



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	14403
<b>WASPA member(s):</b>	Viamedia (SP)
<b>Membership number(s):</b>	0043
<b>Complainant:</b>	WASPA Monitor
<b>Type of complaint:</b>	Subscription Services & Competition
<b>Date complaint was lodged:</b>	2011-08-16
<b>Date of the alleged offence:</b>	2011-08-10
<b>Relevant version of the Code:</b>	11.0
<b>Clauses considered:</b>	2.9, 4.1.2, 9.1.6, 11.1.1, 11.2.2, 11.2.3, 11.2.5, 14.9
<b>Relevant version of the Ad. Rules:</b>	2.3
<b>Clauses considered:</b>	9
<b>Related cases considered:</b>	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. The Complainant also reiterated in subsequent correspondence that the Complaint is only with regards to sections 11.2.2 and 11.2.3, different than originally proposed in the "Heads Up". The Complainant also provided in his / her response to the SP's reply a clarification on the procedural process regarding the "Heads Up".

---

### Service provider's response

The SP, on behalf of the IP submitted a response addressing all of the issues raised in the initial "Heads Up", in addition to the alleged breaches of the formal Complaint.

For clarification purposes, the Adjudicator shall refer to the SP instead of the IP.

Below is a verbatim copy of the SP's response:

Kindly be advised that on the 12 August 2011, a response to the heads up given by the media monitor was provided. In the response the IP provided reasons as to why the complaint was subjective in certain aspects [not codified in the WASPA code] and on other aspects, the IP was amenable to change the WEB landing page. However as per precedent, the IP expected a response from the media monitor and or a dialogue around this particular aspect, this did not take place and instead the media monitor on the 16 August 2011 escalated this matter. The IP would like it duly noted to the adjudicators that the subjective and inconsistent manner of the media monitor cannot be entertained in such a mode, as this is potentially dampening a decent working relationship.

In taking in the spirit of the code, which the IP respects, it must be noted however that clause 14.9.4 states that the "... media monitor may make use of the process if it seems feasible for **the member concerned to provide a prompt remedy to the problem identified.**" (Emphasis added), we are of the view that this matter could have been remedied without the necessity of escalation due to the IP being amenable to make certain codified changes, had the media monitor be able to justify the problems concerned with valid sections of the code and not subjectivity and unfounded statements.

Prior to addressing the issue at hand, the IP would like to note the following;

- ü With regards to the previous heads up and / or informal complaints raised by the media monitor, the IP has been more than obliging in the past to make the necessary changes upon dialogue and engagement with the monitor
- ü The precedent set by the media monitor has been one of engagement
- ü The IP has had no official previous complaints with regard to the WEB services it provides

The campaign complained of by the media monitor;

URL: [http://ads.vmmmap.co.za/a/newipad?bid=265&utm\\_campaign=newipad&am\\_src\\_cmp=newipad&utm\\_source=Ninja&am\\_src\\_prv=Ninja&utm\\_medium=smtm](http://ads.vmmmap.co.za/a/newipad?bid=265&utm_campaign=newipad&am_src_cmp=newipad&utm_source=Ninja&am_src_prv=Ninja&utm_medium=smtm)

is a subscription service run, with the possibility of a subscriber winning a blackberry and airtime. The overall feeling of this campaign cannot be said to be "misleading" as there are numerous places on the landing page where a possible subscriber is made aware that this is in fact a subscription service. One cannot say that there is no intention from the subscriber to opt into the service. It must be noted that there cannot be a stifling and unfounded interpretation [like the one given by the media monitor] of the format in which the creativeness of the campaign must occur, but an assistance and guidance of them.

With regards to the alleged breaches;

ü **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.**

There cannot be said to be dishonest and unfair dealings with the customer, neither can there be said that the pricing information has not been clearly and accurately conveyed to the customer. On the top left hand corner of the landing page in text that is not obscured and in a completely independent colour, the pricing of R 3/ day is shown in 16 point size font. There is nothing in either the code or the advertising

rules that states that this font should be bold – as per the suggestion of the media monitor. It must be further noted that there is no rule informing of the size of the competition, the media monitor unfoundedly makes a statement that “... *decreasing of the size of the competition side of the advert would also make the subscription side more prominent by making the advert more content focused*” it is therefore our view that the media monitor is attempting to make redundant our creative directors and take on that role herself.

ü **4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.**

The IP acknowledged that the use of the word “congratulations” was likely to mislead and or create ambiguity but in no way was the use of the word intended to disseminate information that is false or deceptive. The logic behind the use of such a word was to congratulate the user for landing on the page where the content could be requested.

The IP, in its address to the media monitor advised that it would be changed, and is still amenable to same.

