



## Appeal Panel's Report

<b>Complaint/s on appeal</b>	16294, 16554, 17821 and 17828
<b>Appellant/s</b>	Buongiorno SA
<b>Date appeal lodged</b>	2014-01-24
<b>Appeal decision date</b>	22 August 2014
<b>Relevant Code version</b>	11 and 11.6
<b>Clauses considered</b>	11.1, 11.2.1, 11.2.3, 11.2.5 (version 11.0 and 11.6), 11.2.6, 11.5.2, 11.6.2, 11.6.4 and 14.4.2
<b>Relevant Ad Rules version</b>	Not considered for the purposes of this appeal report
<b>Ad Rules clauses</b>	Not applicable
<b>Related cases considered</b>	<ul style="list-style-type: none"> <li>• The appeal decision regarding complaints 11258, 11582, 11626, 13038 and 13039 (“the first appeal decision”);</li> <li>• The appeal decision regarding complaints 15477, 15722, 16851, 16977, 17184 and 17236 (“the second appeal decision”);</li> <li>• The appeal decision regarding complaints 16303 and 17007 (“the third appeal decision”); and</li> <li>• The appeal decision regarding complaints 17831 (“the fourth appeal decision”).</li> </ul>

## 1. Parties

- 1.1. The Appellant is Buongiorno SA (“the Appellant”) which has appealed a number of decisions taken against it. The Appellant made the following preliminary submissions:

*It ought to be noted from the outset that the Complaints have originated from escalated unsubscribing requests where the complainants’ further requests for refund have been refused by the SP. To the extent that the Complaints have, as a common denominator, the same ground for complaint, and having regard to the fact that they appear to have been adjudicated by the same Adjudicator – it will be noted that the body of the decisions is identical in parts – the SP would appeal the Complaints under one appeal, namely Appeal #16294/16554/17821/17828.*

- 1.2. The Secretariat agreed and we have, therefore, considered the Appellant’s appeals against the Adjudicators’ decisions (“the decisions”) in complaints 16294, 16554, 17821 and 17828 (collectively “the complaints”) together in this report.

## 2. Issues raised on appeal

- 2.1. The Appellant has appealed against the decisions on the following grounds:

- 2.1.1. Audi alteram partem;
- 2.1.2. No breaches of sections 11.1, 11.2.1 and 11.2.3 of the Code;
- 2.1.3. Alleged breaches of sections 11.2.5 and 11.2.6 of the Code;
- 2.1.4. Alleged breaches of sections 11.5.2, 11.6.2 and 11.6.4 of the Code; and
- 2.1.5. The sanctions imposed are unduly harsh and without basis.

### 2.2. *Audi Alteram partem*

- 2.2.1. The Appellant has raised concerns about this principle on numerous occasions and in more than one appeal. Fortunately, various adjudicators and appeal panels have considered the application of the principle that the Appellant is entitled to a fair hearing to various adjudications and we have a line of thinking we may draw on in order to address this specific ground of appeal.
- 2.2.2. The second appeal decision confirmed that -

*complaints regarding breaches of the Code's provisions must be adjudicated bearing in mind the principles of due process and natural justice which include the principle of audi alteram partem.*

- 2.2.3. The basis of the Appellant's contention that its right to a fair hearing was not respected is, essentially, paragraph 3.1 of its appeal submissions which states the following:

*The SP submits that it was not afforded the opportunity to submit responses in respect of sections of the Code of Conduct, to which it had been found in violation of, as none of the sections to which the Adjudicator had applied himself/herself had been brought to the attention of the SP at the time when each of the Complaints were raised, or at all. The SP is therefore compelled to provide such responses now, on appeal, inevitably following the settlement of the appeal fee.*

- 2.2.4. The Adjudicator/s appear/s to have anticipated this objection in complaints 16294, 16554 and 17828 with the following assertions (this is quoted from the Adjudicator's report on complaint 16294 but it is substantially the same in each):

