



## Report of the Adjudicator

Complaint number	#58519
Cited WASPA members	Twistbox Entertainment
Notifiable WASPA members	n/a
Source of the complaint	WASPA Compliance Department
Complaint short description	Non-compliant adult subscription service
Date complaint lodged	2023-03-28
Date of alleged breach	2023-02-23; 2023-03-02; 2023-03-13; 2023-03-15
Applicable version of the Code	v17.3
Clauses of the Code cited	5.1, 5.4, 5.5, 8.8, 21.3, 21.11, and 23A.5(c)
Related complaints considered	n/a
Fines imposed	Member fined following amounts:  R5 000 for breach of clause 5.5; R5 000 for breach of clause 8.8; R10 000 for breach of clause 21.3; R10 000 for breach of clause 21.11;

	R5 000 for breach of clause 23A.5(c).
Other sanctions	n/a
Is this report notable?	n/a
Summary of notability	n/a

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## Initial complaint

1. On four separate occasions (on 28 February 2023, 2 March 2023, 13 March 2023, and 15 March 2023), while browsing on different adult websites, a tester from the WASPA Compliance Department detected alleged non-compliance with the requirements of the WASPA Code of Conduct in relation to the advertising of the Member's "Sex Club" adult subscription service.
2. The test results provided by the Complainant showed the tester browsing on adult websites and being offered free explicit adult videos to watch. On each occasion, when the tester clicked on the "Play" call-to-action provided on the site for their chosen video, the video did not play and the tester was redirected to a landing page for the Member's "Sex Club" adult subscription service.
3. The Complainant alleged that this is misleading advertising of the Member's service in that the tester was misled into believing that they were able to watch a free explicit adult video when instead they were directed to a paid-for adult subscription service.
4. The Complainant also alleged that the call-to-action button on the Member's service landing page is misleading in that the tester was misled into believing that by clicking on the "Continue" call-to-action button, the free explicit adult video they were trying to access and watch would then play. Instead, by clicking on the "Continue" button they would be subscribed to the Member's adult subscription service.
5. In support of the complaint, the Complainant provided an outline of the tester's experience when interacting with these sites, together with screenshots of the relevant webpages and adverts.
6. The tester elected to stop the test before completing the subscription process since alleged multiple breaches of the Code had been detected already.

7. The Complainant alleged that the advertising and subscription acquisition flow for the Member's "Sex Club" adult subscription service breaches the provisions of clauses 5.1, 5.4, 5.5, 8.8, 21.3, 21.11, and 23A.5(c) of the WASPA Code of Conduct.
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## **Member's response**

8. The Member responded to the complaint by pausing all live advertising campaigns for its "Sex Club" subscription service and requested URL logs from WASPA so that it could investigate the matter further to identify and act on the specific campaigns, sites or sources that were alleged to be non-compliant with the requirements of the WASPA Code of Conduct.
9. After receiving the relevant URL logs from WASPA, the Member was able to confirm that the adult sites and advertising campaigns, which are the subject of the complaint, were found on an advertising network provided by Exoclick, who was a supplier to the Member.
10. The Member suspended all live campaigns with Exoclick to give it an opportunity to review the issues complained of with Exoclick and to inform them of the malicious sites on the network where Exoclick were either buying or selling traffic from.
11. The Member's representative tested the reported sites themselves and confirmed that the explicit adult videos offered for viewing on the sites could not be watched. Instead, when they clicked on the videos chosen, this triggered multiple push messages, endless redirects away from the original page, and a series of intrusive alerts. The Member's representative acknowledged that, as an end user, they were frustrated by the experience.
12. The Member confirmed that the use of mobile "pop under" adverts, which were the type of advert used for these advertising campaigns, could be used maliciously by a site owner or advertising network and can lead to a terrible user experience, which the Member alleges is what happened in this case.
13. The Member referenced an extract from Exoclick's website explaining how its "pop under" adverts worked. The Member stated that the landing page for its subscription service should have opened beneath the site being browsed on by a user, which is what this type of mobile ad unit calls for. Instead, the Member found that its service landing page was embedded into the relevant adult sites or served via a redirect.
14. The Member acknowledged that this could cause confusion and cause a user, who was expecting to receive free explicit adult content, feel misled.