ü **9.1.7. 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.**

With further regards to the use of the word “win”, the IP would like it to be noted that even though clause 9.1.7 of the Code prohibits the use of the word, there is not many other compartments in which the potential to triumph can be expressed in order for the subscribers to understand what is at offer. Therefore as this offer is in reality available to a subscriber who is successful, this information cannot be seen as false or deceptive neither does it mislead, create ambiguity, exaggerate or omit anything. There is no inaccuracy here as the blackberry and airtime are prizes that may be won.

ü **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.**

The WEB landing page makes it clear that the service offered to the consumer is in fact a subscription service. Should the adjudicator take time to view the page, the adjudicator will note that there are in fact three instances in which the consumer is informed of the service being a subscription service;

1. Top left hand corner states “subscription service R 3/day”
2. The lower part of the same landing page indicates “...by inserting your pin you acknowledge that you have read the terms & conditions...”
3. Just adjacent to that the page once again state “...subscription service R3 /day”

Should the adjudicator enter his / her cell phone number into the space provided, a further pointer that it is a subscription service would be seen in the form of the pin provided in which [prior to entering the pin on the page] the consumer is informed that this is a subscription service.

It is to be noted that there is also a reasonable expectation on behalf of the WASP that the consumer would further engage the terms and conditions provided for, as they would do before entering into any contract. The provision of content cannot be seen in isolation of any of the other contracts where consumers are expected to be aware of the conditions attached.

**ü 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.**

**ü 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 reasonably 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.**

The campaign is an independent transaction and is not an entry into the competition. Should the consumer not be part of the club, there would be no opportunity of success at the blackberry and airtime prize available. Therefore this competition aspect is incidental to being a club member. There is no codification as to the manner in which an incidental aspect should occur and the media monitor once again cannot attempt to take over the creative department of the IP by stating that "... subscribe to get unlimited content.as a club bonus, you could stand a chance to get a blackberry, iPod or even airtime" would be more of an achievement.

It is reasonably clear that that the blackberry and airtime is an additional benefit and as previously highlighted, this is a subscription service and at no point was it hidden or disguised from the consumer. Buongiorno #11863 [pg 11/15, para 14.3] the adjudicator stated "... the code does not appear to this adjudicator to prohibit explicitly a situation where a customer has both the intention to subscribe to a service and an accompanying intention to participate in a competition" and [pg 12/15, para 16] "...the fact that a competition is associated with the advertisement for a subscription service does not itself establish that there has been a breach of section 11.2.2 read with section 11.2.3".

**ü 11.3.1 if a subscription service is initiated by entering a customer's mobile number on a web page or WAP site then a separate confirmation message must be sent to the customers mobile handset in order to prove that the number entered matches the customers mobile handset number. This message may either:**

- a) Contain a PIN which is then confirmed or validated on the web page, or**
- b) Contain the name of the service, an explanation of the confirmation process, and a url with a unique identifier, which, when clicked, validates the handset number.**

The IP is confused as to why this has been lodged as a breach when it is in compliance with the requirements of the code, the media monitor has misinterpreted

this aspect, as the code **does not** state that subsection a **and** subsection b of clause 11.3.1 **must be** adhered to, the code states **either subsection a or subsection b** (emphasis added).

The message that would be received by the MSISDN that was entered on the web page would read as follows;

***“Hi! Your pin is:19662-Come join the fun!U could win NOW!Entering the PIN will subscribe you to the content”.***

The message received, contains a PIN which upon entry on the web page is validated.

Once this is completed, a welcome message stating;

***“Welcome,you have joined the Entertainment Club!Get ur content now at http://31314.mobi.To stop dial \*120\*31314#(60c/min).ClubR3/day,CC 0861111106”***

is received by that same MSISDN.

The media monitor stated in an email dated 10/08/2011 that the club is named “entertainment club”- the IP would like to reiterate once again that the media monitor has without noting the code standard, provided a jaded view on the naming of clubs. In submission the IP would like the adjudicators to take the following into consideration;

ü The promotion and sign up process as whole must be taken into account and not seen in isolation

ü Every step of the process, the user is aware of costs, frequency, opt out and what they are agreeing to which is in line with the requirements of the best practice and WASPA guidelines.

ü The Buongiorno #11863 [pg4/15, para10] raises the same point that the IP has raised here in that *“...it is inappropriate for the media monitor to attempt to enforce her unfounded interpretation of the format of which our creative must take, when such creative meet all the requirements and elements of the COC and advertising rules”*

ü Buongiorno *supra* [pg11/15, para 14.1] the adjudicator stated that *“...the code does not set out a blanket prohibition of any association of a competition/promotional draw with a subscription service, now 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”*.

The IP humbly requests this matter to be dismissed.

---

## 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.

4.1.2. Members must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

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.

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.

11.2.5. 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].