*In paragraph 16 of its response the SP states that "...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".*

*The invitation by the SP is not one which needs to be accepted in order to reach a fair decision in this matter because the SP has already stated that it believes its campaign complies fully with all of the provisions of both with the Code and Advertising Rules (paragraph 9 of its response). It can therefore safely be taken that the SP avers that its service complies with all of the above sections considered in this adjudication and no further purpose would be served by inviting it to once again re- confirm that it believes its campaign complies with all of the specific sections considered.*

*In addition, whether these specific sections have been complied with is a matter of judgment based on the objective materials produced by the SP itself. These materials can therefore be taken at face value.*

*In these circumstances, the SP has had a reasonable opportunity to address its response to the complaint and to include its advertising materials in support of its argument that the campaign is fully compliant with the Code and Advertising Rules.*

*It would be incorrect to hold that the legal principle of audi alterem partem requires a respondent to be invited to address further argument on each and every point on which a decision maker may base his or her decision nor would it be in the interests of administrative justice to do so.*

- 2.2.5. The complaints each focused on the complainant's contentions that they did not subscribe to the Appellant's subscription services and the Appellant described its subscription processes and associated messages in its responses to the complaints.
- 2.2.6. Although the complaints did not specify clauses of the Code which the Appellant was suspected of breaching, the Appellant appears to have understood that its subscription services and their subscription mechanics were criticised as not complying with the Code and took the time to address a number of possible grounds for this criticism.
- 2.2.7. The Appellant continued to argue that its right to a fair hearing was not respected with the following:

*At no point was the SP prompted to defend itself against the numerous sections highlighted in the Adjudicator's reports, namely sections which included, inter alia, 11.1 Promotion of Subscription Services, 11.5 Welcome Message, 11.6 Reminder Messages. For the avoidance of doubt, at no stage was there envisaged by the SP that Advertising Rules might come within the ambit of the Complaints. Furthermore, the Adjudicator in his report in the case of #17828 found the SP in breach of "sections 12.1, 12.2 and 12.3 of the WASPA Advertising Rules" at paragraph 29 of his/her decision, although in the preliminary section on page 1 of the report he/she had allegedly only considered clause "9.2.1.1, 9.2.2.1". The SP is astonished that such conclusions could accurately be drawn in an appropriate adjudication process.*

- 2.2.8. That the Appellant was not specifically invited to address a specified list of clauses in the Code is immaterial. The Appellant appears to have had no difficulty appreciating the likely causes for concern in the Code and addressed specific themes such as the manner in which it contends it is entitled to promote its services; the welcome messages it sends to new subscribers and the subsequent reminder messages, among others.
- 2.2.9. We agree with the Adjudicator’s statement that “the SP has had a reasonable opportunity to address its response to the complaint and to include its advertising materials in support of its argument that the campaign is fully compliant with the Code and Advertising Rules” and, moreover, believe that it is evident from the Appellant’s submissions that it has done so.
- 2.2.10. Whether the Appellant would have preferred to address other aspects of the Code or expanded on its submissions, in retrospect, is not a basis to argue that the Adjudicator did not respect its right to a fair hearing.
- 2.2.11. We accordingly dismiss the Appellant’s appeal on this ground.

2.3. *No breaches of sections 11.1, 11.2.1 and 11.2.3 of the Code*

**2.3.1. Clause 11.1**

- 2.3.1.1. This clause has been the subject of considerable discussion and analysis. Versions 11.0 and 11.6 of the Code have the following clauses 11.1.1, which are the focus of this part of the Appellant’s appeal under clause 11.1:

Version 11.0	Version 11.6
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.	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.

