



REPORT OF THE ADJUDICATOR

Complaint reference number:	12969
WASPA member(s):	Viamedia (SP) Xcite Mobile (IP)
Membership number(s):	0043
Complainant:	Anonymous Competitor
Type of complaint:	Subscription Services / Competition Service
Date complaint was lodged:	2011-05-09
Date of the alleged offence:	Not mentioned
Relevant version of the Code:	10.0
Clauses considered:	2.9, 9.1.6, 9.2.2, 11.1.1, 11.2.2, 11.2.3, 11.2.4 and 11.2.5
Relevant version of the Ad. Rules:	2.3
Clauses considered:	9
Related cases considered:	11863, 10245

Complaint

The Complainant in this matter alleged that the SP breached certain provisions in the Code by offering subscription services bundled with competitions, and at the same time, utilising words prohibited by the Code.

Service provider's response

The Service Provider responded and the following is a verbatim copy of their response:

We address you for and on behalf of Xcite Mobile as the Information Provider (IP).

Kindly be advised that on the 06 June 2011, a response was duly drafted and emailed to the complainant and WASPA wherein we addressed the complaint at hand. Please be further advised that the position we hold remains that there is firstly no breach of the code and secondly we are of the view that there is no substance in this complaint as the complainant has neither suffered economic loss nor has he stated the possible recourse he wishes to achieve. We therefore are of the view that

the complainant may well be a competitor and not a member of the public, hence the malice in his miscomprehension of the detailed explanation provided to him.

In the initial complaint the complainant stated, "...but lucky I could stop her before she entered in the code they send to my phone..." We would like to further add that in terms of the chronology of events as per our log, the mobile number ##### has not subscribed to the Buffet Club nor has it entered anything relating to the trivia campaign. With regard to the clauses allegedly breached, our response remains the same.

9.1.6 Competition Services and promotional material must not:

(a) use words such as 'win' or 'prize' to describe items to be offered to all or a substantial majority of the participants;

(b) exaggerate the chance of winning a prize;

(c) suggest that winning a prize is a certainty;

(d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

The use of the word 'win' relates to the competition itself and is not a keyword, the code prohibits the use of the word 'win' as a keyword. The campaign focuses on the subscription; the competition element is therefore secondary to that. We state that there was no breach of this provision as the campaign personalises the opportunity to members of the club but without an exaggerated chance of winning, no certainty and no definite suggestion that persons have won nor have definitely secured the prize.

We address the allegation relating to clause 11.2;

11.2.2 any request for a customer to join a subscription service must be an independent transaction, with 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.

This is an offering of a membership service at a given cost with an added incentive of being entered into a competition with the chance of winning a prize. There has been no breach of this clause; the subscription is an independent transaction. The mobile pin must be inserted to join the club, without the insertion of the pin there can be no club membership. We turn the Secretariats view to complaint # 11863 in which the adjudicator held "...the code does not set out a blanket prohibition of any association of a competition or promotional draw with a subscription service, nor would it be desirable for it to do so as this would constitute a significant restriction on the ability of members to promote their services..."¹the adjudicator then held that there was no breach of section 11.2.2 read with section 11.2.3 of the code.

11.2.5 where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service/ and or where that message contains an activation code that when inputted by the user activates a subscription service, then that message along with the subscription initiation instructions and/ or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing]

The IP has duly complied with this clause and the format, flow and wording of the clause is adhered to. We turn the Secretariats view once again to complaint # 11863 in which the adjudicator held “...that it was essentially compliant in the sense that it explicitly sets out that by entering the code into the confirmation webpage the customer will be joining a subscription service charged at R 3 per day...” in the present instance after entering his MSISDN the customer would have received an sms reading

[Welcome, u joined the Buffet Club! To Play *120*31314*5#Content: <http://31314.mobi> 2 stop dial *120*31314#(60c/min). Club R3day CC: 0861111106].

Kindly be further advised that the IP does not “use people like Justin Bieber” as there is no visual representation of him in the campaign and the trivia question has four options applicable. The IP further does not “attract children and trick them (as they are easy prey) into unknowingly joining their services” , there is a clear indication under the terms and conditions [**2.1 Access to Service – In order to use the service you must be at least 18 years of age & have the bill payers permission. If you are under 21 (twenty one) then your parent or guardian should read and accept these terms of use and the Xcite Mobile Privacy Policy before you use any of the services**] that if the user is under 18 he/she must retain permission from a parent or guardian and such parent or guardian must take the onus upon themselves to read the terms of use.

It further claimed that it also complied with section 5.1.3 in facilitating a STOP opt-out request to facilitate the enforcement of section 5.1.2 at the lowest possible tariff.

The SP also stated that it complied with section 5.1.7 in affording the Complainant the opportunity to receive more information as to how the SP's client obtained the said information. It stated that the source of the information was Intimate Data via the South African Post Office. The SP explained that the Complainant refused the proposal.

Sections of the Code considered

2.9. A “**competition service**” is any competition or game with prizes or entry mechanism into a draw. Where an auction or a reverse auction has the characteristics of a competition service, it is considered to be a competition service.

