



Appeal Panel's Report

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| Complaint/s on appeal | 18771 |
| Appellant/s | Buongiorno SA |
| Date appeal lodged | January 2015 |
| Appeal decision date | May 2015 |
| Relevant Code version | 12.1 |
| Clauses considered | 11.2.1 – 11.2.2. |
| Relevant Ad Rules version | Not considered for the purposes of this appeal |
| Ad Rules clauses | Not applicable |
| Related cases considered | <p>Complaints 11863, 15183, 15477, 15664, 16313, 16479, 16559, 16659, and 17831;</p> <p>The appeal decision regarding complaints 11258, 11582, 11626, 13038 and 13039 ("the 11258 appeal decision");</p> <p>The appeal decision regarding complaints 15477, 15722, 16851, 16977, 17184 and 17236 ("the 15477 appeal decision");</p> <p>The appeal decision regarding complaint 17831 ("the 17831 appeal decision");</p> |

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| | The appeal decision regarding complaint 18615 (“the 18615 appeal decision”). |
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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. The adjudicator in this matter ruled as follows:

1.1.1. “I have considered the SP’s explanation in its response as to how the complainant’s number was used to subscribe to the SP’s 35050 Gold and ZAP subscription services and there are certain inconsistencies in the SP’s version.

1.1.1.1. The SP alleges that after confirming subscription to the 35050 GOLD service, the complainant was transferred to another web promotional page for its ZAP service. However, the SP does not state that the complainant’s number was then re-entered on the ZAP landing page. The SP simply goes on to state, rather obtusely, that the complainant was notified in “the pin code message” of the ZAP service offering.

1.1.2. The message in question reads as follows:

>> ur CODE is 1189 << verify it on the web confirmation page. U'll b subscribed to ZAP from Buongiorno @ R6/day. WIN DAILY AIRTIME & more + Unlimited Downloads

1.1.3. It is noted that the same pin code (1189) that was used to subscribe the complainant to the 35050 Gold service was again sent to the complainant to be used to activate his subscription to the ZAP service.

1.1.4. Based on the foregoing, I do not accept the SP's evidence as being credible in this regard and therefore find, on a balance of probabilities, that no separate opt-in process was followed for the ZAP service.

1.1.5. This also casts doubt on the credibility of the SP's evidence that the complainant was even validly subscribed to the 35050 GOLD service. However, for the purposes of this decision, it is not necessary to make a finding in this regard.

1.1.6. I therefore find that the SP has contravened clause 11.2.1 of the WASPA Code in that the complainant has been subscribed to the SP's ZAP subscription service without specifically opting in to that service.

1.1.7. I also find that the SP has contravened clause 11.2.2 of the Code in that there is no evidence of any request from the complainant to join the SP's ZAP subscription service, or if such a request was made, that it was an independent transaction, with the specific intention of subscribing to the ZAP service.

1.1.8. The complaint is accordingly upheld."

2. Issues raised on appeal

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

2.1.1. That the previous Decision was based on an explanation of the MSISDN step which had not clearly highlighted the fact that the customer opted in twice independently, once for the 35050 GOLD service and secondly for the ZAP service. The Appellant believes that the Adjudicator did not appreciate this when concluding "... on a balance of probabilities, that no separate opt-in process was followed for the ZAP service."

2.1.2. That the subscription process applied to this service is based on the double opt-in system and, in particular, that the customer was requested to complete a double opt-in on each occasion. The standard Subscription Process was submitted, with supporting Screenshots B1 to B6 attached, to demonstrate these allegations.

2.1.3. That these details prove that there was no breach of the CoC because:

2.1.3.1. a separate independent transaction took place for each of the services under Adjudication;

2.1.3.2. the customer willingly chose to opt in to the second service ZAP, by following the activation steps; and

2.1.3.3. the double opt-in system was in place and the customer performed and completed it as requested.

2.1.3.4. that two welcome messages, sent on completion of each opt-in process, prove that the customer was subscribing to two different services.