2.3.1.2. Both versions of this clause are identical in the two Code versions.

2.3.1.3. The second appeal decision analyses this clause in the context of versions 11.0 and 11.6 of the Code in some detail from pages 6 to 12 and, on page 10, provides the following guidance:

*The purpose of the prominence of the subscription services is to alert the consumer to the potential cost in a manner that would not be easily overlooked. As a result the caveat subscriptor rule is not an appropriate test. Rather, adjudicators should prefer the more recent approach of the Consumer Protection Act in ensuring that important or unusual terms are highlighted and drawn to a consumer's attention.*

*We consider the cost of the subscription to be a very important aspect of the service and this aspect must always be highlighted. The requirement to highlight the fact that this is a subscription service and what the cost of the subscription service is, is emphasised by chapter 9 of the Advertising Rules (version 2.3).*

*We consider the –*

- 1. position,*
- 2. size, and*
- 3. colouring*

*of the text informing a consumer to be important when deciding whether the text is sufficiently prominent to comply with clause 11.1.1 of the Code as read with chapter 9 of the Advertising Rules.*

2.3.1.4. Although this guidance was given in the context of a discussion about the adequacy of published subscription pricing information, the general comments about what “prominence” amounts to are applicable to whether the subscription nature of a service is “prominent”.

2.3.1.5. As both the Adjudicator pointed out (and the Appellant quoted):

*Section 11.1.1 expressly requires the identification of a subscription service to be both “explicit” and “prominent” in any material in which any portion of a service is promoted. While the promotional web page used by the SP to promote the service and the rewards facility does contain “explicit” identification of the service as a subscription service, the identification is, in my opinion, certainly not “prominent”.*

- 2.3.1.6. The relevant definition of prominent, as found on [www.oxforddictionaries.com](http://www.oxforddictionaries.com), is “Situated so as to catch the attention; noticeable”.
- 2.3.1.7. The question before this panel is therefore whether the communication around the subscription service is situated so as to catch the attention, and noticeable?
- 2.3.1.8. We find that it is not. However the Appellant may choose to remedy this lack of prominence, the information must be communicated with sufficient prominence that a reasonable consumer would inevitably notice the fact that the consumer is about to subscribe to a subscription service. This is not the case on the landing pages in question.
- 2.3.1.9. We therefore find against the Appellant on this aspect of the appeal.

## **2.3.2. Clauses 11.2.1 and 11.2.3**

- 2.3.2.1. Clause 11.2.1 begs the question what the consumer would have been conscious of when going through the subscription service presented by the Appellant, at least with respect to the campaigns which we are considering?
- 2.3.2.2. In order for the Appellant to successfully argue that a prospective subscriber would be sufficiently aware of the subscription nature of the service that he or she would not be confused about what sort of service he or she is being offered, the Appellant would have to demonstrate that, at the very least, the subscription process itself clearly points to a subscription service.

2.3.2.3. Leaving aside our concerns about the “prominence” issue which we have dealt with above, if the Appellant would not fall foul of clause 11.2.1 if a prospective subscriber can sufficiently distinguish between the subscription service and other offerings.

2.3.2.4. This issue is related to the clause 11.2.3 issue which has been addressed repeatedly and with particular emphasis on the question of whether a “promotional draw or competition is ancillary to the subscription service, and the process of joining the subscription service” is disguised as an entry into a competition?

2.3.2.5. The first appeal decision dealt with this question at some length (paragraphs 5.1 to 5.25). The following points are helpful (from 5.12):

*On the first enquiry, regarding whether a promotional draw is ‘ancillary’, it is useful to consider the meaning of this term. We annex to this report the leading information from the top five results to a Google search for the query ‘Dictionary ancillary’. In our understanding, the word ‘ancillary’ clearly means something that is ‘in support of, rather than, the main thing’.*

*In the context of a promotional draw which forms a part of a subscription service extended by a Service Provider and which is subject to clauses 11.2.2 and 11.2.3 of the Code, it must be accepted that the term ‘ancillary’ implies that a potential customer must be enticed firstly with the contents of the subscription service, sweetened secondly by the promotional draw.*