9.1.6. Competition services and promotional material must not:

- (a) use words such as ‘win’ or ‘prize’ to describe items intended to be offered to all or a substantial majority of the participants;
- (b) exaggerate the chance of winning a prize;
- (c) suggest that winning a prize is a certainty;
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.

9.2.2. Competition services that are aimed at, or would reasonably be expected to be particularly attractive to children must not feature long or complex rules.

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.

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.

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.

11.2.4. Members must ensure that children accessing subscription services confirm that they have permission from a parent or guardian to do so.

11.2.5. Where a subscription service is initiated by a user replying to a message from a service provider where that message contains instructions for activating a service and/or where that message contains an activation code that when inputted by the user activates a subscription service, then that message, along with the subscription initiation instructions and/or activation code, must also include the subscription service information in the following format, flow and wording:

[service activation instructions and/or activation code]. You'll be subscribed to [XYZ service] from [name of service provider] at [cost of service and frequency of billing].

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the SP's subsequent reply. For clarification, the Adjudicator shall refer to the SP instead of the IP.

The Adjudicator wants to iterate the similarity of the facts in this matter to the facts considered material to the decision reached in adjudication 14403.

Before however proceeding with the merits of this case, the Adjudicator wants to stress its dismay at the Complainant's disregard towards WASPA in his failing to relay correct information (employed by competitor) to WASPA. This is viewed in a very serious light and the Secretariat is instructed to formally take notice of the fact that the competitor represented by the Complainant, is potentially abusing the process to further its own cause. Any similar action by the said competitor in the future should be actioned by the Secretariat.

It does however not preclude the Adjudicator from evaluating the merits of this case.

With regard to the use of the word "win";

Section 9.1.6 very clearly states that competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants.

The banner ad is a clear contravention of this section and nowhere does the Code prohibit the use of the word 'win' as a **keyword**.

It prohibits its use as a **word** as illustrated above.

The Adjudicator is of the opinion that the banner ad is a clear breach of section 9.1.6 (a) and finds the SP in breach thereof.

The Adjudicator is of the opinion that section 11.2.2's relevance to this matter and the section's subsequent interpretation at the hand of section 11.2.3 resembles the opinion formed by the adjudicator in adjudication 14403.

The only difference is that in this instance the SP did not provide any indication of a subscription service apart from the wording at the bottom of the page.

It might be argued that the wording "Get your content and you could win" assumes subscription.

However, section 11.1.1 is very clear that "subscription service" must be prominently displayed and in the correct format.

The Adjudicator is therefore of the opinion that section 11.1.1 and its relevant clause in the Advertising Rules were contravened.

Following the decision reached in 14403, the Adjudicator is of the opinion that the failure to display the subscription service prominently, as required by section 11.1.1, contributed into making the subscription service ancillary to the quiz, and not vice versa, as is required by section 11.2.3.

The SP is therefore found in breach of sections 11.2.3 and 11.2.2.

The argument proposed by the SP pertaining to the application of section 11.2.5 is misguided and the Adjudicator once again refer the reader to adjudication 14403.

The format, wording and flow of section 11.2.5 must be followed when sending the customer the pin. It must not be confused with section 11.5.2 which deals with the welcoming message. The Adjudicator in this matter did however not receive a copy of the pin message and will therefore refrain from making a ruling thereon.

A recent article stated the following: "As if his 10.4 million-strong Twitter following wasn't enough indication, Justin Bieber is considered the hottest topic for kids 14 and under, according to the latest KIDS survey from market research firm The NPD Group."

The Adjudicator is of the opinion that the banner ad could reasonably be expected to be particularly attractive to children due to the hairstyle that clearly reflects Justin Bieber.

Section 9.2.2 states that competition services that are aimed at, or would reasonably be expected to be particularly attractive to children must not feature long or complex rules.

The adjudicator has reviewed the terms and conditions and is of the opinion that its current format does not conform to section 9.2.2.

Section 11.2.4 states that members must ensure that children accessing subscription services must confirm that they have permission from a parent or guardian do to so.

The Adjudicator is of the opinion that by not complying with section 9.2.2, the SP failed in ensuring that children can confirm their parents' or guardians' consent.

This is further evidenced by the SP not placing the age restriction on the banner ad or subsequent landing page of the website.

It is therefore the opinion of the Adjudicator that the age restriction was not communicated clearly.

The Complaint is upheld.

Sanctions

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

- The prior record of the SP with regard to breaches of the relevant sections of the Code of Conduct; and
- The SP's subsequent response.

The sanctions referred to in 14403 apply as to the breach of section 11.2.2 read with section 11.2.3.

The SP is further fined:

- R 12 500-00 for its breach of section 9.1.6; and
- R 50 000-00 for its breaches of sections 9.2.2 and 11.2.4, of which R 40 000-00 is suspended for 1 year.

The fines must be paid within 5 (five) working days to the WASPA Secretariat after having received notice hereof.