



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Cointel
Telephone Network(s)	Vodacom
Information Provider (IP) (if applicable)	Vodacom
Service Type	Advertising of a competition service offered by the IP
Source of Complaints	Public
Complaint Number	#0159 and #0160

Complaint

Two complaints were received independently from members of the public in respect of SMS messages transmitted by the IP to its customers, using the facilities of the SP. The messages were promotional in nature, relating to a competition currently being run by the IP using the short code of the SP "32082". As the complaints concern the same SMS messages from the same SP on behalf of the same IP and in respect of the promotion of the same competition, these complaints have been dealt with jointly in this report.

The messages alleged to have been received by the complainants read:

"Vodacom gives you 2 free SMS's a week to SMS any 9 letters (A-Z) to 32082 & win R1 Million & lots more. Fore more info call 0822432082(free)"

The complainant in complaint #0159 seems to indicate the receipt of at least two such promotional SMS message. In addition, he questions whether it originated from the IP and whether the two SMS message entries into the competition, as well as use of the help line indicated, are in fact free. The complainant further questions if the competition is in fact a "scam" of some sort.

The complainant in complaint #0160 indicated that he received four SMS messages. He further indicates that he attempted to stop the transmission of these messages to him after receipt of the first SMS message and again after receipt of the second SMS message and instituted the complaint after receipt of a further two SMS messages.

The following possible breaches of the WASPA Code of Conduct were raised by the complainants:

- Complaint #0159 indicated a possible breach of clauses 5 and 9.1; and

- Complaint #0160 indicated a possible breach of clauses:
 - 4.1.5;
 - 4.1.7;
 - 5.1.2; and
 - 5.1.3.

The relevant clauses of the Code of Conduct read:

4.1.5. Members must have a complaints procedure allowing their customers to lodge complaints regarding the services provided. Members must acknowledge receipt of complaints expeditiously, and must respond to any complaints within a reasonable period of time.

4.1.7. Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.

5. Commercial communications

5.1. Sending of commercial communications

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. Where feasible, customers should be able to unsubscribe from any subscription service using no more than two words, one of which must be 'STOP'.

5.1.4. Any mechanism for allowing a recipient to remove his or herself from a database may not be premium rated.

5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

5.2. Identification of spam

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.2.2. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

9. Competitions**9.1. Provision of information**

9.1.1. Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.

9.1.2. Any promotional material for a competition service must include details of how the competition operates.

9.1.3. Interactive competition services with an ongoing incremental cost, must, at reasonable intervals, inform the customer of any additional costs, and must require the customer to actively confirm their continued participation.

9.1.4. Promotional material must clearly state any information which is likely to affect a decision to participate, including:

(d) the closing date;

(b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;

(c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;

(d) any significant age, geographic or other eligibility restrictions;

(e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item.

9.1.5. The following additional information must also be made readily available on request, if not contained in the original promotional material:

(d) how and when prize-winners will be informed;

(b) the manner in which the prizes will be awarded;

(c) when the prizes will be awarded;

(d) how prize-winner information may be obtained;

(e) any criteria for judging entries;

(f) any alternative prize that is available;

(g) the details of any intended post-event publicity;

(h) any supplementary rules which may apply;

(d) the identity of the party running the competition and responsible for the prizes.

9.1.6. Competition services and promotional material must not:

(d) 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.

Investigation

The Secretariat received a response from the SP in respect of Complaint #0159 indicating:

- The SP is merely acting as an aggregator for and on behalf of the IP.
- In the circumstances, in this particular matter the IP (who is not bound to the WASPA Code of Conduct) is indirectly being called to account to WASPA in regard to a matter that falls outside of the jurisdiction of WASPA; a situation that was clearly never envisaged.
- The IP is bound by the terms and conditions of its mobile cellular telecommunications license, and is responsible to a regulatory body of its own, being ICASA. Any complaints from members of the public should

therefore be directed to the IP and the comprehensive complainant and appeal procedure that they have will be implemented.