*This is necessarily an objective enquiry considering the presentation of the offer, and which precedes the question of the potential customer’s subjective ‘intent’ to sign up for the subscription service.*

*In other words, even if the potential customer has formally indicated consent by complying with an acceptable opt-in sign-up procedure, a breach of clauses 11.2.2 and 11.2.3 is possible where the presentation of the offer does not clearly indicate that*



*the promotional draw is ancillary to the subscription service offering.*

*Stated differently, a legally-compliant sign-up process does not of itself preclude a breach of clauses 11.2.2 and 11.2.3 of the Code, on the grounds that the promotional draw is not ancillary to the subscription service.*

- 2.3.2.6. As the Adjudicator/s pointed out in the adjudication reports, the wording of the messages sent to the complainants in 16554, 17821 and 17828 not only failed to meet the Code's formatting and content requirements but also, in our view, failed to clearly convey the subscription nature of the services they enticed the complainant's to subscribe to.
- 2.3.2.7. The effect of this obfuscation is that a consumer could not only be misled into believing that following the prompts would lead to entry into a competition or request for some other non-subscription content and that the consumer would be enticed, first, by the competition or non-subscription content. The fact that the consumer would be subscribed to a subscription service would, understandably, be a delayed and rude surprise.
- 2.3.2.8. In the case of complaint 16294, the initial PIN code and subsequent two messages make clearer reference to the subscription nature of the 35050 service. That said, we still find that the campaign presented in 16294 falls foul of clause 11.2.3 of the Code for much the same reason.
- 2.3.2.9. We therefore uphold the finding that the Appellant has breached clause 11.2.1 in respect of complaints 16554, 17821 and 17828 and uphold the findings that the Appellant breached clause 11.2.3.

#### **2.4. *Alleged breaches of sections 11.2.5 and 11.2.6***

- 2.4.1. The Appellant began its submissions under this heading with its assertion that it was not given an opportunity to make representations regarding these alleged breaches in violation of its right to a fair hearing. We have already dealt with this aspect of the Appeal above.

2.4.2. The Appellant then argued that sections 11.2.5 and 11.2.6 of the Code are not applicable to the Appellant's subscription service as "its subscription services in the Complaints are initiated by the web rather than SMS and accordingly, the SP submits that sections 11.2.5 and 11.2.6 are not applicable".

2.4.3. This is an interesting argument for a few reasons. To begin with, the Appellant's assertion that "its subscription services ... are initiated by the web rather than SMS" seems to run contrary to its assertions that the Web pages that it employs to entice prospective subscribers are not part of the "process of joining" the subscription service. In paragraph 4.32, the Appellant made the following submission:

*In this respect it is submitted that "the process of joining" is not the same as the SP's "promotional material" or the "promotional web page".*

2.4.4. The Appellant argued, in the context of the apparent 11.2.3 breach, that "[t]he process of joining is the double opt-in process employed by the SP" which involves the SMS exchange which the adjudicator/s considered in the context of clauses 11.2.5 and 11.2.6 of the Code.

2.4.5. It is unclear what the Appellant means when it subsequently argues that the subscription services "are initiated by the web rather than SMS" when it just argued that its SMS double opt-in mechanism did not fall foul of other provisions of the Code. Either way, this contradiction does not alter our earlier findings.

2.4.6. In the context of apparent breaches of clauses 11.2.5 and 11.2.6, we disagree with the Appellant on the significance of its SMS messages.

2.4.7. At the outset, the Appellant correctly notes that the adjudicator in 16294 did not find the Appellant to have breached clause 11.2.5 in that matter. The adjudicator quoted the clause of the Code but made no specific finding against the Appellant.

2.4.8. We have therefore considered whether the Appellant has breached clauses 11.2.5 of the Code in respect of complaints 16554, 17821 and 17828 and 11.2.6 in respect of complaints 11.2.5 and 11.2.6. In these instances, version 11.6 of the Code applies.

