



REPORT OF THE ADJUDICATOR

Complaint reference number:	17657, 17734, 17894
WASPA member(s):	Buongiorno SA
Membership number(s):	0002
Complainant:	Public
Type of complaint:	Subscription service
Date complaint was lodged:	29 June 2012
Date of the alleged offence:	s/a
Relevant version of the Code:	12.0
Clauses considered:	4.1.2, 9.1.7, 11.2.1, 11.2.2
Relevant version of the Ad. Rules:	n/a
Clauses considered:	n/a
Related cases considered:	11863, 15183, 15477, 15664, 16294; 16313, 16479, 16559, 16659, 16832, and 17831

Complaint

1. The complainant logged a complaint via the WASPA website on 29 June 2012.
2. The complaint was one of three complaints (17657, 17734 and 17894) lodged against the SP by the complainant.
3. The SP requested that the WASPA Secretariat consolidate the complaints into one complaint as they dealt with the same issues and had been lodged by the

same complainant. The WASPA Secretariat granted the SP's request and these complaints are adjudicated as one complaint.

4. The complainant's complaint refers to a promotional web page found at:
[http://weeklygiftwinner.com/winner/?sid=cp-2&subid=128873&sub2=ams1CMGN1KzfyazeFBACGMHr_vfUuMDcNCIMNDEuMTkzLjI1LjUyKAE.&sub3=&sub4=&sub5=.](http://weeklygiftwinner.com/winner/?sid=cp-2&subid=128873&sub2=ams1CMGN1KzfyazeFBACGMHr_vfUuMDcNCIMNDEuMTkzLjI1LjUyKAE.&sub3=&sub4=&sub5=)
5. The complainant alleges that visitors are directed to the page via banner adverts appearing on other websites on the internet.
6. The page claims "***You could be today's lucky winner***".
7. Any attempt to close the page, forces a pop-up which states: "***WAIT! Are you really sure you want to go? Today is the ONLY day you will be able to win an Apple® iPad 2***"

and

"We are serious, this offer will expire tonight at 11.59PM. Click CANCEL in this window and answer the simple test question for your chance to win!"

8. The complainant states that it is his understanding that the SP does not give away Apple iPads on a daily basis.
 9. He alleges that the page is therefore misleading and exaggerates the chance of winning a prize, and is thus a breach of the WASPA Code of Conduct, specifically clauses 4.1.2 and 9.1.7.
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SP's response

10. In its lengthy response, a copy of which is annexed to this report in its entirety, the SP asserts that a reasonable person viewing the banner adverts and intermediate web pages complained of would not be misled or deceived into believing that their chances of winning the advertised prizes were exaggerated, or otherwise.
11. The SP refers to the format of the entire campaign, emphasising the references to its terms and conditions, the wording used in the banner adverts and web pages, and the double opt-in mechanism used before subscription takes place; and argues that a reasonable person would know that only subscribers to the advertised service would stand a chance of winning one or more of the advertised prizes.
12. The SP argues that at no point in time is a member of the public guaranteed a chance of receiving a reward.
13. The SP placed a lot of emphasis on the adjudicator's report in complaint 11863 and specifically referred to the finding made in that report that the SP is not precluded from simultaneously advertising a subscription service alongside a competition and/or promotional draw.
14. Relying on the adjudicator's findings in complaint 11863, the SP states that interacting with the initial banner adverts and intermediate web pages of this particular campaign does not lead to someone automatically being subscribed to the service and it is only once they have followed the double opt-in process that they would be subscribed.
15. Regarding the specific banner adverts used in this campaign, the SP states that, in line with industry practice, such adverts are used as an initial marketing tool for the purposes of catching the eye of potential customers, and inviting them to link into the underlying landing pages of the campaign.
16. The SP states that its banner adverts are small in context with the rest of the webpage on which they appear, and they therefore have to be made more conspicuous. The SP asserts that it is the landing pages, which the banner advert links to that should contain all the substantive information pertaining to the subscription services being promoted as required by WASPA.