2.2. The Appellant thus asks for the Decision to be dismissed in its entirety and that the Sanction be overturned.

3. Substantive points at issue

3.1. There were three issues raised in the appeal rulings in prior cases:

3.1.1. Whether clause 11.2.2 can be breached "*even if the potential customer has formally indicated consent by complying with an acceptable opt-in sign-up procedure*". This is the basis of the Appellant's case in #18771.

3.1.2. What the consumer's subjective intention was when he allegedly opted in to this service.

3.1.3. Whether the request to join the subscription service is an **independent** transaction from the entry to the competition.

3.2. Each of these issues will be dealt with in turn.

FIRST ISSUE

3.2.1. The **first issue** can be dealt with fairly easily. In appeal decision 11258, which was referred to in appeal decisions 17831 and 18615 respectively, it was found that the double opt-in sign-up procedure **does not** preclude a breach of clauses 11.2.2 and 11.2.3. As stated in the 11258 appeal decision: *"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"*. Therefore the argument submitted by the Appellant that a double opt-in will automatically result in clause 11.2.2 and 11.2.3 not being breached is not sufficient.

SECOND ISSUE

3.2.2. Turning to the **second issue**, the appeal decision 11258 cited the meaning of the word 'ancillary' to be "in support of, rather than, the main thing, and thus concluded that 'ancillary' in the CoC context of clauses 11.2.1 and 11.2.2, means that the "potential customer must be enticed firstly with the contents of the subscription service, sweetened secondly by the promotional draw".

3.2.3. It is clear from perusal of the landing pages submitted by the Appellant that the promotional competition is not ancillary to the subscription service. The landing pages have been purposefully designed to draw the eye to the centre of the page,

where the print is large and in colour. The focus is "Get TOP HITS plus you could also get a BRAND NEW POLO". This is in 48-pt font. There are only two references to the word 'subscription' – the one is in black on the top left hand side where the blue becomes the darkest. The eye is not drawn there as the words are printed in 11-pt font. The other instance of the word is at the bottom of the page, using a very small font. The same small font that is used at the bottom of the first page is used to describe the conditions of subscription on the next landing page, where the cell phone number must be inserted.

3.2.4. This panel is of the opinion that rather than the competition being ancillary to the subscription service, the reverse is the case: the potential customer is attracted by the opportunity to win a "Brand New POLO", and the subscription service is ancillary to that offer.

THIRD ISSUE

3.2.5. Turning to the **third issue**, this panel notes that in both appeal ruling 17831 and appeal ruling 18615, the appeal panels ruled that the subscription service was NOT an independent transaction on the grounds of a "lack of independent subscription transaction".

3.2.5.1. In the 17831 appeal, the panel stated: *"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."*

3.2.5.2. The 18615 appeal panel confirmed this interpretation and declared the lack of independent transaction to be in breach of clause 11.2.2.

3.2.5.3. As a guide to future campaigns, the panel in the 11258 appeal noted that "a good indicator of a potential breach of clauses [11.2.2 and 11.2.3] would be where promotional material predominantly presents information about the "ancillary" offer, and where the information concerning the subscription service is far less prominent." It is clear that the Appellant has not changed its approach as a result of the 11258 appeal.

3.2.6. In appeal decision 18615, the appeal panel stated that "*in considering whether a campaign has fallen foul of clause 11.2.2 ... an adjudicator has to consider the consumer's subjective intention in the context of the relevant objective factors*".

3.2.7. In order to do consider the consumer's subjective intention we now turn to the evidence in this matter:

3.2.7.1. The Complainant alleges that his interaction has been solely with MTN and only when he telephoned MTN on Saturday, the 6th October 2012, to complain about airtime having expired, did he learn of 35050. He told her to do whatever was necessary to get the airtime back.

3.2.7.2. On Saturday, the 7th October 2012, the complainant received two SMS' messages from +27839200 stating that he was unsubscribed.

3.2.7.3. He still did not understand, so he telephoned MTN again on Monday, the 8th October 2012, in order to discover what these messages meant and to establish what was going on.