15. The Member apologised for these misleading campaigns but stated that it relied on third party providers, sites and tools which were outside of its direct control.
16. The Member submitted that all of the elements of marketing material and flows within its absolute and direct control were fully compliant with the WASPA Code. In this regard, the Member provided screenshots of various display banner adverts which had been approved and uploaded for the relevant advertising campaigns for its Sex Club adult subscription service.
17. The Member stated that it felt that Exoclick may not even be aware of these malicious adult sites on its advertising network. The Member referred to dozens of redirects before and after users arrive at Exoclick's servers that were picked up from the URL trace report provided by WASPA. The Member confirmed that it would present this information to Exoclick in the hope that they would clean up such sites from their network or risk losing advertising revenue and long-standing partners such as the Member.
18. The Member also distinguished between other reputable adult video sites where it bought traffic from (e.g. Pornhub, Spangbang) and the malicious "click farm" sites, which it alleges were responsible for the non-compliant advertising in this complaint.
19. With regard to the Member's user acquisition/subscription flow, the Member stated that it utilizes a triple opt-in flow to ensure further honest and fair dealings, and which is safer for users.
20. The Member alleged that its direct relationship with the user starts at its service landing page and this is where it can control what it is promising or offering to users. The Member submitted that its landing pages were fully compliant with the requirements of the Code and were not purposely designed to mislead users, especially in situations where the Member does not know what sites the traffic is originating from.
21. Upon clicking the call-to-action button on the service landing page, a user is presented with the age verification to confirm that they are 18+, and to inform them the service is for persons 18 and over. Once the user confirms they are 18+ and clicks "yes", they are sent to the MTN hosted payment page where the user is clearly presented with the service price, subscription duration, and is asked to *"Confirm your purchase of Sex Club from Twistbox"*.
22. The Member confirmed that it had changed the call-to-action button from "Continue" to "Join" immediately upon receiving the complaint, even though MTN themselves had used "Continue" on their own landing pages. The Member also stated that "Continue" was not misleading or representing and promising anything other than *"you're continuing to the next step of the process"*.

23. The Member stated that it has a very strict Traffic Policy & Guidelines policy which must be agreed to and signed by its advertising partners in order for them to work with the Member. The Member also indicated that it is quite selective with who it works with to ensure there are not any issues or bad practice.
24. In addition to its internal policies and strategy, the Member also employs self-discovery tools such as user behavior mechanisms, which automatically block suspicious user behavior.
25. The Member stated that it has been live in the South African market since August 2016 without any complaints or breaches of the code of conduct. This is the Member's first formal complaint. It did refer to previous Heads-Up complaints received previously from WASPA in the past year, but stated that its response to such complaints, as with this complaint, was immediate, thorough, and above and beyond what was asked.
26. The Member stated that it now realized that while it is proactive on many fronts, it could and should be doing more. In particular, it should be monitoring the user's journey prior to them arriving at its service landing pages, to ensure it is aware of and in control of as much of the flow and user experience as possible.
27. The Member stated further that since advertising has evolved and is far more dynamic than traditional display banner ads, it must evolve and adapt continuously. The Member understands that while it would love to be perfect, even doing everything it reasonably can and that is technically possible, nothing will ever be 100%. So, it is crucial that it does more and does not assume what it expects is what is happening.
28. As was the case with the tester and complainant, expectations are not always met and what it believes is the case, or appears to be, is not. The Member stated that it must do more to limit potential risks as much as possible to not only be compliant, but also aware.
29. The Member stated that it did not knowingly mislead the customer. However, it realized where and how the customer could have been misled as a result of the malicious use of adverts and promotion to the user, one of which happened to be the Member's otherwise compliant service, landing page and flow.
30. The Member apologized for not doing more and stated that it would take positives from this otherwise negative situation. It would be signing up to additional ad monitoring tools and adopt further vetting process to ensure this did not happen again and that it is fully aware of any promotional elements that it is not in control of and ensure they are compliant.
31. The Member also stated that it would not be activating any more mobile pop ad units since there was no way for it to be in full control of these adverts, including to ensure

that the 18+ icon is displayed and/or to ensure that XXX images are not shown as the call-to-action, which triggers the mobile pop advert.