17. The SP acknowledges that its banner adverts cannot be deliberately and blatantly deceitful, but due to their nature and purpose, there is a limit to the amount of information they can include, whilst still being captivating enough to generate interest in the underlying campaign.
18. The SP argues further that the banner adverts in this campaign do not assure potential customers that they have won anything. It merely states that there is an opportunity to win something, and that there are terms and conditions attached to the potential to win.
19. It alleges that any reasonable person interacting with the banner would be aware that, when considering the banner in its entirety:
 - 19.1 there has been no guarantee that they have won anything – only that there is a possibility that something can be one; and
 - 19.2 despite the potential to win, that potential encompasses certain terms and conditions, and no reasonable person would believe they were winning something merely because they clicked on the banner;
 - 19.3 knowing there would be conditions attached a reasonable person would immediately look for the underlying terms and conditions and would easily note that a subscription service is being advertised and there is a cost to join.
20. The SP confirmed that subscribers cannot win an Apple iPad every day and it has acknowledged that the wording of its pop-ups and web pages referring to this prospect are potentially misleading.
21. The SP amended the wording of these elements of its campaign before the matter was adjudicated and annexed a copy of the amended pages to its response.

Sections of the Code considered

22. The following clauses of the Code were considered:

Clause 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.

Clause 9.1.7:

Competition services and promotional material must not:

- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;*
- (b) exaggerate the chance of winning a prize;*
- (c) suggest that winning a prize is a certainty;*
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize.*

Clause 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.

Clause 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.

Decision

23. In its response to this complaint, the SP has emphasised that when its marketing campaign is viewed in its entirety, members of the public, acting and behaving reasonably, would not be misled or deceived into subscribing to the advertised service.
24. However, even if this argument was accepted, this does not mean that the individual elements of the SP's marketing campaign do not need to be compliant with the WASPA Code and Advertising Rules.
25. In particular, individual banner adverts, pop-ups and other web pages cannot be false or deceptive, or be likely to mislead consumers, even if the element of deception or misapprehension is diluted once the consumer follows all the relevant steps in the subscription process.
26. The primary objective of the Code is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about such services.
27. Not only is this a worthy objective in the context of consumer protection, but it also serves to promote the industry as a whole, and for the benefit of all relevant players, including the SP.
28. Turning to the individual elements of this particular campaign:
 - 28.1 The SP's use of the word "*Congratulations*" in its banner adverts in the context of a competition when visitors have not yet won anything is false, deceptive and misleading.
 - 28.2 The wording "*you have been selected as a visitor to this site for a chance to be a lucky winner*" in the intermediate pages of the campaign infers that simply visiting the site enters the visitor into the competition or draw to win a prize. There is no mention of the fact that this is a reward program associated with a subscription service.
 - 28.3 The wording "*click below to see if you are a potential winner*" infers that the visitor has to do nothing more in order to win a prize.

- 28.4 The wording "*act fast please respond now or else we may allow another visitor a chance at the prize*" again infers that simply visiting the site gives the visitor a chance to win a prize.
- 28.5 The wording in the pop-up banner when users try to leave the page: "*today is the ONLY day you will be able to win an Apple iPad*" is false, as confirmed by the SP itself.
- 28.6 The wording: "*we are serious, this offer will expire at tonight at 11:59*" infers that the chance to win the advertised prize or other prizes is part of a one-time offer which is due to expire, and not part of the SP's ongoing reward program which is associated with its subscription services.
- 28.7 The wording: "*click cancel and answer the simple test question for your chance to win*" infers that the opportunity to win is enabled by simply answering a test question. Again, no mention is made of the SP's reward program or that only subscribers stand a chance of winning a prize.
29. Each of the aforesaid elements and the wording used by the SP are false or deceptive, or are likely to mislead by inaccuracy, ambiguity, exaggeration or omission.
30. Taking into account the numerous other complaints that have been lodged and upheld against the SP, its sophistication as a long standing member of WASPA, and the relative ease with which it could achieve its marketing goals while still complying with the requirements and spirit of the Code, I can only conclude that the SP has knowingly included the aforesaid false and/or deceptive and/or misleading wording in the elements of its promotional campaign for the subscription services in question.
31. I find that the SP has therefore breached clause 4.1.2 of the Code and the complaint is upheld in this regard.
32. It is noted that in each of the elements of the campaign the SP does not guarantee that prizes will be won, nor does it suggest that winning a prize is a certainty.