14.9.1. WASPA may employ a Media Monitor, whose role it is to monitor WASPA members' advertising and services for compliance with the WASPA Code of Conduct and Advertising Rules.

14.9.2. The Media Monitor may lodge complaints with WASPA using the procedure outlined in sections 14.1, 14.2 and 14.3 of the Code.

14.9.3. In the case of complaints handling using the formal complaint procedure, the adjudicator reviewing the complaint may request that the Media Monitor perform further tests to ensure compliance with the Code.

14.9.4. In addition to the informal and formal complaints process, the Media Monitor may also use of the "Heads Up" process set out below. The Media Monitor may make use of this process if it seems feasible for the member concerned to provide a prompt remedy to the problem identified.

14.9.5. For the "Heads Up" process, the Media Monitor will send a notification of the problem directly to the relevant WASPA member, and send a copy of this notification to the WASPA Secretariat.

14.9.6. The Member has two working days to respond to the "Heads Up" complaint, thereafter, if the Media Monitor is satisfied that the member has adequately addressed the "Heads Up" complaint, it is considered closed, and no further action is taken against the member.

14.9.7. If the Media Monitor is not satisfied that the "Heads Up" complaint has been satisfactorily resolved then the Media Monitor may either give the member a further two working days to resolve the matter, or proceed to lodge a formal complaint, as described in sections 14.1 and 14.3 of the Code.

14.9.8. The Secretariat will maintain a record of any "Heads Up" notifications and correspondence copied to the Secretariat.

---

## 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.

Without having regard to any aspects which are material to the decision being made in this Complaint, the Adjudicator is of the opinion that certain of the procedural aspects pertaining to the WASPA Code should be clarified.

The procedural aspects relate to the so-called "Heads Up" process.

Section 14.9.4 states very clearly that in addition to the informal and formal complaints process, the Media Monitor may also may(ke) use of the "Heads Up" process set out below. The Media Monitor may make use of this process if it seems feasible for the member concerned to provide a prompt remedy to the problem identified.

The Monitor did follow this process.

Section 14.9.7 states that if the Media Monitor is not satisfied that the "Heads Up" complaint has been satisfactorily resolved then the Media Monitor may either give the member a further two working days to resolve the matter, or proceed to lodge a formal complaint, as described in sections 14.1 and 14.3 of the Code.

The Monitor in this instance proceeded to lodge a formal complaint.

The SP in its response stated the following: "However as per precedent, the IP expected a response from the media monitor and or a dialogue around this particular aspect, this did not take place and instead the media monitor on the 16 August 2011 escalated this matter."

The SP then went further and stated that: "The IP would like it duly noted to the adjudicators that the subjective and inconsistent manner of the media monitor cannot be entertained in such a mode, as this is potentially dampening a decent working relationship."

At a later stage the SP stated that "...we are of the view that this matter could have been remedied without the necessity of escalation due to the IP being amenable to make certain codified changes, had the media monitor be able to justify the problems concerned with valid sections of the code and not subjectivity and unfounded statements."

The Monitor communicated to the SP and made it very clear on the 12<sup>th</sup> of August 2011 that where there is a disagreement in a "Heads Up", the next step would be to refer it to an Adjudicator.

This is in line with section 14.9.7 of the Code.

The Secretariat further outlined the above process to the SP on 16 August 2011.

It is therefore the opinion of the Adjudicator that the SP in this matter is either acting blatantly ignorant to the communication that took place between itself, the Secretariat and the Monitor, or is ill-informed as to the process prescribed by the Code.

Further to the statements uttered by the SP, the Monitor, over a sustained period, has had the advantage of having been exposed to various practical problems that members of the public are exposed to by WASPA Members, and has in the opinion of the Adjudicator, consistently and objectively raised and addressed related concerns.

The allegations of the SP of subjectivity and inconsistency on the part of the Monitor are unfounded and not constructive in forging the working relationship WASPA is trying to create with its members.

The "Heads Up" procedure did help in reducing the number of sections allegedly being breached.

It is perfectly clear to the Adjudicator that the Monitor in this matter was not prepared to provide interpretation to the remainder of the disputed sections (and rightly so), and hence proceeded in line with section 14.9.7.

The Adjudicator will now proceed to the material aspects of the Complaint.

The alleged breaches of certain sections of the Code in the formal Complaint were reduced to sections 11.2.2 and 11.2.3. The Adjudicator will however also take sections 4.1.1, 4.1.2, 11.1.1 and 11.2.5 into consideration.

In its review of the disputed advertisement, the Adjudicator's first impression is that it has all the hallmarks of a competition. From accessing the banner, right through to the webpage concerned, the reasonable user would be brought under the impression that he or she is about to enter a competition.

The whole purpose of section 11.2.2 was to prevent service providers from misleading users into subscription services. Section 11.2.3 was however added to the Code so as to not deny service providers the opportunity to effectively market their services to potential customers.