32. The Member also suggested that there should be clear and objective guidelines for this type of ad format and that until there was, it was safer for the Member to not buy this traffic at all.
  33. It would also be sharing the WASPA Code of Conduct with all relevant account managers where it has live campaigns, to ensure they too are aware of the requirements from the Member's side. And it will continue to have honest and fair dealings with its customers by conducting a thorough review of all current campaigns, promotions, user journeys, and marketing materials.
  34. The Member also felt that given its track record of compliance and swift remedial action, it would have been much more in the public's best interest for WASPA to raise these matters using informal channels, such as the Heads-Up process, so that remedial action could be implemented much faster instead of having these campaigns active for over a month.
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### **Complainant's further submissions**

35. The Complainant disputed the Member's submission that it had been live in the South African market without any complaints or breaches of the WASPA Code of Conduct. The Complainant argued that by its own admission, the Member had previously received several informal Heads-Up complaints over the past year for breaching the Code.
36. The Complainant noted that that the Member had successfully reproduced its own tester's experience and was also frustrated in experiencing the misleading marketing of endless alerts and redirects. The Complainant alleged that this confirmed that there was non-compliant marketing campaigns leading to the Member's service.
37. The Complainant noted that the Member relied on third party providers but referred to clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the WASPA Code and submitted that there was a positive obligation on the Member to ensure that third-party marketing suppliers, in this case Exoclick, promoted and marketed the Member's services in accordance with requirements of the Code.
38. The Complainant disputed the Member's submission that the Member's direct relationship with the user starts at the service landing page, and referred to the banner adverts provided by the Member as part of its response. The Complainant reiterated that the recognised flow for an MTN user for an adult service is as follows:

*Ad banner-> Service landing page-> Age verification page-> Network Hosted Confirmation Page.*

39. The Complainant also referred to clause 24.15 of the Code and submitted that WASPA was entitled to make use of the formal complaint procedure after assessing the nature of the complaint and that its use of the formal complaint procedure in this case was correct due to there being sufficient *prima facie* evidence of several serious, material breaches of the Code.
  40. The Complainant stated that at the time of the alleged breach of the Code, version 17.3 of the Code was in effect. It submitted further that the "Continue" call-to-action button is misleading in that the tester was misled to believe that they could continue playing a video that in fact never played. If the user journey is viewed as a whole, the "Continue" call-to-action button follows various "Play" call-to-action buttons, which is misleading.
  41. The Complainant confirmed that it was not disputing that the Member's service was in context with the publication in which it appeared. The Complainant was instead stating that explicit marketing material was used (which is classified as XX or X18 by the Film and Publication Board) and this triggered the Member's service landing page. The advertised video content was explicit (XX or X18), while the Member's adult subscription service was rated 18+.
  42. The Complainant submitted further that the Member had not denied that the promotion and marketing aspect leading to its service was not compliant and had merely provided reasons in mitigation of the breaches caused or facilitated by alleged external third parties.
  43. The Complainant submitted that the Member should be held liable for these breaches of the Code.
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### **Member's further submissions**

44. The Member responded to the additional submissions made by the Complainant.
45. The Member submitted further that in a mobile "pop under" advertising campaign, the click prior to the service landing page is not always tied to a set creative. The page or advert prior to the service landing page in this instance was not creative that had been uploaded by the Member.
46. Since there was no creative used for this particular advert format (compared to when there is when a display banner advert is used and displayed to users), any action taken

on the prior site would initiate the service landing page by opening it up as a new tab/window in the user's browser.