33. However, by inferring that visitors can win a prize simply by visiting the site, and/or that simply answering a test question will qualify them for winning a prize, the SP has indeed exaggerated the chance of winning a prize.
 34. I therefore find that the SP has also breached clause 9.1.7 of the Code and the complaint is upheld in this regard.
 35. Finally, I am satisfied that the SP's double opt-in mechanism, its terms and conditions, and the other references in the campaign to the subscription element of the service ensures that any request from a customer to join the SP's subscription service would be an independent transaction, with the specific intention of subscribing to the service.
 36. Furthermore, there is no evidence before me of a request being made to enter the advertised promotional draw being taken as a request to subscribe to the service.
 37. Therefore, I do not uphold the complaint that the SP has breached clauses 11.2.1 and/or 11.2.2 of the Code.
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Sanction

38. I have taken note of the sanction of suspension already imposed on the SP in terms of complaint 16294 and others, which is currently the subject of an appeal.
39. Therefore, the appropriate sanction for the SP's contravention of the Code in this complaint is the payment of a fine.
40. Taking into account the fines previously imposed on the SP for the same or similar contraventions of the Code, a fine of R100 000.00 is imposed on the member, which is payable within 7 days of the date of publication of this report.



Response to Complaints #17657, #17734 and #17894, as consolidated by the WASPA

Secretariat

1. On 05 July 2012 and 18 July 2012 we were advised by WASPA that three complaints had been lodged against us by Julius Cobbett (the “Complainant”).
2. The Complaints were numbered 17657 (“#17657”), 17734 (“#17734”) and 17894 (“#17894”), collectively referred to as the “Complaints”.
3. The WASPA Secretariat (the “Secretariat”) was of the opinion that all three of these complaints would be resolved informally. As we had already, in the past, unsuccessfully tried to settle, on an informal basis, similar complaints in connection with the same Complainant we were of the view that informal settlement would not be possible – therefore instead of wasting unnecessary time a costs on attempting to resolve this matter informally we requested that these all be converted to formal complaints and consolidated into one Complaint.
4. As a result of our request the Secretariat did convert all three complaints to formal complaints and agreed to consolidate them into one complaint.
5. The reason we requested the Complaints to be consolidated is due to the fact that all three were substantively the same, with respect to both the content underlying the Complaints and the alleged breaches of the WASPA Code of Conduct (the “Code”).
6. The relevant version of the Code at the time of the Complaints was version 12, which version we shall therefore be applying in response to the Complainant’s allegations.
7. We are accused of breaching sections 4.1.2, 9.1.7 and 11.2.2 of the Code. In addition to these sections of the Code we will also be dealing with section 11.2.3 of the Code – as will be seen below, due the nature of the contents underlying the Complaints and the allegations pertaining thereto, section 11.2.3 is intrinsically connected to answering the allegations regarding the breach of section 11.2.2.
 - 7.1. Section 4.1.2 states that, “[m]embers must not knowingly disseminate information that is false or deceptive, or that is likely to mislead by inaccuracy, ambiguity, exaggeration or omission”;
 - 7.2. Section 9.1.7 states that, “[c]ompetition services and promotional material must not:



- (a) use words such as 'win' or 'prize' to describe items intended to be offered to all or a substantial majority of the participants;*
- (b) exaggerate the chance of winning a prize;*
- (c) suggest that winning a prize is a certainty;*
- (d) suggest that the party has already won a prize and that by contacting the promoter of the competition, that the entrant will have definitely secured that prize";*

7.3. Section 11.2.2 states that, "[a]ny 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"; and

7.4. Section 11.2.3 states that, "[n]otwithstanding 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, it must be 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".

