



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	13244
<b>WASPA member(s):</b>	Smartcall Technology Solutions (SP) (0090) JP Consulting (IP) (1192)
<b>Membership number(s):</b>	See above
<b>Complainant:</b>	Competitor
<b>Type of complaint:</b>	Adult Subscription Service
<b>Date complaint was lodged:</b>	2011-05-30
<b>Date of the alleged offence:</b>	Not apparent
<b>Relevant version of the Code:</b>	10.0
<b>Clauses considered:</b>	Clauses 5.1.3, 5.2.1, 8.2.3, 11.2.1, 11.3
<b>Relevant version of the Ad. Rules:</b>	N/A

**Related cases considered:** 10701; 12343

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### Complaint

Complaint 13244 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 SP responded on 2011-06-01.
- The SP responded on 2011-06-12 on behalf of the IP.
- Complainant refused resolution on 2011-06-14.

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 are 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; and
  - Marketing of adult services directly in contravention of code.
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### **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.
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## Sections of the Code considered

### 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.

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## 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.

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.

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**Sanctions**

Due to the fact that the adjudicator is only entitled to rule in terms of breaches of the Code, if the Complainant is concerned about the use and availability of their personal details they could consider taking the matter of the unauthorised use of their personal details up with the Consumer Commission of the Department of Trade and Industry.

I fine the IP R10 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.