47. If the Member's banner adverts had been used, they were fully compliant with the requirements of the Code and would be displayed prior to the user being sent to the age-verification page and then to the network-hosted confirmation page.
48. However, none of the buttons, banners, video screenshots, or any other element clicked on prior to the user arriving at the Member's landing page were creatives uploaded or used by the Member for these campaigns. The only creative uploaded and used was the service landing page, which the Member alleges was fully compliant.
49. The Member argued that the Heads-Up complaint process is an informal process used by WASPA and that its co-operation with this process does not constitute acknowledgement of any breach by the Member nor that a breach has been proven. These breaches are all alleged and cannot be accepted as a statement of fact. To clarify, the Member stated that this was its first formal complaint.
50. The Member submitted that the only reason these campaigns are categorized as being misleading was because there was no 18+ mentioned and the tester assumed that the XXX video was the advert. The Member denied that this was the case and stated that the advert is a mobile pop ad unit and the creative is the Member's service landing page.
51. The Member submitted that the fact that its representative had expressed frustration with the replicated user experience did not confirm any aspect of alleged non-compliance, as alleged by the Complainant.
52. The Member also submitted that adult sites like these were outside WASPA's jurisdiction. Furthermore, WASPA's compliance mandate is guided by the Code and there is not any jurisdiction over a website on the mobile web in general, nor is its mandate to govern / monitor user expectations.
53. The Member confirmed that it had not admitted non-compliance. No breach had been found yet for it to be held liable for.
54. The Member clarified that the banners adverts that it had supplied in its previous response were intended merely as examples of the Member's compliance when creatives like this are used as the marketing material for its services. It was not alleging that these materials were to be used in the mobile "pop" advert placements.
55. The Member urged WASPA to consider reviewing and creating specific provisions in the Code for all available ad units that are made available to the industry, since currently only display banner adverts are covered in the Code and all other ad units are otherwise open to various potential breaches.



56. The Member disputed that there is an MTN industry-acknowledged flow. Adult service flows or subscription initiated via web on MTN must be compliant with clauses 23A.5 and 23A.6 of the Code. The Member also argued that an “industry-acknowledged” flow is not part of the Code and is merely a guideline that can be used. There is no requirement that a banner advert must be part of the flow.
  57. The Member also argued that although the Code allows WASPA a discretion to determine which complaint process to use, such discretion should be used in a reasonable manner for WASPA to fulfil its mandate and should not be used punitively. The Member felt that the harm to the public could be reasonably avoided and could be limited when remedial options such as the Heads-Up process is used to limit the impact of any alleged non-compliant behaviour.
  58. The Member stated that it has an extensive history of collaboration to ensure compliance, so a formal, or even emergency procedure appeared at face value to be punitive in approach.
  59. The Member argued further that the "Continue" call-to-action on the service landing page does not promise any video and is not presented in the form of a video. It is a call-to-action to continue to be subscribed to the service. The Member reiterated that MTN had been using "Continue" for calls-to-action prior to the release of version 17.4 of the Code.
  60. The Member also stated that a distinction must be made between a service being in breach as opposed to the marketing material or flow. The Member argued that there was no allegation made that its service was not compliant.
  61. In conclusion, the Member disputes that the listed clauses of the Code were breached.
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## **Sections of the Code considered**

62. Clauses 5.1, 5.4, 5.5, 8.8, 21.3, 21.11, and 23A.5(c) of the WASPA Code of Conduct were cited in the formal complaint and considered.
  63. Clauses 3.1, 3.2, 3.5, 3.6 and 3.7 of the Code were also considered.
  64. No other relevant clauses were assigned by WASPA.
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## Decision

65. Before I deal with the merits of the complaint, it is necessary to consider certain submissions made by the Member regarding the process followed by WASPA when dealing with this complaint and the ambit of its jurisdiction.