8. We will deal with Complaints under four separate headings, being:

8.1. General submissions;

8.2. The banners, attached and marked "B1" to "B3" (both inclusive);

8.3. The intermediate webpages ("B4" to "B10") (the "Intermediate Pages");

8.4. The substantive advertising Landing Page ("B12" to "B17") (the "LP")..

General:

9. A reasonable person would know that the rewards advertised would not be available without underlying terms and conditions – this is confirmed by a) the use of the asterix; and b) the wording placed throughout the advertisement ("*stand a chance to win*"; "*you could be a potential winner*"; etc). At no point in time is a member of the public guaranteed a chance of receiving a reward.



10. On consideration of the entire advertising campaign, more especially the main Landing Pages, it is clear to a reasonable person that our rewards program is ancillary to the subscription service – without being subscribed one cannot participate in the program. The format of the LPs have previously been condoned by WASPA’s adjudicators in reports to which we refer you specifically to adjudications for complaints numbered 11863, 13744, 15183, 15664 and 16382, especially the first and last mentioned adjudications.
11. We confirm that sections 11.2.2 and 11.2.3 of Code, as confirmed by the adjudications listed in 10 above allows simultaneous advertising of the subscription service alongside a competition and/or promotional draw:
 - 11.1. *"The Code does not set out a blanket prohibition on any association of a competition or promotional draw with the subscription service, nor would it be desirable for it to do so as this would constitute significant restrictions on the ability on members to promote their services"* (paragraph 14.1 of the Adjudicator's Report for complaint numbered 11863); and
 - 11.2. *"The Code does not appear ... to prohibit explicitly a situation where a consumer has both intention to subscribe to a service and an accompanying attention to participate in a competition. This is permissible as long as the customer has a clear appreciation for the fact that he or she is joining a subscription service and that certain terms and conditions and pricing apply to being a member of such subscription service"* (paragraph 14.3. of the Adjudicator's Report for complaint number 11863);
 - 11.3. The adjudicator in paragraph 14.4. of the Adjudicator's Report for 11863, sets a strict test which has to be adhered to in order to ascertain whether the parallel advertisement of a subscription service and a competition and/or promotional draw is in compliance with the Code, specifically with regard to ascertaining whether a subscription is an independent transaction made with the required intention to become a member of a subscription service:
 - 1.1.1 The adjudicator states on page 11 of the Report (point 14.2) that, *"where...a competition or promotional draw is associated with an advertisement for a subscription service the central principle remains that a request from a customer to join that subscription service must be an independent transaction made with the specific intention of subscribing to that service"*;



1.1.2 At point 14.3, *“The Code does not appear to...prohibit explicitly a situation where a customer has both the intention to subscribe to a service and an accompanying intention to participate in a competition...as long as the customer has a clear appreciation of the fact that he or she is joining a subscription service and that certain terms and conditions and pricing applied to being a member of such subscription service”*;

11.4. At point 16 the Adjudicator states, *“the fact that a competition is associated with the advertisement for a subscription service does not of itself establish that there has been a breach of section 11.2.2 read with section 11.2.3 of the Code. [Where] there is such an association...an adjudicator must turn to an evaluation of whether a customer joining the service would be doing so with the necessary intent and whether the presentation of the competition is such that it disguises entry into the subscription service”*.

12. The Adjudicator in that complaint clearly stated that the requisite intention of joining a subscription service is that last active step taken by a member of the public confirmed that they wished to join the subscription process – which clearly was not at the point of interacting with the banner and, in this case, the Intermediate Pages (this will be discussed in more detail below), but at the stage of when the member of the public confirms his/her request to join the Service (i.e. when they click “CONFIRM” on, for example, B14). Our double opt-in mechanism ensures that this intention exists at the appropriate time:

12.1. *“The SP’s double opt-in subscription process ensures that customers are not misled and that they have a clear appreciation of the fact that they are joining a subscription service.”* (See also the adjudicator’s report of complaint #11863” (page 18 – 19 of Adjudicator’s Report for #16382).