2.4.9. Clause 11.2.5 of the Code states the following:

*11.2.5. If a subscription service is initiated by a customer sending an SMS to the service provider, then a separate confirmation message must then be sent to the customer's mobile handset. Only once the customer has followed the activation instructions in the confirmation message can they be subscribed to the subscription service.*

2.4.9.1. Clause 11.2.5 seems to hinge on the word “initiated” which, [according to Oxford Dictionaries](#), means to “Cause (a process or action) to begin”.

2.4.9.2. This clause of the Code seems to require that a “separate confirmation message” be sent to a prospective subscriber’s “mobile handset” where the prospective subscriber “cause[s] (a process or action) to begin”.

2.4.9.3. Clause 11.2.5 goes on to require that the prospective subscriber follow “activation instructions in the confirmation message” before the prospective subscriber may be “subscribed to the subscription service”.

2.4.9.4. This process is a basis of what has become known as the “double opt-in” process in which a prospective subscriber to a service is required to take an initial step towards subscribing followed by a confirmatory step before actually being subscribed. The Appellant has referenced its “double opt-in” subscription process in its submissions and is clearly familiar with the idea.

2.4.10. Clause 11.2.6 deals with the format of the confirmation message referenced in clause 11.2.5 and states the following:

*11.2.6. The confirmation message described in 11.2.5 must 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].*

#### **2.4.11. Complaint 16554**

2.4.11.1. The adjudicator found that the message containing the activation code for the subscription service breached clause 11.2.5 (paragraphs 29 and 30 of the adjudicator’s report):

*It is my opinion that the message received by the consumer containing the activation code for the subscription service on 2012-01-22 which read: ">> ur CODE is 6782 << enter it on the web confirmation page & Get UR Chance to WIN\*!!", is a clear breach of section 11.2.5 detailed above.*

*All this message provides is the activation code and advertising material. There is no subscription service information contained therein pertaining to the name of the service provider, the cost of the service and frequency of billing, or that the consumer will be subscribed to the 35050 Gold service.*

- 2.4.11.2. The adjudicator quoted clause 11.2.5 from version 11.0 of the Code in the adjudicator's report and found the Appellant to be in breach of this clause. Clause 11.2.5 in version 11.0 reads as follows:

*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].*

- 2.4.11.3. Clauses 11.2.5 and 11.2.6 of version 11.6 of the Code contain, substantively, the same requirements of the older clause 11.2.5 in that both sets of clauses have the following elements:

- 2.4.11.3.1. A confirmatory message-based communication with a prospective subscriber;

- 2.4.11.3.2. An activation mechanism forming part of the communication which, when used, would result in a subscription to the subscription service; and
- 2.4.11.3.3. Specific message format requirements for this confirmation message which are identical in versions 11.0 and 11.6 of the Code.
- 2.4.11.4. The adjudicator's reference to clause 11.2.5 of version 11.0 of the Code is, in the circumstances, immaterial. That older clause bears substantively the same requirements as the newer clause 11.2.5 and 11.2.6.
- 2.4.11.5. The Appellant correctly conceded, in paragraph 5.5, that this message was "not fully compliant" with and was therefore in breach of the Code's message formatting requirements.

#### **2.4.12. Complaint 17821**

- 2.4.12.1. The Appellant similarly conceded that the confirmation/activation message it sent to the consumer was in breach of clause 11.2.6 of version 11.6 of the Code and argued that "no prejudice was caused and to extent that it was, such was, in any event, trivial."
- 2.4.12.2. The reason for this assertion is that the Appellant sent a reminder message a day later which contained the requisite information.
- 2.4.12.3. It is not clear that a reminder message was sent the following day. According to the message logs for this complaint, the consumer received two sets of non-compliant activation messages on 25 April 2012 along with two sets of congratulatory and welcome messages. The first reminder message was sent on 25 May 2012.
- 2.4.12.4. Regardless, clause 11.2.6 requires that the confirmation/activation message meet specific formatting requirements because it forms part of the important double opt-in subscription process. Disregarding these requirements because subsequent messages sent after the consumer is subscribed to the service may contain this information is hardly "trivial" and remains in violation of clause 11.2.6.