### *Informal vs formal complaint process*

66. The Member has raised the point that the Heads-Up process may have been a better way for WASPA to deal with this complaint and that the exercise of its discretion to refer a formal complaint to adjudication may, in the Member's view, be considered to be punitive, taking into account the Member's track record of compliance.
67. In terms of clause 24.15, WASPA has the discretion to make use of either the informal, formal or emergency complaint procedure, as appropriate, to process any complaints received. In terms of clause 24.16, in the case of a complaint for which it is feasible for the member to provide a prompt remedy and where no material breach of the Code seems to have occurred, the informal complaint procedure will be followed.
68. Based on the results of the tests conducted by the Complainant, I am satisfied that it was reasonable for WASPA to hold the view that the alleged breaches of the Code, if upheld, were material. The alleged breaches relate to the use of explicit adult content in advertising for an adult subscription service, as well as alleged deceptive and misleading advertising of an adult subscription services. In both instances, if proven, these breaches are of a serious nature. This is in line with the findings of other independent adjudicators in past adjudications.
69. I am therefore satisfied that the use of the formal complaint procedure was appropriate in the circumstances.

### *Member's liability for non-compliance by third party suppliers*

70. A further issue that should be dealt with before the merits of the complaint are considered is whether Member should be liable for non-compliance with the requirements of the Code by third parties who the Member contracts with to advertise its services.
71. The Member has confirmed that the relevant adult sites complained of were found on the advertising network provided by Exoclick, a supplier to the Member.
72. The Member confirmed that it had signed up as an advertiser on Exoclick's digital platform to run advertising campaigns on Exoclick's advertising network for its "Sex Club" adult subscription service.

73. The Complainant has correctly referred to clause 3 of the WASPA Code in its submissions.
74. In terms of clause 3.1 of the Code, the advertising campaigns that were conducted by the Member on Exoclick's advertising network (which constitutes the marketing of the Member's subscription service for the purposes of clause 3) are subject to the relevant provisions of the Code as if Exoclick was a member of WASPA.
75. In terms of clause 3.5 of the Code, the Member has a positive obligation to ensure that Exoclick, as its supplier, is made aware of the requirements of the Code when marketing the Member's adult subscription service.
76. In terms of clause 3.6 of the Code, the Member has a positive obligation to ensure that Exoclick is marketing the Member's services in a manner consistent with the requirements of the Code.
77. In terms of clause 3.7, the Member is liable for any breaches of the Code resulting from the marketing of its subscription service by Exoclick.
78. Based on the applicability of these provisions of the Code, I am satisfied that even if it is found that the Member was not directly responsible for any breach of the Code in the advertising and marketing of its adult subscription service, the Member will still be liable for any breach of the Code by Exoclick, as its contracted supplier.
79. I will now consider each of the clauses of the Code which the Complainant has cited in its complaint. For the avoidance of doubt, where reference is made in a provision of the Code to a "member", that reference, by virtue of the provisions of clause 3 of the Code, must be deemed to include a reference to Exoclick, as a supplier to the Member.

*Alleged breach of clause 5.1*

80. No evidence was presented by the Complainant that the Member offered, promised, or charged for services that it is unable to provide. The Complainant's tester did not complete the subscription process and would therefore logically not know whether the Member was able to provide the adult subscription service offered by it. The complaint in respect of the alleged breach of clause 5.1 is therefore dismissed.

*Alleged breach of clause 5.4*

81. With regard to clause 5.4, the pertinent question is whether the Complainant's tester can be regarded as a "customer" of the Member. A customer is defined in clause 2.2B of the Code as "a consumer who has entered into a transaction with a WASPA member, either directly, or via a third party".

82. Again, since the tester did not complete the subscription process in any of the tests conducted, they did not enter into any transaction with the Member, and therefore cannot be regarded as a customer of the Member. The complaint in respect of the alleged breach of clause 5.4 is accordingly dismissed.

