



## Appeal Panel's Report

<b>Complaint/s on appeal</b>	18615
<b>Appellant/s</b>	Buongiorno SA
<b>Date appeal lodged</b>	2014-01-21
<b>Appeal decision date</b>	2015-04-
<b>Relevant Code version</b>	12.1
<b>Clauses considered</b>	11.2.1 and 11.2.2
<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>	Complaint 17831;  The appeal decision regarding complaints 11258, 11582, 11626, 13038 and 13039 (" <a href="http://old.waspa.org.za/code/download/11258_appeal.pdf">the 11258 appeal decision</a> <sup>1</sup> ");  The appeal decision regarding complaints 15477, 15722, 16851, 16977, 17184 and 17236 (" <a href="http://old.waspa.org.za/code/download/15477_appeal.pdf">the 15477 appeal decision</a> <sup>2</sup> ");  The appeal decision regarding complaint 17831 (" <a href="http://old.waspa.org.za/code/download/17831_appeal.pdf">the 17831 appeal decision</a> <sup>3</sup> ")

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<sup>1</sup> [http://old.waspa.org.za/code/download/11258\\_appeal.pdf](http://old.waspa.org.za/code/download/11258_appeal.pdf)

<sup>2</sup> [http://old.waspa.org.za/code/download/15477\\_appeal.pdf](http://old.waspa.org.za/code/download/15477_appeal.pdf)

<sup>3</sup> [http://old.waspa.org.za/code/download/17831\\_appeal.pdf](http://old.waspa.org.za/code/download/17831_appeal.pdf)

## 1. This appeal

1.1. The Appellant is Buongiorno SA (“the Appellant”). The Appellant has appealed against the adjudicator’s finding that it breached clauses 11.2.1 and 11.2.2 of the Code:

*13. I am satisfied, on the basis of the evidence before me, that the complainant, or someone using her handset, replied “yes” to the opt-in confirmation message sent by Vodacom. Vodacom’s records support the SP’s own logs in this regard.*

*14. However, I am not satisfied that the “yes” response sent from the complainant’s handset was made with the specific intention of subscribing to the SP’s advertised subscription service.*

*15. I refer to the findings of the adjudicator in complaint 17831 in relation to the wording (or absence thereof) and format of the promotional web pages and confirmation message used in a similar campaign.*

*16. Although the respective campaigns are not identical, the elements of the campaign that the adjudicator found fault with in complaint 17831 are the same as those used in the campaign for the subscription service which is the subject of this complaint.*

*17. The complainant has actually stated in her complaint that she interpreted the wording of the confirmation message, which makes no reference to “ subscription service”, to mean an entry into a competition.*

*18. The campaign was therefore not only potentially misleading, but in this case, actually misleading.*

*19. I therefore find that the SP has breached clause 11.2.1 and 11.2.2 of the Code. The complaint is accordingly upheld.*

1.2. The adjudicator did not go into more detail as to why the Appellant’s campaign breached clause 11.2.1 and 11.2.2 so it is necessary to reference complaint 17831 and determine whether the adjudicator correctly based his/her decision on that earlier complaint. We deal with this below.

## 2. Issues raised on appeal

- 2.1. The Appellant has appealed against the decisions on the following grounds:
  - 2.1.1. The adjudicator incorrectly applied a “[s]ubjective test of intention” in that the adjudicator considered whether the campaign satisfied the Code’s requirements taking into account the complainant’s subjective intention when interacting with the campaign;
  - 2.1.2. The adjudicator applied the incorrect test outlined in complaint 17831 to determine whether the campaign complied with clause 11.2.2 of the Code; namely the “format of the promotional web pages”;
  - 2.1.3. A breach of the audi alteram partem principle; and
  - 2.1.4. The sanctions imposed on the Appellant by the adjudicator were “unduly harsh and without basis”.

## 3. Procedural concerns

- 3.1. The Appellant argued that its right to a fair hearing was not respected by the adjudicator. Various appeal panels have reiterated the importance of a member’s right to a fair hearing and that the audi alteram partem principle be respected. Appeal decisions affirming this include the 11258 appeal decision and the 15477 appeal decision.
- 3.2. After quoting from the 11258 appeal decision on this point, the Appellant made the following arguments in its appeal submissions (from 5.3 to 5.5):

*The SP submits that it was not given the opportunity to respond to the alleged breaches in this Complaint. In any event the SP did not contemplate that the Adjudicator will consider section 11.2.3, nor the remainder 11.1 to 11.10!*

*The SP further submits that should the Adjudicator have applied himself/herself to those highlighted section, namely 11.2.1 and 11.2.2, it is clear that regard was also had to section 11.2.3 in his/her respective consideration, as no mentioning of the “format of the promotional web pages and confirmation message used in a similar campaign” should have occurred.*

*In this respect, the SP submits that this is a clear breach of the principle of audi alteram partem, and that the sanctions be set aside.*

- 3.3. While the adjudicator indicated that s/he considered clauses 11.1 to 11.10 of the Code, the adjudicator's decision was decided on the basis of the adjudicator's consideration of clauses 11.2.1 and 11.2.2.
- 3.4. The Appellant made a number of submissions during the formal complaint process (which preceded the adjudicator's decision) and, in those submissions, the Appellant made specific reference to clause 11.2.2 on page 3 of its formal submissions.
- 3.5. The Appellant was not only given an opportunity to respond to the complaint, it did so. The adjudicator's ruling was based on at least one material clause which the Appellant dealt with in its submissions to the adjudicator.
- 3.6. Although the Appellant insists that the adjudicator ought to have considered clause 11.2.3 (and then contends that it was unaware of such hypothetical reliance), this clause does not appear to have been the basis of the adjudicator's finding against the Appellant.
- 3.7. There is no apparent basis for the Appellant to argue that its right to a fair hearing was not respected and that the adjudicator's ruling was "a clear breach of the principle of audi alteram partem". We noted that the Appellant didn't submit that the whole of the adjudicator's finding should be set aside on the basis of this alleged breach, merely the sanctions.
- 3.8. The Appellant's appeal on this basis fails.

