: +2773 794 5282.

- 1.) No welcome message received
- 2.) No required MTN double opt in message received.
- 3.) No Double opt in done for this MSISDN.

R10 was deducted from the pay as you go account balance.

On 22 April 2008 the following sms's were sent to the short code 39999:

- 1.) 15h23 MOV

Response received: Hay babe, U r already part of this sexy club! Visit wap.lsexy.co.za, we have new content every week that will tickle you more than pink. 4 help call 0822327600.

- a. Wap link returns: The page contains errors and can not be displayed
- b. No mention of age restriction for service

2.) 15h42 Stop ALL

Response received: Sorry, according to our records, you are not an Alerts subscriber. Customer Care: 0822327400.

3.) 15h44 Stop Mov

Response received: Sorry, according to our records, you are not an Alerts subscriber. Customer Care: 0822327400.

4.) 15:45 Mov

Response received: Hay babe, U r already part of this sexy club! Visit wap.lsexy.co.za, we have new content every week that will tickle you more than pink. 4 help call 0822327600.

5.) 16:00 Stop Lesbian

Response received: Sorry, according to our records, you are not an Alerts subscriber. Customer Care: 0822327400.

Call centre was then contacted who confirmed that user was subscribed and that to stop the subscription, user would need to send "STOPL" to 39999.

User then unsubscribed, using the keyword STOPL and received a reply message:

"Hay babe! U have decided to leave the mansion. Ur VIP pass will expire in 24hrs, we really hope u come back soon 2 play some more. Wap.lsexy.co.za/0822327600

User then re-subscribed immediately after that but did not receive a welcome message or MTN double opt in request.

In addition to this a separate number has been subscribed to this service for several weeks, billing is continuing but no welcome message was received and no reminder messages are being received.

Code Violations:

4.1.1. Members are committed to honest and fair dealings with their customers.

- In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

- This service is intentionally trying to deceive the public and is not operated in good-faith. The subscription cost is clearly visible but a user is not confirmed as a subscriber, seemingly not able to access the wap portal and is not availed of a stop mechanism.

It is further stated in the code that:

3.3.3. A member is not liable for any failure to provide a service due to circumstances beyond that member's control.

- This is acceptable for a technical issue but this service has been used on three separate occasions over several weeks by different MSISDN's and in all cases no welcome messages have been received even though billing has taken place. All expected messages were received; except the welcome message.

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

(a) 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 must be included at the start of any messaging service, for example: "reply STOP to opt out".

- The initial marketing message send gives the details of smsOUTto39999, STOP ALL was sent and reply indicates that user is not a member when trying to unsubscribe. Even though the above relates to marketing messages, it stipulates that "STOP" needs to be a valid keyword.

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

Advertising guidelines: Best Practice Display text: "Adults Only" or Display text: "You must be over 18 to view images"

- No indication made that service is for over 18's only in the marketing or follow up messages: "EXCLUSIVE OFFER ! wild uncensored hardcore vids Get them now from the hottest & sexiest LESBIAN club!sms MOV to 39999(R10/5daysSubscriptionServicesmsOUTto39999)"

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

- No interaction with an iTouch service had occurred from this sim (+27836017015) for many months. Certainly not within 3 months. This is not an isolated case as the same was experienced by several of our MSISDNs.
- iTouch has already been reprimanded and fined for this offence on several occasions eg. Complaint #2402 on 28 January 2008.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

- A colleague and I have sms'd MOV to 39999 on three occasions, from different sim's and not received any form of welcome. We ask that the monitor also test this service as soon as possible.

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

- No information regarding the stopping of this service was received via sms.

11.2.3. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

- This has been adhered to with STOPL but in such a way that the user would not know unless they requested information from the help desk.
  - This is clearly manipulating the code in order to make unsubscribing from this service difficult.
  - STOP All – states that you are not a member
  - STOP LESBIAN (name of club) – states that you are not a member
  - STOP MOV (initial subscribing keyword) – states that you are not a member.

11.1.8. A monthly reminder SMS must be sent to all content subscription service customers containing the following information:

- (a) The name of the subscription service;
  - (b) The cost of the subscription service and the frequency of the charges;
  - (c) The service provider's telephone number.
- An alternative sim was used earlier in the year to test this service and no reminder messages have been received.

As members of WASPA are required to abide by network rules:

MTN states that an independent confirmation must be obtained for subscription services (i.e. a Double Opt In). This is not done, but user is subscribed.