*Alleged breach of clause 5.5*

83. Based on the test results provided by the Complainant (and confirmed by the Member's own testing), I am satisfied that a visitor to the relevant sites reported would not be able to access and watch the free explicit adult videos offered for viewing on each respective site.
84. The owners/operators of these adult sites have therefore knowingly disseminated information that is false and deceptive, i.e. that explicit adult videos can be watched for free on the site by simply clicking on the "play" button provided with the video in question.
85. It is also likely that a visitor to these sites would be misled into believing that they would be able to watch the free explicit adult video offered to them, when this was not the case. It is also likely that a visitor seeking to watch these videos would not expect to be subscribed to a paid-for adult subscription service and would feel misled.
86. While I accept the Member's submission that a user's actual subjective expectations cannot be known, clause 5.5 simply requires that the relevant information is *likely* to mislead. I am satisfied that such a likelihood has been established.
87. The next question is whether the publication or dissemination of false and deceptive information on these adult sites formed part of the advertising of the Member's services.
88. The Member has confirmed that it selected the "popunder" advert format for the advertising of its subscription service on the Exoclick advertising network. It was also confirmed that popunder adverts were used on or with the relevant pages on these sites where the explicit video content was offered. These popunder adverts, when triggered through the tester's activity on the sites, triggered the redirects to the Member's service landing page.
89. When considering the flow of events from the time that the tester accessed the relevant adult sites and chose a video to watch, until they were directed to the network-hosted confirmation page for the Member's adult subscription service, I am satisfied that the adult sites and content published can be regarded as forming part of the overall advertising and subscription flow for the Member's subscription service.
90. Even though WASPA does not have jurisdiction over these sites directly, it does over advertising relating to the Member's services.

91. The next issue to be determined is whether Exoclick, and therefore the Member, by virtue of the provisions of clause 3 of the Code, should be held liable for the breach of clause 5.5 as a result of the false and deceptive publication of information (or information likely to mislead) on adult sites appearing on Exoclick's advertising network.
92. In its response to the complaint, the Member suggested that Exoclick may not have been aware that these adult sites were on its advertising network. I do not accept this as being plausible for the following reasons.
93. Exoclick states on its own website (accessible at <https://www.exoclick.com/about-us/>) that persons who wish to earn advertising revenue using Exoclick's advertising network can sign up as a publisher with Exoclick and add their relevant website addresses when doing so. Once submitted, the publisher and its sites are reviewed by Exoclick's compliance team. Once approved, the publisher can then create a number of "ad zones" on the relevant sites and select from the different advertising formats that can be published on such sites.
94. Exoclick also states on its website that its state-of-the-art ad serving platform automatically filters and rejects bot traffic, click farms, malwares and viruses.
95. Based on Exoclick's own statements regarding its procedures for signing up and vetting publishers, and the measures it employs to administer and monitor its advertising network, it would know or should have known which publishers were approved to use its network and to derive advertising revenue from the placement of adverts on or embedded in sites provided by them.
96. Exoclick is also best placed to exercise control over which sites are accepted as publishers on its advertising network and to monitor any "malicious" activity on such sites, including any non-compliance with the requirements of the WASPA Code of Conduct when services, which fall under WASPA's jurisdiction, are advertised via its advertising network.
97. I therefore find that there has been a breach of clause 5.5 of the Code and that Exoclick, and therefore the Member, by virtue of the provisions of clause 3 of the Code, are liable for such breach. The complaint in this regard is accordingly upheld.
98. The Complainant also alleged that the Member itself had knowingly disseminated information that was false and deceptive and/or was likely to mislead by designing its service landing pages in such a way that suggested that the explicit video content that the user was seeking to watch would be made available to them by clicking on the "Continue" call-to-action button appearing on the relevant landing pages.

