



REPORT OF THE ADJUDICATOR

Complaint reference number:	16479
WASPA member(s):	Buongiorno SA (SP)
Membership number(s):	0002
Complainant:	Public
Type of complaint:	Subscription Services & Competition
Date complaint was lodged:	2012-02-21
Date of the alleged offence:	2011-02-21
Relevant version of the Code:	11.6
Clauses considered:	2.9, 4.1.2, 9.1.6, 11.1.1, 11.2.2, 11.2.3, 11.2.5, 14.9
Relevant version of the Ad. Rules:	2.3
Clauses considered:	9
Related cases considered:	11863, 10245, 14403

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 in banner ads, accessed by the Complainant and subsequently submitted by him or her as proof.

Service provider's response

The SP in its initial response offered its full co-operation, but iterated that some of the banner-ads mentioned by the Complainant were either not belonging to it or alternatively did not carry its approval.

After the Complainant failed to accept resolution the SP provided a formal response of which a verbatim copy is provided here, safe for the annexures thereto:

"1 On 27th February 2012 we received notification of informal complaint numbered 16479 (the "**Complaint**").

2 The Complaint had been lodged against us in a formal setting from a member of the public / Waspa on 6th March 2012.

3 The version of the WASPA Code of Conduct applicable to this Complaint is version 11.6 of the WASPA Code of Conduct will hereinafter be referred to as the "**Code**".

3.1 The advertisement of our Reward program.

3.2 Banner marked ("**B2**") states don't miss your chance to win an iPad2.

At no stage during this advertisement do we state that you are a winner but, merely that you stand a chance of gaining one of our rewards, should you wish to engage and meet the criteria as outlined in detail within our Terms and Conditions.

4 For your ease of reference, please find attached hereto:

4.1 Screenshots of the advertised banner and campaign (the "**banner & Campaign**") which would have led this complaint having been lodged, marked annexure ("**B3 – B5**"); and

4.2 The relevant issue raised by the complainant on 27th February 2012 that the infringing banner leads to this service, marked annexure "B3 – B5".

4.3 This is not our service therefore we cannot be responsible for the banner.

We immediately tested the banner and found that the banner link to B3 – B5 and found that it links to another Wasp's campaign not ours.

Subscription in relation to the Banners:

5 We believe that the banners ("**B1**" & "**B2**") in question contains all the subscription elements required by the Code and the WASPA Advertising Rules (the "**Rules**"), and that it is highly unlikely, that if the banner had been considered properly the person interacting with the banner would have not realised they were interacting with a advertising a subscription service and a reward connected with such service. ("**B1**" & "**B2**") ***Buongiorno SA cannot be held accountable for another Wasp's banners found by the complainant, nor its affiliates used to advertise their services.***

6 By way of amplification of our subscription process:

6.1 The banners ("**B1 & B2**") contain the requisite information as is required by the Code and the Rules.

7 6.2. Pricing of services

6.2.1. All advertised prices must include VAT.

6.2.2. All advertisements for services must include the full retail price of that service.

6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.

As stated above, this can be verified in attachments (**B1 & B2**).

Summary:

8 We maintain that the banners and advertising are compliant with the Code.

9 For the reasons stated above we submit that we are compliant with the Code with regards to the issues raised in the Complaint, and that it should accordingly be set aside and addressed with the infringing WASPA member.

10 We haven't addressed our specific campaign into which our banners link as these do not appear to be the subject of this complaint. Therefore should Waspa or the complainant wish us to deal with any of the aspects of the campaign beyond the banner kindly revert to us and we will do so accordingly. For the same reason we haven't attached the campaign into which our banner links too. Should the adjudicator or the complainant wish to see them, we will provide them.

11 Should the Adjudicator and/or the Complainant wish us to deal with other specific sections of the Code they are free to revert to us and we will gladly address these specified sections."

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.

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.

The alleged breaches of certain sections of the Code in the formal Complaint were reduced to sections 4.1.2 and 11.2.2. The Adjudicator will however also take sections 2.9, 9.1.6, 11.1.1 and 11.2.3 into consideration.

In reaching a decision, the Adjudicator is of the opinion that it is appropriate to first evaluate which banner ads are in scope for this adjudication and therefore subject to a ruling by the Adjudicator.

Without the Complainant having provided specific referring urls on the landing pages in his or her complaint, the Adjudicator is not in a position to rule on those banner ads that were referenced as B3, B4 and B5 by the SP in its response.

The Adjudicator therefore, in light of evidence provided by the Respondent, concurs that such campaigns do not seem to belong to the SP in this matter, and for the purposes of this complaint, therefore fall outside the scope of this Adjudication.

The Adjudicator is however aware of the fact that the Complainant is of the opinion that the SP is dodging its responsibility.

To bring clarification to this concern, the Adjudicator finds it appropriate to bring some aspects pertaining to section 3.9.1 and member accountability to the attention of the reader.

In Appeal 6759 it was stated that:

The Panel does not believe that section 3.9.1 should be interpreted as providing a form of strict liability on SP's but that fault in the form of intention or negligence is required before this section can be invoked.

In this regard section 18.2 of the WASPA Constitution is also relevant:

"18.2. No member of WASPA shall be answerable or deemed to be in any way responsible for any act or default of any other member or for any deficiency or insufficiency of any title or security whatsoever taken by WASPA, save to the extent that such member acted negligently or fraudulently."

This brings the Adjudicator then to those banner ads that do fall within scope of this adjudication and that have been referenced by the SP in its response as B1 and B2.

The Adjudicator in adjudication 14403 provided a detailed interpretation of section 11.2.2 by elaborating on its workings:

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**.*

Applying such interpretation to the matter at hand might prove difficult without having access to the subscription page and therefore having had the opportunity to evaluate the whole subscription process.

The Adjudicator is not convinced that a user, by clicking on a banner ad alone, has necessarily **requested** a subscription service.

Such subscription **request** will usually only be materialised at a later stage in the subscription process.

However, section 11.2.3 however states that the **process of joining** the subscription service may not be disguised as an entry into a competition.

The Adjudicator here is of the opinion that a banner ad might form **part** of the process and as such the SP is responsible to comply in its banner ad with the following conditions:

- *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**.*

The above opinion that banner ads are not excluded also stems from the fact that section 11.2.1 inter alia states:

*...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 current wording of the SP in its banner ad, referenced as B2 in its response, does not seem to conform to the principles underlined in section 11.2.3 and does the use of the word "Congratulations" not conform to section 4.1.2 in the sense that it creates ambiguity.

Section 4.1.2 states that:

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

Although the SP, and hence the Respondent in this matter, has gone further than most in its banner ad by including reference to its terms and conditions and by identifying it as a subscription service, the Adjudicator is not convinced that the conditions in section 11.2.3 were fulfilled and therefore finds the SP in breach of section 11.2.2, read with section 11.2.3.

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; **AND**
- The SP shall also make it clear that any competition that forms part of such subscription is **ancillary** to the subscription service at the first point of contact with the service and all subsequent subscription services (irrespective of medium).