2.4.12.5. While the Appellant's explanation that the consumer in this complaint may have benefitted from the subscription service even though the consumer appeared to lack sufficient funds to cover the subscription cost may be a mitigating consideration, the Appellant's failure to comply with clause 11.2.6 remains a problematic breach of the Code given that clause's role in reiterating the nature of the service and consequences of subscribing in the first place.

### **2.4.13. Complaint 17828**

2.4.13.1. This complaint is somewhat more complicated when it comes to compliance with clause 11.2.6. In this case, the customer was a Vodacom subscriber and the Appellant was required to appeal to the customer through Vodacom which has adopted its own subscription mechanism.

2.4.13.2. Vodacom's subscription process involves a message from Vodacom to a prospective subscriber which the Appellant had no meaningful control over. If the customer responded positively to Vodacom with a "yes", Vodacom would grant the Appellant permission to add the customer as a subscriber and charge the customer.

2.4.13.3. A failure to respond or a negative response by the customer to Vodacom would not result in a subscription if the Vodacom mechanism worked effectively.

2.4.13.4. Either way, it appears that the Appellant was not able to send a message directly to the customer as clauses 11.2.5 and 11.2.6 of version 11.6 of the Code require and, instead, the Appellant published wording from what would have been in a confirmation/activation message on its website disclosing the requisite information. This is evident in annexure "B2" to the Appellant's original submissions to the adjudicator.

2.4.13.5. This text would seem to be subject to the same lack of prominence criticism in terms of clause 11.1 but that is not the reason for the finding against the Appellant in this complaint.

2.4.13.6. As we pointed out above, clause 11.2.6 and 11.2.5 are pre-emptive and are designed to better inform a prospective subscriber before the subscription is activated. The Appellant is not in a position to influence

this part of the process with a properly formatted message and we are unable to agree with the adjudicator that the Appellant breached clause 11.2.6 because subsequent messages failed to comply with this clause of the Code.

2.4.13.7. We therefore uphold the Appellant's appeal against a finding that it breached clause 11.2.6 in complaint 17828.

## 2.5. *Alleged breaches of sections 11.5.2, 11.6.2 and 11.6.4 of the Code*

### 2.5.1. **Complaint 16294**

2.5.1.1. The consumer received two sets of messages from the Appellant for what seem to be two different services. The adjudicator found the welcome messages for both services to be in breach of clause 11.5.2 in that the messages failed to contain a "clear notification" of the subscription service's name and "[c]lear and concise instructions for unsubscribing from the service".

2.5.1.2. Of the two welcome messages, we agree that the 35050 welcome message is somewhat unclear about how to unsubscribe from the service. As the adjudicator pointed out, the use of the number "2" instead of the word "to" (we added bold emphasis) can be confusing in the context of the dial string required to unsubscribe:

*Welcome 2 35050 GOLD! 4 top Apps, cool games, MP3 hits & more go 2 <http://35050.mobi> on ur mobile! Help 0214178001 Dial \*120\*5133# **2** unsub(R5/day subscription)*

2.5.1.3. We don't agree with the adjudicator's assertions that other aspects of clause 11.5.2 have been breached by the messages concerned.

2.5.1.4. Unlike clause 11.5.2, clause 11.6.2 of the Code requires that reminder messages contemplated by clause 11.6.1 "adhere exactly" to the formatting requirements illustrated in clause 11.6.2.

2.5.1.5. Both sets of reminder messages fail to identify the "content/service description" and breach clause 11.6.2. Because these reminder messages

fail to identify the service as a subscription service, they are also in breach of clause 11.6.4.