99. Although each of the landing pages in question do display an adult video above the "Continue" call-to-action button, this video is not the same as the explicit video originally selected by the user on the previous adult sites. There is also nothing further on the landing page that would indicate that the video that was selected by the user on the adult sites previously visited could be viewed by pressing the "Continue" call-to-action button on the Member's landing pages. I therefore do not agree with the Complainant's contention in this regard.
100. However, a user would reasonably expect that pressing the "Continue" call-to-action button on the landing page would allow them to watch the video that is displayed immediately above this button on the Member's landing page. Instead, by pressing the "Continue" call-to-action on the landing page, the tester is directed to the age verification page and then to the network hosted confirmation page for the Member's subscription service.
101. The network hosted confirmation page, accessed by the tester in each test result, contains the following wording which appears above another "Continue" call-to-action button – *"just 1 click to watch the video"*. There is no other video displayed on the network hosted landing page so it is reasonable that a user would expect that the video displayed on the previous landing page can be accessed and watched by them pressing "Continue".
102. The manner in which the Member's landing page has been designed, and the "flow" between the landing page and the network hosted confirmation page is therefore likely to mislead by inaccuracy, ambiguity, exaggeration and omission. I therefore make a further finding that the Member is in breach of clause 5.5 in this regard.

*Alleged breach of clause 8.8*

103. With regard to the alleged breach of clause 8.8, I am satisfied that the explicit video content offered on the adult sites found on Exoclick's advertising network constitutes content promoted in the advertising of the Member's Sex Club subscription service.
104. The Member has confirmed that it selected the "popunder" advert format for the advertising of its subscription service on the Exoclick advertising network. It was also confirmed that popunder adverts were used on or with the relevant pages on these sites where the explicit video content was offered. These popunder adverts, when triggered through the tester's activity on the sites, triggered the redirects to the Member's service landing page.
105. The explicit video content promoted on the relevant adult sites (which is or would be classified as XX or X18 by the Films and Publications Board) is not the same as the content provided as part of the Member's advertised service (which would be classified as 18+).

106. Furthermore, the content promoted on the adult sites appears to be offered for free and without any requirement for the viewer to first join a paid-for adult subscription service.
107. I find that the content promoted on these sites, which forms part of the advertising of the Member's service, is not the same content provided as part of the Member's "Sex Club" adult subscription service, and further that the advertising of the Member's service in this manner was misleading. This constitutes a breach of clause 8.8 of the Code.
108. The Member has argued that it did not supply any marketing material used or related to the explicit video content promoted on these third party adult sites. However, even if the Member was not directly responsible for the publication of this content, the content did form part of these advertising campaigns and the Member is liable for the breach of clause 8.8, by virtue of the provisions of clause 3 of the Code. The complaint with regard to the alleged breach of clause 8.8 is accordingly upheld.

*Alleged breach of clause 21.3*

109. With regard to the alleged breach of clause 21.3, the pertinent issue is to identify what the relevant "advertisements" were for the purpose of clause 21.3.
110. On each of the adult sites reported, popunder adverts offered by Exoclick and selected by the Member, were used. These popunder adverts constitute "promotional material" or "advertisements" for the purposes of clause 21.3.
111. The Member's "Sex Club" subscription service is an adult service.
112. Based on the test results provided by the Complainant, there is no evidence that the relevant popunder adverts used, or any of the web pages they were placed in or with, contain the words "18+".
113. It is noted from the Member's own submissions that it has decided, after receiving this complaint, to stop using this type of advertising format because it is not able to control how they are used, including to ensure that the words "18+" are used.
114. I am satisfied that there has been a breach of clause 21.3 and the complaint against the Member is upheld in this regard.

*Alleged breach of clause 21.11*

115. The same issues arise when considering whether the provisions of clause 21.11 have been breached. The popunder adverts used for these campaigns, viewed together with the web pages that they appear in, with or under, collectively constitute "marketing material" for the purposes of clause 21.11.

116. The explicit content published on these web pages would be classified as XX or X18 by the Films and Publication Board, or would be likely to be classified as such, which is in contravention of clause 21.11.

117. The complaint in respect of the alleged breach of clause 21.11 is accordingly upheld.

*Alleged breach of clause 23A.5(c)*

118. The landing page for the Member's subscription service contains a call-to-action button labelled "Continue". The pertinent question is whether this call-to-action is misleading.

119. Taking into account that an adult video is displayed on the landing page immediately above the "Continue" call-to-action button (albeit not the same video previously offered for viewing on the relevant adult sites from which the tester was directed), it is plausible that a user would be misled into believing that by clicking on the "Continue" call-to-action, they would be able to watch that video and would not first need to subscribe to the Member's service.

