



REPORT OF THE ADJUDICATOR

Complaint reference number:	12488
WASPA member(s):	Buongiorno SA
Membership number(s):	0002
Complainant:	Competitor
Type of complaint:	Subscription Service and Promotional Competition
Date complaint was lodged:	2011-03-29
Date of the alleged offence:	Not ascertainable
Relevant version of the Code:	10.0
Clauses considered:	Clauses 4.1.1, 11.1.1, 11.1.2 and 11.2.3.
Relevant version of the Ad. Rules:	Not applicable

Related cases considered:

Complaint

Complaint 12488 is a complaint by a competitor of the SP regarding a service offered by the SP that the competitor feels does not comply with the WASPA Code. The complainant alleges that the SP's service relating to the chance to get an iPhone is contrary to the sections of the code listed above. The complainant has not gone into great detail around why these sections have been breached.

The complainant also alleges that the services constitutes "bundling" which I presume to be a reference to section 11.2.2 and false advertising.

Service provider's response

The SP firstly complained of the fact that they feel the escalation of this complaint to a formal adjudication prior to there being an attempt to resolve this matter through the informal process channel is undue.

The SP then went on to explain why there had been no breach of the Code. Due to the fact that both the SP and the complainant have site of this response I will not go into detail as to what was said save to say that the allegations were denied in full.

Sections of the Code considered

Section 4.1.1 Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

Section 11.1.1 Promotional material for all subscription services must prominently and explicitly **identify the services as "subscription services"**. This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

Section 11.2.2 Any request from a customer to join a subscription service must be an independent transaction, with the specific intention of subscribing to a service. **A request from a subscriber to join a subscription service may not be a request for a specific content item and may not be an entry into a competition or quiz.**

Section 11.2.3. Notwithstanding the above clause, **it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer.** In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

Decision

I considered the Code, the complaint and the response of the SP in determining how to rule on this case. Whilst the SP has clearly attempted to comply with the Code, I feel that in certain respects they have fallen short of the standard required. I will now set out below the sections alleged to have been breached, what has been done by the SP that they feel is sufficient to comply with the Code and how I feel such steps have fallen short of the Code.

Section 4.1.1 Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

Although an argument could be posed that the SP was not honest with their customers I do not feel that this particular section needs to be dealt with in any great detail save to say that I feel an ordinary consumer of the type to which this service would apply could be misled by the service offering.

Section 11.1.1 Promotional material for all subscription services must prominently and explicitly identify the services as "subscription services". This includes any promotional material where a subscription is required to obtain any portion of a service, facility, or information promoted in that material.

I feel that the SP has breached this section. Although the SP correctly points out that at all times (save in the instance of what appears to be an honest omission of an asterisk which omission, for the purpose of this case and due to it having been corrected, I have ignored) the services is stated as being a subscription service, I do not feel that this is done in a prominent manner as required.

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Section 11.2.3. Notwithstanding the above clause, it is permissible for a customer to be included as a participant in a promotional draw or competition as an additional benefit to being a subscription service customer. In such a case, it must be clear to the customer that the promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service may not be disguised as an entry into a competition.

I have dealt with section 11.2.2 and 11.2.3 together, the one being the exception to the rule of the other. Once again, although the SP alleges that they state that the obtaining of an iPhone is part of a loyalty and reward programme associated with the subscription service I do not feel that in all (or in fact in any) instance this has been clearly expressed. The entire campaign looks and feels like a competition to get an iPhone and not a subscription service and as such I feel the general tenor of it is that of subscribe to this service and win an iPhone which in my view falls foul of the requirements of section 11.2.2 and 11.2.3. Whilst the SP quite correctly points out that it is permissible to use a loyalty or reward programme as a legitimate marketing tool I feel it is not utilised sufficiently clearly to avoid it being contrary to the Code.

I therefore find that the SP has breached the sections of the Code as set out above.

Sanctions

Due to the fact that the SP has attempted to comply with the Code I have been lenient in my sanctioning of their behaviour.

I fine the SP R20 000 to be suspended in total for a period of 3 months to allow the SP to comply with the request set out below. Should the request not be complied with the fine will be payable immediately to WASPA.

I request that the SP modify all of the marketing in connection to this campaign so as to properly comply with the Code. Inter alia I would expect that it is made clearer that this is a subscription service. This must be done in a manner that is prominent so as not to be disguised by the potential to obtain a reward. Furthermore, the fact that the iPhone is a possible reward offered to people who both subscribe to the service and also join the loyalty or reward programme must be made clearer and should state at a minimum that the mere signing up to the subscription service does not enter you into a draw for the iPhone.

The campaign must be withdrawn immediately on receipt of this adjudication pending such amendments being effected. Confirmation of the withdrawal must be sent to WASPA within 48 hours of this adjudication report being received.