



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Buongiorno UK
Information Provider (IP):	Not applicable
Service Type:	Subscription service in breach with the Code
Complainants:	Anonymous
Complaint Number:	8411
Code Version:	7.0
Advertising Rules Version:	2.3

Complaint

The Complainant wrote:

http://www.youmobile-za.com/adv-milionario--game-336_104.html?checkSplash=yes&operatore=mtn&bannerVar=

This service is advertised with a banner that the user answers multiple answer quiz questions. After 2 questions the user is directed to site that offers mobile content.

This offer uses a quiz to entice users into a subscription service.

This offer also uses a specific content item to opt users into an ongoing subscription.

The code states that more than one example of the subscription content must be displayed, but by allowing the user to pick only one of the content items displayed it deceives the user into thinking that they are only buying that specific item. Unfortunately they are then automatically opted into a subscription offer.

This service uses a quiz to opt members into a subscription service. This service also uses a specific content item to opt users into a subscription service. Both are breaches of the WASPA Code.”

The Complainant refused resolution:

“This complaint is not resolved as the code was breached. That they have disabled the offer is good, but does not change the fact that they have breached the code.”

Service provider's response

The SP wrote:

"We have asked our third party advertiser to review the advertisement and will revert back soonest."

The SP provided an additional response:

"We thank you for bringing this matter to our attention. We have since had the advertisement disabled for further investigation until such time, that it is compliant with the code of conduct. Once all is corrected with the amended changes with our third party advertiser, we will revert back with the outcome, weather to leave it disabled or reinstate the advert. We trust that this is to the secretariats satisfaction."

Sections of the Code considered

4.1.1. Members are committed to honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.

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.

6.1.1. In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.

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.

11.1.2. 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.

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 response.

It has come to the attention of the Adjudicator that the website referred to is still up and running, displaying the exact issues that were raised by the complainant, albeit the undertaking by the SP to disable the said site.

In reviewing the said website, there were a number of issues that drew the attention of the Adjudicator.

Although the subscription service text at the top of advertisement is displayed in a font that is correct, it still does not in the opinion of the Adjudicator conform to section 9.3.15 of the WASPA Advertising Rules which requires that the terms "subscription service" must be prominently displayed.

The colour of the font being used against a backdrop of similar colour is of such a nature that it would be disadvantages to anyone with a slight visual impairment to see any prominence in display, whether such impairment can be related to colourblindness or reading difficulties.

Even in the absence of any visual impairment, the Adjudicator finds it hard to see any prominent display of the text as is required by the Advertising Rules.

This in itself relates to a breach of section 11.1.1 of the WASPA Code of Conduct where in addition to the word "prominent", the word "explicit" is also used. Nothing in the said advertisement aspires to these words.

The terms and conditions at the bottom of the page are situated at such a position that one has to scroll down, before noticing it. The website design is of such a nature that one would not necessarily think of scrolling down, therefore failing in taking note of the terms and conditions. These terms and conditions are also not fulfilling the font size 12 as is required by section 9.2.2.1 of the Advertising Rules.

The SP has failed to adhere to the Advertising Rules which would suggest a breach of section 6.1.1 of the Code of Conduct.

In its reply the SP has not denied any of the allegations made against it in the said complaint, therefore inferring acknowledgement of the alleged breaches.

The luring of consumers into subscription services by way of a quiz is a direct breach of section 11.1.2 of the Code of Conduct and further analysis of the specific content is therefore irrelevant to this matter, although also clearly a further violation of section 11.1.2.

In its breaches of the relevant sections, the Adjudicator also finds the SP in subsequent breach of sections 4.1.1 and 4.1.2.

With regards to its shifting of blame to its third parties, the Adjudicator feels it necessary to refer the SP to Adjudication 7631 where the relevant Adjudicator made the following remarks in its decision related to third parties:

"There is an abundance of precedent to the effect that a WASPA member cannot escape responsibility for compliance with the Code of Conduct by raising a defence that the non-compliant conduct was undertaken by a third party with which the member had contracted for the provision of marketing and other services. This

position is normally expressed with regard to the relationship between WASPs as aggregators and information providers – see Appeal 4580 @ paragraph 6.1.8 and Appeal 0985 @ paragraph 6.3.4 – and this Adjudicator cannot see any cogent reason as to why this principle should not be extended to apply to the relationships between WASPA members and affiliate marketing entities. The following excerpt from the findings of the WASPA Alternative Appeals Panel in Appeal 4580 is particularly apposite:

“It is imperative that the parties have proper agreements in place to manage their contractual relationships and to define their roles and responsibilities under the Code and generally in relation to consumers.”

2. It is accordingly found that the member bears direct responsibility for any breaches of the Code of Conduct related to the promotional site and sign-up procedure as tested by the Monitor.”

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;
- The SP's willingness to investigate but subsequent failure to rectify.

1. The SP is required to suspend the service and access to the site it is hosted on until such time as it complies with the orders set out below. The SP may not initiate any new or existing billing transactions for the service during such period of suspension; however it may process any unsubscription requests;

2. The SP shall send an sms notification to all existing subscribers of the service in the format prescribed in 11.4 of the current Code (the SP shall furnish the WASPA Secretariat with confirmation that it has notified its subscribers);

3. The SP shall clearly indicate at the first point of contact with the service and all subsequent pages and sites that the service is a subscription service and further precisely what the subscription entails. These indications must be clearly visible and unambiguous.

4. The SP shall ensure that any reference to or implication of the availability of single items is removed from the service's site such that the site only makes reference to its subscription content in clear and unequivocal terms;

5. The SP shall ensure that its terms of use are amended in accordance with Rule 9.2 of the Advertising Rules;

6. The SP is fined:

6.1 R30 000 for its breach of sections 4.1.1 and 4.1.2 on the basis set out above;

6.2 R50 000 for its non-compliance with 11.1.1 and 11.1.2; and

6.3 R15 000 for its breaches of the Advertising Rules.

The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this.