120. I have noted that further information is published below the "Continue" call-to-action button to indicate that this is a subscription service. However, this wording is displayed in much smaller print and is not as prominent as the remainder of the elements of the landing page, including the call-to-action button.

121. I also do not agree with the Member's contention that "Continue" in this context means or implies that *"you're continuing to the next step of the process"*.

122. I therefore find that the Member has breached clause 23A.5(c) and the complaint in this regard is accordingly upheld.

*Summary of findings*

123. To summarize the findings made, the complaints in respect of the alleged breach of clauses 5.1 and 5.4 of the WASPA Code of Conduct are dismissed. The complaints in respect of the alleged breach of clauses 5.5, 8.8, 21.3, 21.11 and 23A.5(c) of the Code are upheld.

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## **Sanctions**

124. In determining appropriate sanctions against the Member, the following factors have been taken into consideration:



- 124.1 any previous successful complaints made against the Member in the past three years;
- 124.2 any previous successful complaints of a similar nature;
- 124.3 the nature and severity of the breach; and
- 124.4 any efforts made by the Member to resolve the matter.
125. I have also taken account previous precedent set by WASPA adjudicators and appeal panels in previous complaints for the same or similar contraventions when determining appropriate sanctions.
126. There have been no other formal complaints made or upheld against the Member. This is the first formal complaint made against the Member. This has been taken into account as a mitigating factor.
127. The Member also responded immediately after receiving notice of the complaint by suspending all active campaigns on the Exoclick network. This has been taken into account as a mitigating factor.
128. In terms of clause 3.7 of the Code, even though the Member has been found liable for various breaches of the Code resulting from the marketing of its services by a third party supplier that is not a member of WASPA, if the Member can demonstrate that they have taken reasonable steps to ensure that that party provides and markets services in a manner consistent with the requirements of the Code, then this must be considered as a mitigating factor when determining the extent of the Member's liability for such breaches.
129. In this regard I have considered the various submissions made by the Member and I am not satisfied that it has demonstrated that reasonable steps were taken by it to ensure that Exoclick, and publishers on Exoclick's advertising network, advertised and marketed its "Sex Club" subscription service in a manner consistent with the requirements of the Code.
130. The Member stated in its submissions that it has a very strict **Traffic Policy and Guidelines** when contracting with third party advertising partners/suppliers. However, the Member confirmed, in response to a query from the adjudicator, that when it signed up as an advertiser on Exoclick's digital platform, it did not provide Exoclick with a copy of its **Traffic Policy and Guidelines**.
131. In any event, after reviewing the Member's **Traffic Policy and Guidelines** document, there is no reference made in this document to the WASPA Code of Conduct or its requirements.

132. There is also no other evidence that the Member made Exoclick aware of the requirements of the WASPA Code of Conduct.
133. In its response to the complaint, the Member outlined a number of things that it would be implementing in future, including employing the use of ad monitoring tools, communicating the requirements of the Code to its account managers, and generally taking a more proactive approach to finding out the source of traffic being directed to its landing pages.
134. These are all steps that should reasonably have already been taken by the Member, taking into account that its subscription services are of an adult nature. The potential harm that can be caused to consumers through non-compliant advertising of adult services and, in particular, through the use of false, deceptive or misleading advertising campaigns is severe.
135. Based on the foregoing, I am satisfied that the following fines to be imposed on the Member are appropriate sanctions for each of the listed breaches:
- 135.1 The Member is fined an amount of R5 000 for the breach of clause 5.5;
- 135.2 The Member is fined an amount of R5 000 for the breach of clause 8.8;
- 135.3 The Member is fined an amount of R10 000 for the breach of clause 21.3;
- 135.4 The Member is fined an amount of R10 000 for the breach of clause 21.11; and
- 135.5 The Member is fined an amount of R5 000.00 in respect of the breach of clause 23A.5.
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