13. Therefore when considering the process of joining, the Adjudicator analysed the entire subscription process – from the banner to the final point of subscription, being the confirmation page.

Banners:

14. Before we address the merits of the Complaints we would like to place banners in perspective to the rest of the advertising campaign:



- 14.1. The industry uses banners as an initial marketing tool, for the purposes of catching the eye of potential customers, inviting them to link into the underlying LPs;
- 14.2. They are small in context with the rest of the webpage on which they appear and therefore have to be conspicuous;
- 14.3. The underlying advertising LPs should contain all the substantive information pertaining to subscription services and as required by WASPA. The Code itself focuses more on the underlying LPs than the banner – the sections of the Code dealing with banners is very limited compared to those dealing with the format of the underlying LP;
- 14.4. Banners cannot be deliberately and blatantly deceitful, but due to their purpose and the nature thereof, there is a limit to the amount of information they can contain, whilst still being captivating enough to generate interest in the underlying LP;
- 14.5. Banners are the very first point of interaction with the potential customer, whereafter the potential customer may – if interested - link to an underlying LP through the banner. Therefore in context, banners only form a small element of the entire advertising campaign;
- 14.6. Interaction with the banner does not lead directly and immediately to subscription by potential customers. If the potential customer has chosen to interact with the banner, they will be linked into the underlying LP;
- 14.7. The potential customer has to then follow the double-opt in process – prescribed by WASPA - before he/she can become subscribed to the particular WASP's service (this will be discussed in more detail below). Only once they have completed the double opt-in process, and consciously and actively agreed to become subscribed, will the potential customer be subscribed to the service.
15. In this instance the banners do not assure potential customer that they have won anything. It merely states that there is an opportunity to win something, and that there are terms and conditions attached to the potential to win. There is also - clearly visibly - an asterix which refers to applicable terms and conditions, immediately next to which it explicitly states that it involves being subscribed to a service charged at R5/day:
- 15.1. “B1” and “B2” clearly specify the following:



"You can be today's Lucky Winner!"

Congratulations!

*Click here for your chance to win an iPhone**

**T&Cs apply. Subscription service R5/day"; and*

15.2. "B3" stipulates:

"CONGRALUATIONS!

You have a chance to

*win an iPhone S4!**

**T&Cs apply. Subscription service R5/day".*

16. The reference to terms and conditions, the subscription nature of the service to which it relates and the cost thereof all appear in black on a grey background.

17. Any reasonable person interacting with the banner would be aware that, when considering the banner in its entirety:

17.1. there has been no guarantee that they have won anything – only that there is a possibility that something can be one; but

17.2. despite the potential to win, that potential encompasses certain terms and conditions - even if reference to the terms and conditions was not contained on the banner (which it is), no reasonable person would believe they were winning something merely because they clicked on the banner. This conclusion would be absurd;

17.3. knowing there would be conditions attached a reasonable person would immediately look for the underlying terms and conditions – in this regard their eye would easily catch the reference to terms and conditions, subscription service and the cost thereof. It would be difficult to miss the black print on the grey background. A reasonable person would, we submit, easily have spotted print at the bottom of the banner.

18. We confirm that, as part of our reward program, our subscribers do stand a chance of winning:

18.1. daily prizes;
and monthly *inter alia*,

18.2. iPhones;

18.3. iPads;



and from time to time:

- 18.4. cars (usually a Polo or Mini).

19. The fact that these promotional draws are only available to our subscribers is clearly stated in the terms and conditions. There is nothing in the Code or Advertising Rules (the “Rules”) which stipulates that we are not allowed marketing our rewards program alongside our subscription service advertising – in fact the Code states the opposite, as set out above.

20. We therefore submit that no reasonable customer would view us as:
 - 20.1. having acted falsely and/or deceptively; and
 - 20.2. attempted to mislead them by inaccuracy, ambiguity, exaggeration or omission.

21. The rewards offered by us to our customers:
 - 21.1. are *not* available to all or a substantial majority of our subscribers;
 - 21.2. do not suggest that winning is a certainty;
 - 21.3. suggest that a reward has already been won and that by contacting us a prize is already secured.

