



## REPORT OF THE ADJUDICATOR

**WASPA Member (SP)** ViaMedia  
**Information Provider (IP)** Xcite Mobile  
**Service Type** Subscription service  
**Source of Complaints** Competitor  
**Complaint Number** #0052

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### Complaint

A complaint was received in respect of the subscription service offered by the IP through the SP. In particular the complaints concerned whether subscribing to a subscription service is an independent transaction, as evidenced by an advertisement for the service as placed by the IP.

The following clauses of the WASPA Code of Conduct were considered:

2.20. A “**subscription service**” is any service for which a customer is billed on a repeated, regular basis without necessarily confirming each individual transaction.

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.

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### SP response

The Secretariat received the following response from the SP:

“Please let [it] be noted that we believe that Gavin Penkin is abusing the WASPA complaints procedure for his own competitive advantage. This complaint is clearly not valid and is wasting WASPA, ViaMedia and Xcite Mobiles time.

To illustrate Mr Penkin's subversive activities, we believe he convinced the legal representation of Super Sport and others to send legal letters addressed to ViaMedia about trademark infringements. None of ViaMedia's partners use ANY of the Super Sport trademarks at all (or anything similar).

Again in this case it is simply a waste of everyone's time and money.

In response to Complaint #0052 our partners have submitted the advert in question and the following response.

==== Xcite Mobile Response =====

- Although the Advert is a 'Hybrid' advert as defined by the WASPA Code of Conduct, there is ABSOLUTELY NO bundling in this advert.
- The service has been carefully designed to avoid any bundling.
- Any content request will only result in content and NOT a subscription.
- MTN, CellC & non-members can download freely without subscribing at R5/sms.
- A subscription request is a completely independent request and doesn't include content.
- ONLY Vodacom users can subscribe to a club at R5/week and get 5 credits each week i.e. costing R1 per item. Bearer charges are clearly listed.
- The Subscription instructions are advertised in a completely separate section of the advert and very clearly labelled.
- We have spent much time ensuring there is no bundling and that the advert is very clear to the users.
- We have submitted a copy of the advert in question for review by WASPA and we have no doubt you'll agree with us and discount the complaint.”

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## Decision

The complainant refers to “bundling” of content and a subscription service. The term bundling is not referred to in the WASPA Code of Conduct and seems to derive from the WASPA Advisory on Subscription Services (dated 8 August 2005) (hereinafter referred to as the “Advisory”). Following a previous decision, the Adjudicator held that the Advisory does not have the status of the WASPA Code of Conduct and is an attempt to explain and interpret the Code of Conduct. As such, it has a guidance role and the Adjudicator considered same, however is not bound to follow the interpretation of the Code of Conduct contained therein. More particularly, no finding can be made of a contravention of the Advisory and certainly no sanction can be imposed for a failure to adhere to the Advisory.

The Adjudicator noted the IP’s submission concerning so-called “hybrid” advertisements, by which the Adjudicator understands the IP to be referring to advertisements, which advertise both a subscription service and specific content. Again this is not a term used in the WASPA Code of Conduct, nor is such form of advertising specifically permitted as the IP alleges. However, while so-called “hybrid” advertising is not specifically permitted in the WASPA Code of Conduct, it is also not

specifically prohibited, provided that such a “hybrid” advertisement does not contravene the Code in other respects.

With regard certain of the SP’s submissions and particularly those concerning the abuse of the complaints process by the complainant, this is a matter between the respective parties. In the absence of a formal complaint by the SP and an opportunity for the complainant to respond thereto, the Adjudicator did not consider this issue further.

The adjudicator expressed his concern regarding so-called “hybrid” advertisements as they have a far greater potential to cause confusion in the minds of consumers than advertisements only for content or only for a subscription service.

The Adjudicator noted:

- A download “club” is a subscription service, however differentiated from earlier subscription services in that the subscriber selects one or more content items, rather than having content pushed to the subscriber;
- The complainant operates a similar service, using its WAP portal to allow subscribers to select content rather than relying on a subscriber SMSing a product code;
- Clarity and differentiation of service and pricing in a “hybrid” advertisement is more difficult than in an advert for one of specific content or a subscription service and needs careful evaluation in terms of the WASPA Advertising Guidelines; and
- Download “clubs” require careful attention to ensure that consumers are neither confused nor harmed.

With regard to the specific instance, the mechanisms used by the IP to allow a customer to join a subscription service and to access specific content are well differentiated by the fact that the subscription process makes use of a generic key word to initiate the subscription and then the use of a seven digit product code to select the specific content to be received as part of the subscription service. Use of this seven-digit product code, without having subscribed to the subscription service, will initiate a content download and not a subscription to the subscription service. As such, it was the view of the Adjudicator that subscription to the IP’s subscription service is an independent transaction and not linked to any other transaction.

Having regard to the foregoing, the service offered by the IP through the SP and the processes it employs and the specific content of the advertisement submitted by the complainant, the Adjudicator did not uphold the complaint.