2.5.1.6. We therefore dismiss the Appellant's appeals against the adjudicator's findings in the respects we have outlined under this header.

## **2.5.2. Complaint 16554**

2.5.2.1. The primary concern in this complaint under this header is clause 11.5.2. The adjudicator found that the welcome message failed to "provide a clear notification of the name of subscription service, and the cost of the subscription service".

2.5.2.2. We disagree with the adjudicator on both counts and uphold this aspect of the Appellant's appeal.

## **2.5.3. Complaints 17821 and 17828**

2.5.3.1. In both of these complaints, the adjudicator found the welcome messages to be in breach of clause 11.5.2 of the Code because the messages, in the adjudicator's view, failed to adequately identify the services and the pricing information did not "provide a clear notification that the cost of subscription service is R5/day".

2.5.3.2. Although we agree with the adjudicator's underlying concern that the welcome message does not reinforce the impression that the service is a subscription service, clause 11.5.2 does not require the welcome message to reiterate the *nature* of the service, only to name it and state its costs.

2.5.3.3. On the other hand, clause 11.6.4 does require reminder messages to provide a "content/service description" and, in both complaints 17821 and 17828, the reminder messages fail to do so.

2.5.3.4. We accordingly uphold the appeals against clause 11.5.2 findings in complaints 17821 and 17828 and dismiss the appeals against clause 11.6.4 findings in these two complaints.



2.6. *The sanctions are unduly harsh and without basis*

2.6.1. To a large extent the sanctions which survive this appeal will follow the result.

2.6.2. The sanctions imposed on the Appellant fell into two categories:

2.6.2.1. Fines; and

2.6.2.2. Suspensions for a period of 6 months or until such time as the fines were paid (whichever time period was longer).

2.6.3. Although the Code permits both suspensions and fines as sanctions, clause 14.4.2 of the Code lists these sanctions as distinct sanctions. An adjudicator may fine and/or suspend a member “for a defined period”. Had the adjudicator limited the suspension to a period of 6 months, alone, it would have been a technically competent sanction.

2.6.4. Suspending the member for “a period of 6 months or until the above fines have been paid, whichever period is the longer” is not competent. The time period is potentially variable and is therefore not a “defined period”. We therefore overturn the suspensions in the complaints.

2.6.5. With respect to the fines imposed on the Appellant, we note the adjudicator’s concern about the number of adverse findings against the Appellant and accumulated fines based on past adjudication reports.

2.6.6. The adjudicator’s statements in complaints 16554 have merit:

*The experience of the SP, the relatively high number of previous complaints upheld against it for non-compliant subscription services and the relative ease of compliance with the particular provisions of the Code and Advertising Rules breached in this particular matter must be considered against the importance of these specific provisions in safeguarding the interests of consumers and in upholding the reputation of the WASP industry as a whole.*

2.6.7. We therefore see no reason to vary the monetary sanctions imposed on the Appellant in respect of the appeals we have dismissed and dismiss this particular aspect of the appeals to that extent.

### 3. Appeal Panel's Decision

- 3.1. As we stated above, we uphold the appeals against the findings that –
  - 3.1.1. the Appellant breached clause 11.2.6 in complaint 17828;
  - 3.1.2. the Appellant breached clause 11.5.2 in complaint 16554;
  - 3.1.3. the Appellant breached clause 11.5.2 in complaints 17821 and 17828; and
  - 3.1.4. the Appellant ought to be suspended for “a period of 6 months or until the above fines have been paid, whichever period is the longer” in each of the complaints on appeal, namely 16294, 16554, 17821 and 17828.
- 3.2. We dismiss the remaining appeals.
- 3.3. The Appellant has therefore been substantially unsuccessful in its appeals before us and we therefore direct that it forfeit its appeal fee/s. To the extent the Appellant has not paid the fines imposed on it and which survive this appeal, it is directed to do so on demand by the WASPA Secretariat.