22. We submit therefore, in as far as the banners are concerned, we are not in breach of either sections 4.1.2 and 9.1.7.

23. Section 11.2.2 deals very specifically with having the intention to join and subscribe to a service. We repeat:
 - 23.1. The Adjudicator for complaint numbered 11863 (“#11863”) clearly states that the intention to join a service is determined at the point when the potential subscriber takes the last active step to join that service:

 - 23.2. *“If this advertisement was viewed in isolation then it would be fairly straightforward to conclude that the member had further breached section 11.2.2 read with section 11.2.3 of the Code. However the intent of the person following the process should be measured at the time at which it is exercised, i.e. at the time when the customer takes the last positive step prior to being subscribed. This is not at the time at which the advert is viewed but rather at the time when the customer interacts with the confirmation webpage...and inserts the PIN code received to his*



or her handset as a result of the inputting of his or her MSISDN on a previous page...”.

23.3. Therefore the intention to subscribe as referred to in section 11.2.2 cannot be at the time of interacting with the banner, but rather by interacting with the LP into which it ultimately leads and by completing the double opt-in subscription process – which process is described in more detail below.

23.4. #11863 has set a precedent for the industry and ourselves. The reasoning behind the decision is clear, logical and well-reasoned.

23.5. The Complainant was made fully aware of this adjudication by the Secretariat – see email dated Fri 2012/05/18 02:28 PM attached hereto marked “B18”.

23.6. We confirm that the Complainant has never actually followed the pages to their completion (i.e. to the LPs), nor has he acknowledged that we have explained, in full, the double opt-in process to him. His focus remains on the banners and the Intermediate Pages. The actual underlying LP is never attacked by the Complainant. It is these LPs which lead to the required intention referred to by the Adjudicator in #11863.

23.7. We have also invited the Complainant to visit our premises in order that we can explain fully our advertising campaigns and the double opt-in process. To date he has not taken us up on our invitation.

24. For the reasons stated by the Adjudicator in #11863, and dealt with more fully below, we submit that we are not in breach of section 11.2.2 with regards to the banners in question.

25. Section 11.2.3 does not stand independently from section 11.2.2 in this case. For the reasons stated above, it is premature to deal with a breach of section 11.2.2 breach at this stage. Therefore, at banner level, we submit that we cannot be found wanting in terms of section 11.2.3.

26.

The Intermediate Pages:

27. The Complainant attached the screenshots numbered B4 – B10 to his Complaints.



28. His specific grievances with these pages were the following:

#17657:

28.1. *"The page claims 'You could be today's lucky winner'".*

"Any attempt to close the page, forces a pop-up which states: 'WAIT! Are you really sure you want to go? Today is the ONLY day you will be able to win an Apple® iPad 2. We are serious, this offer will expire tonight at 11.59PM. Click CANCEL in this window and answer the simple test question for your chance to win!'"

"It is my understanding that the respondent does not give away iPads on a daily basis. Thus, I believe the page is misleading and exaggerates the chance of winning a prize, and is thus a breach of the code".

[Emphasis added].

#17734:

28.2. *"Congratulations! You have been selected for a chance to win a POLO! Read below for details.*

You Could Be the Lucky Winner in Isando !

You have been selected for a chance to be a lucky winner. Click below to see if you are a potential WINNER!

Click here to avoid forfeiting your chance. It takes less than a minute."

"I contend that these statements are misleading and exaggerate the chance of winning a prize."

#17894:



28.3. *"Congratulations! You have been selected for a chance to win a POLO! Read below for details";*

"I can supply a screen shot of this pop-up if necessary."

"After clicking "OK" to clear the pop-up, I was presented with a webpage which makes, among others, the following claims:"

"You Could Be the Lucky Winner in Isando !

You may have (1) prize unclaimed.

You have been selected for a chance to be a lucky winner. Click below to see if you are a potential WINNER!

Act fast! Please respond within 00 min and 00 sec. Or else, we may allow another visitor in Isando a chance at the prize."

