



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	AMV Holdings / Opera Interactive
<b>Information Provider (IP):</b>	“Not applicable”
<b>Service Type:</b>	Adult Service
<b>Complainant:</b>	“Public”
<b>Complaint Number:</b>	8438
<b>Code Version:</b>	9.0
<b>Advertising Rules Version:</b>	“Not applicable”

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### Complaint

Complainant complained of subscription process in respect of an adult subscription service as well as the sending of unsolicited sms's to minors relating to such adult subscription service.. Following on his sending of an unsubscribe message to the WASPA member, the complainant was unsubscribed from the service, the mobile number involved permanently barred and all monies deducted repaid in full.

Notwithstanding the foregoing, the complainant held that his complaint had not been resolved to his satisfaction due to the fact that:

- a) The method for assessing whether or not a recipient is a minor or not is insufficient; and
  - b) The fact that unsolicited sms's of an adult nature are being sent to minors.
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### Service provider's response

The service provider responded with details of how and when the subscription had occurred as well as details of how and when billing had occurred and details of removal from subscription to the service of the complainant and consequent refunding of monies deducted.

The service provider's response was as follows:

“Our logs indicate that:

On the 19th November the user accessed our mobile content site through an advertisement on an affiliate's website.

While browsing the internet on their Nokia6280 cell phone the user responded to an advert for our Adult Land WAP site.

The site states that:

CLICK TO SUBSCRIBE FOR R14/2DAY

Please confirm you are aged 18+

Provider: BS Mobile.

YES

By clicking Yes you confirm subscription service entry. R14/2days.

Sms STOP to 31922 to end service.

At 17:04:00 the user clicked the 'Yes' button to accept the terms and join the subscription. The user was then diverted through to the Adult Land site and sent the following welcome message:

Thanks 4 Adult Land!Content link on its way!Click on it 2 get ur content!Probs?Call 011-461-0317.Sms STOP to 31922 to end subscription. R14/2day.18+

The first stop we received was:

2009-11-20 04:35:29      Opera                      31922                      Stop

The user was then unsubscribed and sent a free confirmation.

By actively confirming that they were over 18 by clicking the 'yes' button, the user has agreed to receive promotions of an adult nature.

We have now ensured however, that the user has been blacklisted from all future interactions with our company.”

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

The service complained of falls within the ambit of the definition of an adult service as set out in the Code of Conduct. The sections of the Code of Conduct applicable to this issue are:

- a) 2.7 defining Children's service;
- b) 7.2.1-7.2.5 relating to prohibited practices for Children's Services;
- c) 8.1.3 relating to the steps needing to be taken to ensure you are not dealing with a minor;
- d) 8.1.4 relating to marketing messages sent to customers of adult services; and
- e) 8.1.5 relating to the content of such marketing messages.

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### **Decision**

It is my decision after careful consideration of both the code and the intention behind the drafting thereof that the WASPA member/service provider has fallen foul of sections 7.2.1-7.2.5, 8.1.4 and 8.1.5 (partially or totally) but not 8.1.3.

The rational for my decision is as follows:

1. The minor in question unintentionally subscribed to an adult content service via a wap site link on a gaming website. In my view this makes the service a Children's service as contemplated by the Code due to the pace in which the link was placed.
2. Bearing this in mind, the WASPA member clearly falls foul of the provisions relating to sections 7.2.1 through 7.2.5 of the Code which prohibited certain practices in relation to Children's services. At this point I feel it is prudent to refer to case 4673 in which the WASPA member was found guilty of the same violations and fined a substantial sum of money.
3. With regards to section 8.1.3 the Code does not require that the WASPA member do anything other than to "take reasonable steps to ensure that only persons of 18 years or older have access to adult content services. Explicit confirmation of a user's age must be obtained...". In my view the WASPA member took these steps. The Code does not require any personal or further verification.
4. With regards to section 8.1.4, although the clause prohibits the sending of marketing material about an adult content service to a customer who has not access the service within the preceding 3 month period, and although on a very narrow interpretation of the clause the "customer" had utilised the service in the preceding 3 month period due to their unintended subscription and subsequent unsubscription, I feel that once someone has unsubscribed they should not be deemed as having been a customer for the purposes of marketing post such unsubscription. The WASPA member has therefore abused this clause and should not have sent marketing sms's to this number.
5. With regards to 8.1.5 the Code specifically states that a marketing message about an adult service should never contain "any words or phrases that may be considered profane...". In my view the words in the marketing sms "hardcore pumping" have obvious sexual overtones and must be considered profane, "pumping" being a well know slang term for sexual activity. Additionally, the message contained a link to the wap site with the adult content. See portion provided by complainant of sms sent:  
" Title: Whimpering girl loves hardcore pumping!\  
<http://wap.mob365.net/x67bya/fvmy>".
6. It also appears that the initial and unintended subscription to the adult service was through a link on a gaming site aimed at Children.
7. It is my opinion that notwithstanding the fact that the WASPA member promptly unsubscribed the complainant from the service and readily refunded all sums deducted in error, as well as the fact that in my view they did not fall foul of the mechanism required to assess minority of a customer, the content of the marketing material clearly falls foul of the Code of Conduct.

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## Sanctions

As this appears to be one of numerous complaints about breaches of the Code of Conduct by the WASPA member I feel the sanction should be sufficiently onerous eventhough many of the other complaints refer to pricing irregularities the intention of the WASPA member to blatantly and continually flout the Code seems obvious.

The WASPA member must amend their adverts to exclude profanities and links to content described by such profanity. They must further desist from placing such links or marketing the service on sites clearly intended to be Children's service, for example gaming websites.

The WASPA member is further fined an amount of R100 000.00 (one hundred thousand rand) to be paid within 5 (five) working days of this adjudication to the WASPA Secretariat.