

REPORT OF THE APPEALS PANEL

Date: 01 October 2011
Service Provider: Viamedia
Complaint Number: 9624
Applicable version Code: V 9.0
Applicable versions Advertising V 2.3
Guidelines:

1 BACKGROUND TO THE APPEAL

- 1.1 This appeal concerns the adjudication of a complaint made on 01 June 2010 by a competitor regarding a subscription service provided by Viamedia, the Service Provider (SP) and member of WASPA.
- 1.2 Specifically, the complaint, adjudication and appeal concern subscription services and “bundling”, the practice of linking subscription services to content, including competitions.
- 1.3 The complainant cites a breach of sections 11.2, 11.2.1 and 11.2.2 of the WASPA Code of Conduct (Code).

2 THE COMPLAINT

- 2.1 The panel notes a variation in the wording of the complaint made by the complainant and responded to by the SP. A matter which is unresolved in the adjudicator’s report, where section 5.3 of the report records that the complainant is to provide WASPA with proof of the wording. No such proof has been provided to the panel.
- 2.2 The variation is in the form of an abbreviation of ‘subscription’ to ‘subs’. All other words in the message complained of are identical.
- 2.3 *The complainant - version*
- 2.3.1 “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”.
- 2.4 *The complaint-the SP’s - version*
- 2.4.1 “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”. (Bold font is the panel’s emphasis).

**WASPA appeals panel
Complaint 9624**

2.5 Neither the Code nor the Advertising Guidelines (Rules) reference use of an abbreviation from 'subscription' to 'subs' being acceptable. Given that the Complainant has not provided proof that an abbreviation to 'Subs' was used, the panel will rely on the SP's version and not concern itself with the use of the abbreviation. We ask in future that adjudicators request confirmation as they are entitled to in terms of sec 14.3.9 of the Code, prior to making a finding.

2 DECISION OF THE ADJUDICATOR

2.1 Findings of the Adjudicator

2.1.1 The adjudicator found that the SP had breached sections 4.1.2, 11.1.1, 11.2.1 and 11.2.2 of the WASPA Code.

2.2 Sanctions imposed by the adjudicator

2.2.1 The adjudicator imposed the following fines in respect of the various sections of the Code breached:

2.2.1.1 Section 4.1.2 - R50,000 (R40,000 suspended for one year);

2.2.1.2 Sections 11.2.1 and 11.2.2 – R100,000 (R80,000 suspended for one year);
and

2.2.1.3 Section 11.1.1 – R20,000 (pending proof of wording (abbreviation) to be provided by the complainant).

2.2.1.4 The balance of the adjudicator's sanctions relate to notification to subscribers regarding the suspension of the service and various reminders for the SP to comply with the Code in future.

3 GROUNDS OF APPEAL

3.1 The SP's reason for appeal is that it contends the adjudicator made an error. It hopes the panel will "agree and dismiss this complaint".

3.2 The undated appeal document sets out the SP's position relating to sections 4.1.2, 11.2.15 and 11.2.2 of the Code. (The panel notes that 11.2.15 should read as 11.2.1 and that 11.1.1 has been excluded).

3.3 With respect to the adjudicator's finding of a breach of section 4.1.2, the SP contends that the wording of its message "in no way tries to mislead the user, it clearly states that it is a "Subscription service. R3/day". Furthermore, the SP states that even the adjudicator had acknowledged that the service had been portrayed as a subscription service.

3.4 With respect to of 11.2.1 and 11.2.1 the SP contends that use of the plural "clips", "indicates that there is more than one content item on offer for this service". This "clearly indicates that this it is a subscription service for multiple content items". Additionally, the customer is told that they need to reply "SA" to join the "club", the manual opt-in process precluding any automatic subscription.