"I contend that the process described above is a clear breach of Waspa rules in that it is misleading and exaggerates the chance to win a prize."

29. We again confirm that we do give away daily prizes to our subscribed customers.
30. As regards #17657, it does appear that our marketing could be interpreted to mean that that daily prize is an iPad 2, which is in fact not the case. As soon as this was pointed out to us we changed any references that could have been interpreted as meaning the iPad 2 was in fact a daily prize – the relevant page, as changed, is now attached, marked "B11".
- Our loyal subscribers are entered into a promotional draw in which they could be selected to win bigger prizes, such as an iPad 2, iPhone or a car (usually a Polo or a Mini).
31. At the bottom of all the Intermediate Pages our terms and conditions are referred to, as well as the fact that following through with the process will lead to subscription to our Service.
32. Furthermore, we confirm that interaction with this page, like the banner, does not lead to direct and immediate subscription of potential customers. The Intermediate Pages



are followed by the LPs, wherein the double opt-in mechanism is invoked and there can be no mistake that any rewards advertised and changes to win them are ancillary to being subscribed to our 35050 Gold Subscription Service (the "Service").

33. In other words these Intermediate Pages are used as a marketing tool to advise the public (both subscribed and unsubscribed) that there are opportunities to win rewards that are available to subscribed customers.
34. At no point in time do we advise customers that they have actually won anything, only that there is the potential to win something ("*you could be today's lucky winner*"; "*chance to be a lucky winner. Click below to see if you are a potential WINNER!*"; "*chance to be a lucky winner. Click below to see if you are a potential WINNER!*").
35. Even if customers misread the pages and misinterpreted them to believe that they have won something or that by providing their details they will win something and they enter their details on the following splash page (e.g. B12), the splash page and the following pages within the LP make it clear and unambiguous that the rewards referred to from banner to final confirmation page are a) part of the rewards program and only available to subscribed customers; b) the advising campaign as a whole is intended to attract potential customers to our Service, which is a subscription service, charged at R5/day. We will refer to this in more detail below.
36. We also repeat our contentions *mutatis mutandis* as stated in paragraphs 17, 20, 21, 22, 23, 24 and 25 above.
37. Even if the Complainant had only followed through to the splash page he would have seen that the substantive advertising of our rewards program make it clear that any rewards were only available through being subscribed to our Service (i.e. is ancillary to being subscribed to our Service).
38. We therefore contend that if the entire advertising campaign, including the LP, is viewed as a whole – especially in light of the double opt-in mechanism - then the Complainant's contentions are incorrect – we refer to the LPs in more detail below.

The Landing Page:



39. If a member of the public has chosen to interact positively with our banners and the Intermediate Pages they are lead into our LPs, which is our main platform of advertising.
40. The LPs most definitely advertise our subscription service, prominently and explicitly, side-by-side with our ancillary rewards program (e.g. B12 – B14).
41. We will use B12 – B14 [**note: must be Polo pages**] as the example to assist with the explanation of our LP and the double opt-in process.
42. As confirmed by the Adjudicator in complaint #11863, banners, like the Intermediate Pages were, could, in isolation, be viewed to be in breach of sections 11.2.2 and 11.2.3 – which in this case we deny. However the entire advertising campaign has to be considered fully before such breaches can be confirmed:

“If this advertisement was viewed in isolation then it would be fairly straightforward to conclude that the member had further breached section 11.2.2 read with section 11.2.3 of the Code. However the intent of the person following the process should be measured at the time at which it is exercised, i.e. at the time when the customer takes the last positive step prior to being subscribed. This is not at the time at which the advert is viewed but rather at the time when the customer interacts with the confirmation webpage...and inserts the PIN code received to his or her handset as a result of the inputting of his or her MSISDN on a previous page...”.