This service should NOT have sent the commercial message it did (8.1.4), it FAILED to send a welcome message (11.1.7), users are UNABLE to unsubscribe (11.2.1) other than via a very cryptic method (which is clearly misleading 4.1.1 and 4.1.2), the WAP site didn't work, which based on the other misleading behaviour appears to be planned.

NO reminder messages have been received (11.1.8).

It appears that the service allows users to join, no further correspondence is sent and normal STOP mechanisms are carefully configured to make a user believe that that are not actually subscribed.”

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## **SP Response**

No response was received from the SP despite numerous attempts by the WASPA Secretariat to the last notified contact details of the SP.

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## **Sections of the Code of Conduct considered**

4.1.1. Members are committed to honest and fair dealings with their customers.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission

5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:

(a) 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 must be included at the start of any messaging service, for example: "reply STOP to opt out".

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

8.1.4. Marketing messages (including commercial communications) may no longer be sent to a customer of an adult service if that customer has not made use of the service during the preceding three months. This is to prevent the accidental marketing of such services to children as a result of a recycled telephone number.

11.1.7. Once a customer has subscribed to a subscription service, a notification message must be sent to the customer containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) Clear and concise instructions for unsubscribing from the service;
- (d) The service provider's telephone number.

11.1.8. A monthly reminder SMS must be sent to all content subscription service customers containing the following information:

- (a) The name of the subscription service;
- (b) The cost of the subscription service and the frequency of the charges;
- (c) The service provider's telephone number.

11.2.1. Instructions on terminating a subscription service must be clear, easy to understand, and readily available.

11.2.3. Customers must be able to unsubscribe from any subscription service via SMS using no more than two words, one of which must be 'STOP'.

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## **Decision**

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. In this particular instance, the WASPA Secretariat has made no less than six attempts in its efforts to elicit a response from the SP at the contact details last provided by it.

The Adjudicator is therefore satisfied that the SP had more than enough time to file a response as is required by section 13.3.4 of the WASPA Code of Conduct. In the absence of the SP raising such a response, the Adjudicator has to assume that the SP, as is indicated in section 13.3.5 of the WASPA Code of Conduct, does not wish to respond to the claim. In light of these circumstances the

Adjudicator has no alternative but to accept the uncontested version of the Complainant.

Without repeating what has already been mentioned in the Complaint itself the Adjudicator has reviewed every allegation lodged against the SP. The Adjudicator has been given no reason to doubt the credibility of the Complainant's version and will therefore have to proceed on the basis that the facts are as given by the Complainant.

After carefully reviewing the Complainant's interpretation of the sections of the Code, the Adjudicator is of the firm opinion, that there have indeed been various breaches of the Code.

With regards to these sections of the Code allegedly being breached, the Adjudicator is of the same opinion as the Complainant in its allegations.

The Adjudicator therefore finds that the SP is in breach of section 4.1.1 read in conjunction with section 4.1.2. It further finds that the SP is in breach of sections 5.1.4, 8.1.1, 8.1.4, 11.1.7, 11.1.8, 11.2.1 and 11.2.3.

The Complaint is upheld.

In determining an appropriate sanction, the following factors were considered:

- The prior record of the SP with regard to breaches of the abovementioned sections of the WASPA Code of Conduct; and
- The failure of the SP to respond to the Complaint.

In order to get a clearer picture of the SP's record with regards to previous breaches of the various sections, the Adjudicator has produced a list of previous offences and where applicable, subsequent fines:

#### Section 4.1.1

Adjudication # 0059  
Adjudication # 0158  
Adjudication # 0633 R 16 000, 00

#### Section 4.1.2

Adjudication # 0059

#### Section 5.1.4

Adjudication #1655 R 2 500, 00  
Adjudication #1680 R 2 500, 00  
Adjudication #1767 R 11 000, 00  
Adjudication #2409 R 10 000, 00  
Adjudication #2040 R 11 000, 00

Section 11.1.7

Adjudication #1655 R 2 500, 00  
Adjudication #1680 R 2 500, 00

There were no previous offences related to sections 8.1.1, 8.1.4, 11.1.8, 11.2.1 and 11.2.3.

For these breaches the SP is fined R 2 500, 00 for each section.

For its breach of section 4.1.1 read in conjunction with section 4.1.2, the SP is fined R 20 000, 00.

For its breach of section 5.1.4, the SP is fined R 15 000, 00.

For its breach of section 11.1.7, the SP is fined R 5 000, 00.

The SP is therefore fined R 52 000, 00 in total payable to the WASPA Secretariat within five (5) days of notification hereof.

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