3.2.7.4. On Monday the 8th October 2012, he also received an sms from +27831230 stating that R29 had been paid to MTN. This is a mystery that has not been

resolved as no money was, in fact, paid in according to the records at our disposal.

3.2.7.5. The complainant strongly denies knowing anything about the subscription service.

3.2.7.6. The complainant is 76 years old and can thus be regarded as a vulnerable consumer.

3.2.7.7. The complainant further stated that he would not be interested in subscribing to "fun", "games", or "unlimited downloads". He alleges that he used airtime for "emergency purposes" and would never have subscribed for services totalling R330 per month. (It is worth noting that the billing continued until 7th October 2012, despite no funds being available for some time).

3.2.7.8. In this matter the complainant allegedly opted in to two subscription services: 35050 Gold and ZAP. Thirty-five seconds after being welcomed to the 35050 Gold subscription service, a second SMS was allegedly sent to the complainant, giving the same code as previously given to opt in to 35050 Gold, to opt in to the ZAP subscription service.

3.2.7.9. The fact that the same code was used to activate a second subscription service is a further factor that supports the contention that the complainant may not have had the subjective intention to enter into the second subscription service (for example the complainant may have expected the first attempt to enter the code to have been unsuccessful due to an error and as a result the code needed to be inserted again). This appeal panel

considers the repetition of the opt-in code to be misleading. The same opt-in code also suggests that the 35050 Gold and ZAP may in fact be one and the same service.

4. Conclusions

4.1. Only sections 11.2.1 and 11.2.2 of the WASPA Code of Conduct are being considered for the purposes of this appeal. They read:

11.2.1. Customers may not be automatically subscribed to a subscription service as a result of a request for any non-subscription content or service. Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.

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.

4.2. From the evidence available, this panel believes on the balance of probabilities that the complainant did in fact opt in. Despite the complainant's denial, he has failed to provide any evidence to support his claim that he did not receive nine of the SMS' sent to him. He could have approached the network log for evidence of the SMS'. However this does not end the question of whether the complainant had the necessary subjective intention to enter into both subscription services.

4.3. The independence of the two subscription services, one from the other, is unclear.

4.4. From the evidence submitted by the Appellant, the conclusion can be drawn that the 35050 Gold and the ZAP subscription services are linked on the grounds that the same activation code is required by both subscription services.

- 4.5. Because the independence of the one subscription service from the other has not been established, the panel concurs with the adjudicator that on the balance of probabilities, the complainant did not have the express intention of subscribing to an additional subscription service. Accordingly, the panel rules that the SP contravened clause 11.2.1 of the WASPA Code of Conduct.
- 4.6. The independence of the subscription transaction from the promotional activity remains unclear. It seems that entering the competition is not a separate transaction from subscribing to the 35050 Gold. The one is inextricably linked to the other. Furthermore, if 11.2.2 is read in conjunction with 11.2.3, it is clear that the competition is not ancillary to the subscription service. This panel concurs with previous appeal rulings that *"it is the lack of an independent subscription transaction that renders the breach of clause 11.2.2."*
- 4.7. We affirm the adjudicator's decision that the Appellant is in breach of clauses 11.2.1 and 11.2.2 and dismiss the Appellant's appeals against that decision.

5. Sanctions

- 5.1. In appeal 17910 (May 2014) the panel commented: *"we also see this as a problem only if the Appellant is trying to comply with the absolute minimum that it can get away with. There is absolutely no reason that the Appellant could not comply with all the rulings, putting itself well in the clear of the Code"*.
- 5.2. In appeal 16554 (August 2014) the panel reiterated the adjudicator's comment in that case: *"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”.

- 5.3. The appellant in this matter has a long and chequered past with WASPA which has been documented in many appeal decisions and need not be repeated here.
- 5.4. This appeal panel associates itself with the sentiments expressed above. As a member of WASPA, this Appellant is urged to align itself both with the letter and with the spirit of the Code.
- 5.5. The Appellant's appeal against the sanction of R100 000 is accordingly dismissed and the appeal fee is forfeited.