



REPORT OF THE ADJUDICATOR

Complaint reference number:	20817
WASPA member(s):	Buongiorno SA
Membership number(s):	0002
Complainant:	Competitor
Type of complaint:	Subscription service
Date complaint was lodged:	10 October 2013
Date of the alleged offence:	10 October 2013
Relevant version of the Code:	12.4
Clauses considered:	11.1 – 11.10
Relevant version of the Ad. Rules:	n/a
Clauses considered:	n/a
Related cases considered:	11863, 15183, 15477, 15664, 16313, 16479, 16559, 16659, 16832, and 17831

Background

I previously referred this complaint back to the SP and the complainant to provide further information regarding this complaint.

The SP has responded to this request by assuming that a finding has already been made in its favour and that no breach of the Code was established. The SP alleges that the matter is therefore *functus officio* and that it is under no obligation to provide any further response.

No further information has been received from the complainant.

Sections of the Code considered

14.3.10. The adjudicator may ask the secretariat to request that the complainant, the member, or both, furnish additional information relating to the complaint. Specifically, the adjudicator may request that the member respond to any additional breaches of the Code of Conduct discovered during the investigation of the complaint, but which were not specified in the original complaint.

Decision

The SP is not correct in its view that a finding was previously made in this matter. It is clear from the wording of my previous report that a request for further information was made in terms of section 14.3.10 before any finding could be made.

The request made to the SP was actually favourable to its case as the SP was afforded a further opportunity to substantiate certain allegations made in its initial response to the complaint.

However, if the SP does not wish to avail itself of this opportunity, I cannot force it to do so. The SP's argument that this complaint deals with procedural or substantive issues which have already been decided in its favour on appeal is accordingly dismissed.

Unfortunately, the complainant has also not responded to my request for further information so I am unable to make a finding in this complaint.



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Complaint

The complainant lodged a formal complaint against the SP on 10 October 2013. The complaint concerned a promotional competition offered by the SP for its 35050 Gold subscription service.

Entrants are offered the chance to win a Volkswagen Polo.

The complainant alleged that the promotion breached clauses 9.1.1, 11.2.1, 11.2.2, and 11.2.3 of the WASPA Code of Conduct.

SP's response

After requesting an extension of time to respond to the complaint, the SP's initial response was to request that the complaint be suspended pending the outcome of appeals being heard in the following cases #15477, #15722, #16851, #16977, #17184, #17236, #16559, and #16659.

The SP alleged that the current complaint dealt with the same sections of the Code which had been dealt with at length by the SP in its grounds for appeal in the aforesaid matters.

Despite the SP's request, the complainant insisted that the current complaint be dealt with and the SP was notified accordingly.

The SP then sent a further response taking issue with the WASPA Secretariat for referring the request for a suspension of the complaint pending the outcome of the appeals in the other cases to the complainant instead of dealing with the request itself.

The SP argued further that the complainant had only provided a link to the service and nothing further to support the complaint. The complainant also did not request a particular remedy or aver that they were a customer or recipient of the relevant services, or that they had suffered any damage which required immediate resolution.

The SP then went on to take further issue with Secretariat for allegedly delivering the SP's confidential information contained in its responses to various complaints to its competitors pending the publication of the Appeal Panel's reports in the various matters.

The SP argued that the Secretariat had not properly considered its request to suspend the current complaint and had not responded to the SP's request in this regard.

The SP believes that the matter has been escalated to a formal complaint without consideration of the facts or of the SP's request.

The SP requested formal confirmation from the Secretariat that the complainant and the complaint itself were compliant with the procedure set out in section 14.1.3 of the Code of Conduct.

Sections of the Code considered

9.1.1. The total cost for any entry into a promotional competition shall not exceed R1.50.

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.

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, all marketing and promotional material must make it 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.

14.1.1. Any person may lodge a complaint against any member who, in the view of the complainant, has acted contrary to the provisions of this Code.

14.1.2. Any complaint must be lodged with the WASPA secretariat using the contact information published on the WASPA web site.

14.1.3. A complaint should contain the following information:

(a) the name of the wireless application service provider against whom the complaint is being made, or if the identity of the service provider is not clear, the number of the service or other identifying information;

(b) the full names, address and contact details of the complainant;

(c) to the extent that the information is known or available, identification of the part or parts of the Code of Conduct which has allegedly been breached; and

(d) a detailed description of the actions (or inactions) that resulted in the alleged breach.

14.1.4. Any complaint lodged that does not contain the above information may be referred back to the complainant by the secretariat, together with a request to provide the missing information.

14.1.5. If a complainant requests anonymity, the complainant's identity may be withheld from the member at the discretion of the secretariat.

14.1.8. Where the complainant has lodged a complaint or dispute, or instituted an action with any other regulatory body or in a Court, and where the subject matter of that complaint, dispute or action is substantially the same as the subject matter of a complaint lodged by that complainant with the WASPA Secretariat, WASPA may decline to consider and deal with the complaint.

Decision

Firstly, the SP has taken issue with the WASPA Secretariat for not properly considering its request to suspend the complaint until various other complaints under appeal, which deal with the same subject matter and sections of the Code, have been finalised.

The SP has also taken issue with the Secretariat for referring this request to the complainant and, following the complainant's refusal, its decision to refer this matter to formal adjudication.

I do not believe that the Secretariat is under any obligation to comply with the SP's request and/or deviate from the procedure for dealing with complaints as set out in the Code. The Secretariat, in the normal course, requested the SP to respond to the complaint and it forwarded that response onto the complainant. The complainant was not satisfied with the response and requested that the matter proceed to formal adjudication.

Secondly, the SP alleges that the Secretariat is disclosing confidential information contained in the SP's responses to its competitors. The SP has not identified what confidential information it is referring to so it is impossible for me to test whether the information is actually confidential in nature, and/or to comment further on the allegations made.

However, the SP should bear in mind that when information is disclosed to the Secretariat during the complaint resolution process, it will be shared with the complainant. None of the information required by the Code to be disclosed by the SP in its response to complaints is confidential in nature. If the SP intends to volunteer further information in its response which it deems to be confidential, the onus will be on it to take the necessary steps to alert the Secretariat accordingly and to request that the information in question is only disclosed to the appointed adjudicator and not to the complainant. The SP has failed to do so in the present complaint.

The SP has also alleged that, when lodging its complaint, the complainant has not complied with the provisions of section 14.1.3 of the Code in that it has not provided a detailed description of the actions (or inactions) that resulted in the alleged breach.

The complainant provided a link to the SP's online promotion for its 35050 GOLD subscription service together with a reference to the specific sections of the Code that it alleges have been breached by the SP.

This link was not accessible at the time of adjudication of this complaint and it is therefore practically necessary for me to request screen shots and any other pertinent information that the complainant may have regarding this complaint.

Finally, the SP also requested that this complaint be suspended until its appeal in a number of other complaints dealing with the same subject matter and provisions of the Code have been finalised.

The appeal hearing for these other complaints has been held and a number of the procedural arguments raised by the SP in those matters were upheld.

However it is not clear from the SP's response in this matter what procedural and/or substantive grounds of argument raised in the appeal should also be considered in the adjudication of this complaint.

Section 14.3.15 of the Code states that, when making adjudications and determining sanctions, previous precedent should be taken into account, and that precedent set by appeals panels should carry more weight.

Based on the foregoing, I refer this complaint back to the complainant and the SP to provide further information and evidence, where applicable, in support of the cases they wish to make out in this matter.