



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP):</b>	Viamedia
<b>Information Provider (IP):</b>	Not applicable
<b>Service Type:</b>	Subscription service
<b>Complainants:</b>	Anonymous
<b>Complaint Number:</b>	9624
<b>Code Version:</b>	9.0
<b>Advertising Rules Version:</b>	2.3

### Complaint

The Complainant wrote:

The following sms was sent to the Complainant by the SP: "DO U want to WIN R2000 a day Then REPLY SA to become the Face of BAFANA supporters, get clips to 2 Ur Phone Subs service. R3/day Reply out 2 stop Sent via my BlackBerry from Vodacom - let your email find you!"

The Complainant insists there is a breach of the Code: 11.2. Subscription process.

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.

The Complainant was not satisfied with the SP's response and wrote the following:

"We do not consider this complaint resolved. Please send for adjudication. There is not a clear enough distinction between the competition and the subscription service in our opinion. The SMS constitutes bundling."

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## Service provider's response

The SP wrote:

"The complainant received an SMS from one of our partners and suggests a breach of clause 11.2.1 and 11.2.2. In what follows we will demonstrate that there is no breach, as claimed.

The message in question reads as follows:

Do U want to win R2000 a day? Then REPLY SA to become the Face of BAFANA supporters & get clips to 2 Ur Phone. Subscription service. R3/day. Reply out 2 stop.

The message offers a user BafanaBafana images and clips if they reply SA. It indicates clearly that it's a subscription service and costs R3/day (conforming to the requirements of the code). It also communicates that there is a promotional competition where a user who joins could win R2000 per day. We will address each detail of the following two clauses in this regard.

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.

The relevant part of the clause is numbered and in italics, while our response is immediately below that. The Bold emphasis is our own addition for your convenience:

*Clause 11.2.1.*

*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**...*

There is neither an **automatic** subscription, nor **non-subscription content or service**. The SMS is clearly promoting a subscription service. The keyword, "SA" is generic. The content offer is in plural ("clips"). A **manual** action is required for the subscription. A hypothetical consumer cannot but understand that a **manual** action is required, in order to initiate a subscription service.

*11.2.1. ... Customers may not automatically be subscribed to a subscription service without specifically opting in to that service.*

Once again, there is no automatic subscription. The user is required to respond with the keyword "SA" in order to initiate a clearly promoted subscription service.

This SMS advert is clear, with respect to the communications of a subscription service. It conforms with all requirements of the code in this regard. By the definition of automatic this cannot be an automatic subscription as the user is required to reply to the message after having read the message, in order to **manually** initiate their subscription. The short nature of an SMS ensures that a user should quickly and easily be able to make an educated decision based on the words "Subscription Service" and the pricing i.e. "R3/day" and as mentioned the generic keyword and plural offer.

*Clause 11.2.2.*

*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.*

As explained before, the offer is clearly for a subscription service. A hypothetical user would manually reply to the message with the intention of joining the service to get Bafana Clips with the added attraction of the promotional competition. There is only one call to action and it is therefore by definition independent.

*11.2.2. .... A request from a subscriber to join a subscription service may not be a request for a specific content item .....*

The offer is clearly not for a specific item. The keyword is generic and cannot be confused as a single item and the offer of 'clips' is in plural and that too cannot be considered a single item. **The request is for multiple content items.**

*11.2.2. .... and may not be an entry into a competition or quiz.*

The request is for content items and is not an entry into a competition or quiz, however, all members are eligible for the promotional competition that is also communicated. The subscription action is for the content not the competition, although the message implies entry for members, which is correct and in line with the promotion. The competition is completely independent of the subscription service. The test to apply is: Is there a content service without the competition? The answer is Yes. Is there a competition without the content service? The answer is No. Are the users charged for the competition? The answer is No. The hypothetical user is easily able to determine this from the message, regardless of the attractiveness of the competition. They are charged for access to the content items. This is a content service with a promotional competition element. This is a completely acceptable promotion. We trust that we have demonstrated that there is no contravention. Please don't hesitate to request any further clarifications should it be required."

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## Sections of the Code considered

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.

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.

11.2.1. 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.

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## 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.

The whole purpose of section 11.2 of the Code of Conduct is to eliminate bundling which creates confusion, deceptive practice and misleads the public into subscribing to unwanted content.

It has also come to the attention of the Adjudicator that the Complainant alleged receiving a sms containing the word "subs" while the SP in its reply stated that the word "subscription" was used. Pending the Complainant providing the WASPA Secretariat with proof of the wording "subs", the Adjudicator finds the SP in breach of section 11.1.1.

Although the Adjudicator is not denying that the SP in this matter is portraying its services as a subscription service, it does unfortunately not comply with the wording and format as is prescribed in the Code. Irrespective of how clear one makes your intention of subscribing a customer to your service, one cannot bundle such a service with a competition.

The Adjudicator therefore finds the SP in breach of section 11.2.2.

Further, a customer's request into entering the R2000-00 per day competition ("non-subscription content or service") will by itself result into subscription which negates the first part of section 11.2.1.

The Adjudicator therefore also finds the SP in breach of section 11.2.1.

The Adjudicator also finds the SP in breach of section 4.1.2.

The Complaint is upheld.

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### **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; and
- The SP's subsequent response and withdrawal of the site.

1. The SP is required to suspend the service 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, detailing such suspension, to all existing subscribers of the service (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 services (irrespective of medium) 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 competitions are removed from the service and that the service only makes reference to its subscription content in clear and unequivocal terms;

5. The SP is fined:

5.1. R50 000 for its breach of sections 4.1.2 of which R 40 000 is suspended for one year;

5.2. R100 000 for its non-compliance with sections 11.2.1 and 11.2.2 of which R 80 000 is suspended for one year; and

5.3. R20 000 for its breach of section 11.1.1 pending the Complainant providing the WASPA Secretariat with proof of the wording "subs",

payable to the WASPA Secretariat within 5 (five) working days of notice.

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