## 4. Substantive appeals

- 4.1. We will deal with the remaining arguments below.
- 4.2. *Incorrect application of the "[s]ubjective test of intention"*
  - 4.2.1. The Appellant's argument can be encapsulated in paragraph 3.5 of its appeal submissions where it states the following:

*It will be recalled here that there is no room for subjective interpretation, as the double opt-in process enforced by Vodacom ad deemed in full compliance with the Code of Conduct, is precisely designed to ensure that*

*a potential customer is objectively aware at all stages in the process that he/she is joining a subscription service.*

4.2.2. This is a curious argument to make for various reasons. The Appellant argued that compliance with clauses 11.2.1 and 11.2.2 can be achieved wholly objectively and almost mechanically; if the opt-in mechanism is compliant with the Code, the subscription process must be compliant.

4.2.3. The Appellant goes on to argue that even though the welcome message made no reference to the campaign soliciting new customers for a subscription service, Vodacom had already checked that “aspect of the process” and confirmed that the complainant’s “acceptance of the subscription service”.

4.2.4. Going further, the Appellant argued the following:

*Having appropriately completed the double opt-in process, it is unwarranted for WASPA, as the regulator, or for any Adjudicator, to reverse the process and look behind the customers’ subjective interpretations, which for the avoidance of doubt, is not an appropriate standard by which the subscriptions requests can be judged, nor managed.*

4.2.5. The Appellant’s argument for a purely objective test based on the mechanics of the particular opt-in process is fatally flawed. In the 11258 appeal decision, the appeal panel considered a similar issue and ruled that the appropriate test is partly objective and partly subjective (at paragraphs 5.13 to 5.16):

*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.*

- 4.2.6. Curiously, the Appellant argued in complaint 17831 the opposite of what it has argued in its present appeal. The Appellant took the adjudicator's decision in 17831 on appeal and, in the 17831 appeal decision, the appeal panel described the Appellant's argument as follows:

*The Appellant submits that the subjective specific intent of the consumer, as brought about by the advertising material, is one of the key considerations for this clause. In appealing Clause 11.2.2 it embarks on an in depth analysis of Clause 11.2.3 and that the process of subscribing to a service must not be disguised as an entry into a competition. The gist of the submission is that because the subscriber knows by the end of the process that they are subscribing, there is no breach of Clause 11.2.2.*

- 4.2.7. The appeal panel considered a campaign that was substantially similar to the campaign which forms the subject matter of this appeal and affirmed the adjudicator's ruling in complaint 17831 that the campaign breached clause 11.2.2 of the Code and 11.2.2's clear requirement that "[a] request to join a subscription service MUST be an INDEPENDENT transaction".
- 4.2.8. The test in 11.2.2 is not a purely objective test or a purely subjective test. Instead, as the appeal panel in the 11258 appeal decision stated, it is both an objective test and a subjective test and is necessarily so. In considering whether a campaign has fallen foul of clause 11.2.2 (and its similar successors in subsequent Code revisions), an adjudicator has to consider the consumer's subjective intention in the context of the relevant objective factors.
- 4.2.9. The Appellant's argument must fail.

4.3. *The adjudicator incorrectly applied the “format of the promotional web pages” test*

4.3.1. This argument is similar to the previous argument. The Appellant suggests that the correct approach would be to assess the campaign’s compliance under clause 11.2.3 of the Code.

4.3.2. As we pointed out above, the 17831 appeal decision concerns a substantially similar campaign to the one we are concerned with and the appeal panel in that matter ruled as follows:

*However, it is impossible to enter the competition without subscribing and it appears to be impossible to subscribe without entering the competition. It is in fact unclear what the subscription service IS if separated out from the competition as the only information given in the material is “Get Hot Deals on ur phone plus a chance to win. . .”. So it is clear that the subscription is something separate from the competition – some sort of advertising service – but it is impossible to subscribe independently from the competition. It is this lack of an independent subscription transaction that renders this a breach of Clause 11.2.2.*

4.3.3. We agree with the appeal panel’s finding in 17831. The campaign is in breach of clause 11.2.2. It is not necessary to consider clause 11.2.3 in this matter.

4.4. *Sanctions that are “unduly harsh and without basis”*

4.4.1. The Appellant’s arguments for reconsidering the sanctions the adjudicator issued are as follows:

*The SP would further be much obliged if the Panel would kindly consider the harshness and groundless basis upon which the sanctions have been imposed, and if deemed appropriate in their respected opinion, set aside or substantially reduce them, as the case may be.*

4.4.2. As we pointed out above, the Appellant seems to rely on its argument that its right to a fair hearing was not respected and a consequence of this is that the sanctions ought to be set aside.

4.4.3. The sanction of R50 000 is in line with the decision taken in complaint 17831 (which was subsequently upheld in the 17831 appeal decision). The Appellant has not presented compelling reasons why we should vary the sanctions in this matter.

4.4.4. The Appellant's appeal against this aspect of the adjudicator's decision also fails.

## 5. Conclusions

5.1.1. We dismiss the Appellant's appeals against the adjudicator's decision that the Appellant's campaign was in breach of the Code of Conduct.

5.1.2. The Appellant forfeits its appeal fee and must comply with the adjudicator's ruling on demand by the Secretariat.