43. Therefore the intention to subscribe as referred to in section 11.2.2 cannot be at the time of interacting with the banner or the Intermediate Pages, but rather by interacting with the LPs into which they link and following and completing the double opt-in subscription process.
44. We submit that all the advertising campaigns, especially the LPs - which lead to actual subscription - are a) compliant with the Code’s prescribed double opt-in mechanism, in fact our opt-in mechanism is stricter than that required by the Code; and b) the advertising of our rewards program is most definitely clearly advertised as being ancillary to be a subscribed customer – see “General” above – as is required by the Code.
45. By way of amplification of our double opt-in mechanism, and in addition to what has been set out above:



- 45.1. On the splash page (B12) the potential subscribers may, if they choose to do so, enter their phone number (MSISDN), whereafter they will be sent a pin number to their phone. At this point the potential subscriber has still not been subscribed to the service in question;
- 45.2. Once the pin number is received, potential subscribers may then choose to enter the pin number on the confirmation pages (e.g. B13);
- 45.3. The text message containing the pin number again confirms that the potential subscriber is dealing with a subscription service and the cost (e.g. "*>> ur CODE is 0000 << enter it in the web confirmation page. U'll b subscribed to 35050 from Buongiorno @ R5/day. WIN A POLO, iPads,iPhones+Unlimited Downloads*").
- 45.4. If the potential subscriber enters the pin number on the confirmation page (e.g. B13) and clicks on the CONFIRM button, only then will they be subscribed to the Service;
- 45.5. Immediately below the CONFIRM button the potential subscriber is again informed of the subscription element of the service(s), the cost thereof and referred to our terms and conditions which includes a hyperlink to the Terms and Conditions section of the LPs if they chose to follow it – this is not a requirement of either the Code and/or the Rules;
- 45.6. Only after taking the positive steps of a) entering a pin number, which is unique and directed to the phone of that particular potential subscriber; and b) clicking the CONFIRM button, is the potential subscriber then subscribed to the service;
46. By adopting this procedure before subscription, there is no prospect that a potential subscriber could subscribe to the Service without intending to do so.
47. In addition to this our LPs contain a further page, which we refer to as the "Welcome" page. This page then immediately follows the confirmation page on each campaign. This page again confirms that the customer is now a) subscribed to the Service in question; b) the cost thereof; c) our helpline details; d) and an instruction on how to unsubscribe (which instruction is easy to follow and implement) (e.g. B14).



48. As soon as they are subscribed, new customers are also sent a welcome message, as required by WASPA, which also contains the information referred to in paragraph 47 above.

49. It is not possible for a reasonable member of the public to become subscribed to our Service without realising that a) participation in our advertised reward program is ancillary to being subscribed to the Service; b) the ultimate purpose of the advertisement is to encourage people to subscribe to our Service; c) in becoming subscribed, due to the double opt-in mechanism, the requisite intention would exist at the time of subscription.

50. The method of advertising as contained in the LP is clearly in compliance with the Code and we cannot be found to be in breach of any of the sections mentioned by the Complainant.

Conclusion:

51. If the entire advertising campaign were considered as a whole, especially the LPs, we confirm that a reasonable member of the public would:
 - 51.1. Know that the rewards advertised are not immediately available to any person by merely interacting with the banners, Intermediate Pages, and even the LPs;
 - 51.2. Know about and read the continuously advertised terms and conditions as well as promotional draw rules, which confirm that a) rewards are ancillary to being subscribed to our Service; and b) the Service is a subscription service, charged at R5/day;
 - 51.3. If choosing to join the Service, by clicking “CONFIRM” on the confirmation pages, would most definitely have the necessary intention to join the Service in question;
 - 51.4. Know that, by being a member of our Service, they would have the opportunity of being eligible for the prizes advertised as part of our reward program – some of which are daily and monthly rewards and others of which – the bigger prizes like the Cars – are periodic rewards.

52. We submit that, if the entire campaign is viewed as a whole we would not be in breach of any of the sections mentioned by the Complainant.



53. Should the Complainant and/or Adjudicator wish us to deal with any other aspect of our advertising campaigns, or any other section of the Code, we request that they do so before the Adjudicator makes his/her finding and that we be afforded the opportunity to respond thereto, also before the finding is made.