Potential customers might for instance reconsider subscribing to a service where they stand the change of winning a prize that is made subject to them subscribing.



It is therefore important to interpret the relevant sections and words contained within these sections (11.2.2 and 11.2.3) by having hindsight of the Code's evolution as was briefly described in the above two paragraphs.

Section 11.2.3 can be considered as an exception to section 11.2.2 and is divided into two segments.

The first segment explains the *qualifying criteria* for the exception and states that:

Notwithstanding the above clause (11.2.2), 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.

This is however subject to the second segment of the section which explains the *conditions a member has to comply with*, after having qualified its services for the exception. These conditions state that:

- 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**.

In adjudicating whether the SP in this matter has complied with section 11.2.3, the Adjudicator will first assess whether the SP's service qualifies for the exception.

In other words, could the competition be seen as an additional benefit for the customer to being a subscription service customer?

Having read the SP's response and taking all the relevant material into consideration, the Adjudicator is of the opinion that the service does qualify for the exception.

This brings the Adjudicator to the following segment which relates to the conditions.

In order to understand what is meant by the first condition, an interpretation or definition of ancillary must be provided.

Various dictionaries have been consulted and some definitions to the word are provided below:

The root of the word, "Ancilla" literally means "servant or maid". It also means: secondary; subordinate; auxiliary; supplementary; in addition to something else, but not as important; connected with something, but less important than the main thing; relating to something that is added but is not essential.

The condition states it **must be clear** to the customer that the promotional draw or competition is **ancillary** to the subscription service.

The Adjudicator has read the SP's response, analysed the decision reached in adjudication 11863 and came to the conclusion, taking the definitions of "ancillary" into consideration, that the advertisement is everything BUT clear on the ancillary nature of the competition. In fact, it would seem as if the subscription service is ancillary to the competition.

The Adjudicator has reached this conclusion by analysing various aspects of the advertisement and by assessing related clauses in the Code.

Section 11.1.1 states that 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.

A similar approach is adopted by the WASPA Advertising Rules in clause 9.3.15 (i).

The Adjudicator is not satisfied that this requirement has been fulfilled. The overwhelming feeling of the advertisement is that of a competition and the display of “subscription services” in the left hand top corner of the webpage, after having clicked on a banner that stipulates nothing but a competition, is most definitely NOT prominent, therefore not lending weight to the supposed ancillary characteristic of the competition.

The second condition states that the **process** of joining the subscription service **may not be disguised as an entry into a competition**.

The Adjudicator has read adjudication 11863 and although some of the arguments uttered by the adjudicator in the said adjudication might be true, the Adjudicator in this matter is of the opinion that there are some variations between the adjudications (11863 and this matter).

Two pertinent differences in 11863 are the terms and conditions directly underneath the confirmation button and the format in which the pin or activation code was presented in format, flow and wording.

That, to a certain extent might have compelled the adjudicator in 11863, to decide that the process, in that instance, was not disguised.

Contrary to adjudication 11863, the SP in this matter did not have its terms and conditions related to the subscription service directly underneath the confirmation button and it did not present its pin or activation code in a similar manner.

Section 11.2.5 states that 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 SP in this matter failed to realise that section 11.3.1 of the Code cannot be read in isolation of section 11.2.5. The whole of section 11.2 is dedicated to the subscription process.

The SP, having failed to adhere to the format, flow and wording of section 11.2.5 as illustrated above, has acted contradictory to section 11.2.5.

The Adjudicator is therefore of the opinion that the SP also failed in its attempt to adhere to the second segment of section 11.2.3 by not complying with sections 11.1.1 and 11.2.5 of the Code, along with other aspects.

The Adjudicator therefore has no alternative but to find the SP in breach of section 11.2.3.

This means that the advertisement in its current format is also a breach of section 11.2.2.

Although other sections of the Code have been implicated, the Adjudicator does not feel it necessary to rule on those, since the Complainant limited his / her Complaint to sections 11.2.2 and 11.2.3. The Adjudicator does however form the opinion that the services related to the relevant breaches, read in conjunction with the other sections implicated, are tantamount to information that is deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission.

This is in contravention of the Code and the Adjudicator finds the SP similarly in breach of section 4.1.2.

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 SP is required to suspend the service until such time as it complies with the orders set out below.

- The SP shall clearly indicate at the first point of contact with the service and all subsequent services (irrespective of medium) that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.
- The SP must amend its services to comply with section 11.2.5 of the Code.

The suspended sanction against the SP in adjudication 10245 is no longer suspended, and the SP must now pay this fine of R80, 000.00 (eighty thousand rand) to WASPA. No additional fine, over and above the suspended fine from adjudication 10245, is imposed.