**WASPA appeals panel
Complaint 9624**

- 3.5 The SP does not agree with the adjudicator's finding that a customer's request to enter the promotional competition ("R2000-00 per day non-subscription content or service") will by itself result in subscription. The SP contends that "the competition is a promotion that is available to members of the club", claiming that the entry to the competition "is free and in no way would result in a subscription". The SP states that "the average user would therefore logically understand that the service is a subscription service for content and not just an entry into a competition."
- 3.6 With regard to section 11.2.2 of the Code, the SP contends that the "intention when including this wording in the clause (of the WASPA Code) was to deal with Internet Quizzes and NOT promotional competition, this was agreed and discussed in the last Codecom meeting, the minutes of which have been attached to this appeal. Furthermore it has been agreed that this element of the COC should be changed so it is clear that this clause does not include promotional competitions. [T]hese changes are currently being ratified by WASAP (sic) Mancom." In summary, the SP concludes that "Given these facts we respectfully contend that the interpretation of this element of the code is being applied incorrectly, and if it were read in conjunction with the revised version of the COC there would in fact be no contravention."
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4 FINDINGS AND DECISIONS OF APPEALS PANEL

4.1 Sections of the Code reconsidered by the panel and findings

- 4.1.1 *Code section 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.
- 4.1.1.1 *Finding on section 4.1.2:* Based on the contentions in the SP's appeal document, the panel is prepared to accept that the SP did not knowingly disseminate information that is false or deceptive, or that is likely to mislead. The SP seems convinced of the clarity of its intention and interpretation. The panel nevertheless finds that the message is likely to mislead consumers. Our finding merely excludes the element of direct intention to mislead.
- 4.1.2 *Code section 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.
- 4.1.2.1 *Finding on section 11.1.1:* The panel finds no breach of this section of the Code. We agree that the message clearly describes the service as a subscription service.
- 4.1.3 *Code section 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.
- 4.1.3.1 *Finding on section 11.2.1:* The panel finds that subscription results from the consumer's manual opt-in request for subscription services and not as a result of a request for content, with the result that section 11.2.1 has not been breached.

**WASPA appeals panel
Complaint 9624**

4.1.4 *Code section 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.

4.1.4.1 *Finding on section 11.2.2:* The panel finds that a request from a customer to join the subscription service is an independent transaction to which the customer does intend subscribing (Bafana clips). On a strict interpretation of this part of the Code, it has not been breached. However, this first part requirement is linked to the second part of the section, that of a competition.

4.1.4.1.1 The panel finds that the second part of this section of the Code has been breached because the subscription request is the entry to the competition.

4.1.4.1.2 The panel notes that the adjudicator's report and the SP's response and appeal documents hinge largely on language and interpretation. We do not accept the semantics put forward by the SP with regard to a promotional competition. The fact of the matter is that the subscription service is linked to the competition to "win R2000 a day" and the consumer is quite possibly influenced or even induced in making his or her decision to "subscribe" by the chance of winning.

4.1.4.1.3 The panel finds the wording and the purpose of the applicable version 9 of the Code plain. We cannot accept the contentions made by the SP in 3.5 above with regard to the future intentions of the WASPA Mancom. We note for the record that the minutes of the "last Codecom meeting" which were not provided are not required because it is not the panel's function or mandate to make findings on or to use extraneous material.

4.2 *Sanctions of the appeal panel*

4.2.1 The fines imposed by the adjudicator for breaches of sections 4.1.2, and 11.1.1 are withdrawn.

4.2.2 The fine imposed by the adjudicator for the combined breach of sections 11.2.1 and 11.2.2 is withdrawn and replaced by the following sanction:

4.2.2.1 The SP is fined R 75,000 for the breach of section 11.2.2 of the Code.

4.2.2.2 R50,000 of the fine in 4.2.2.1 above is suspended for 12 months. The suspended portion of the fine will become due and payable if the SP breaches the same section of the Code within 12 months of the receipt of this report.

4.2.3 The fine must be paid to WASPA within 5 days of receipt of this report.

4.2.4 The appeal fee is not refundable.