- Notwithstanding the above, as a gesture of good faith (but purely without prejudice) the IP have agreed that the SP may respond on their behalf.
- In regard to the complainant's complaint that he did not request the message, we confirm that the complainant is a customer of the IP's and therefore has a direct and recent prior commercial relationship with the IP and would reasonably expect to receive marketing communication from the IP. The message was therefore not spam and in the circumstances the IP was entitled to have sent the message.
- In regard to the complainant's complaint that the SMS appears to be a scam, we confirm that the SMS in question relates to a bona fide loyalty programme that the SP recently launched. The first two SMS's sent each month to the number 32082 are indeed for free, as are all calls to the number 082 243 2082.

In addition, the SP's response in respect of complaint #0160 repeated the first five paragraphs of the above response and instead of the final paragraph, it indicated:

- Ad breach of clause 4.1.5: As indicated above the IP does have a comprehensive complaints procedure in place. The complainant's complaint was expeditiously acknowledged, and responded to within a reasonable period of time.
- Ad breach of clause 4.1.7: It is not clear how this relates to the complaint. In any event there is indeed a link on the SP's website to the WASPA website and to their code of conduct.
- Ad breach of clauses 5.1.2 and 5.1.3: The IP's intended approach in advising its customer of the loyalty programme is to send only one SMS to each of its pre-paid customers, and only if the customer participates in the loyalty programme, to send further SMS's. The sending of multiple SMS's to one customer was an error for which Vodacom apologises. Steps have been taken to ensure that this will not occur again. This will render the requirement to have a facility in place whereby customers can be removed from the database unnecessary.

The competition of the IP promoted using the services of the SP were tested by the Secretariat and no charges were levied in respect of the first two competition entries to the number 32082, as indicated by the SP, though additional entries were charged. In addition, calls to 082 243 2082 were not charged.

Decision

The Adjudicator considered the two complaints and the submission of the SP in respect of each such complaint. The Adjudicator did not uphold either of the complaints, for the following reasons:

- **Complaint #0159**

Clause 9.1 of the WASPA Code of Conduct:

The complainant in complaint #0159 raised the issue of a potential “scam” and referred to Clause 9.1 of the WASPA Code of Conduct. Having tested the service and investigated the terms and conditions relating to the IP’s competition, the Adjudicator has no doubt that this is a legitimate competition.

While no breach of Clause 9.1 of the WASPA Code of Conduct was found, the Adjudicator referred the SP and the IP to the provisions of Clause 9.1 of the WASPA Code of Conduct and Section 11 of the WASPA Advertising Guidelines regarding possible improvements to the wording of future promotional SMS messages.

- **Complaint #0160**

Clause 4.1.5 of the WASPA Code of Conduct:

The Adjudicator accepted the submission of the SP that the IP has a complaints procedure in place. The Adjudicator noted further that the SP has its own complaints procedure in place.

In the instant circumstance the complainant used the help line of the IP and initiated a complaint in terms of the IP’s complaints procedure. The Adjudicator is of the view that the existence of such a complaints procedure coexists with the WASPA Code of Conduct, nevertheless, the requirement of Clause 4.1.5 of the WASPA Code of Conduct relates specifically to the SP and not the IP. As the complainant used the complaints procedure of the IP, the Adjudicator cannot make any finding as to the efficiency of such procedure or the complainant’s satisfaction (or lack thereof) with the procedure. A complaint of this nature falls outside of the authority of the WASPA Code of Conduct and within the ambit of the telecommunications regulator.

The Adjudicator noted, as an aside and without making any finding in respect thereof, the complainant’s frustration at still receiving unwanted messages more than two months after his initial request that transmission of such messages to him be terminated. The SP’s apology in this regard is further noted, as are the steps taken to remedy the situation.

Complaint #0160 - Clause 4.1.7 of the WASPA Code of Conduct:

The Adjudicator concurred with the SP that this obligation only applies to the SP as a member of WASPA and not the IP. Such link duly appears on the Internet web site of the SP as submitted.

- **Both Complaint #0159 and Complaint #0160**

Clause 5 (particularly 5.1.2 and 5.1.3) of the WASPA Code of Conduct:

The Adjudicator found that the multiple SMS messages sent to both of the complainants were not spam (as defined in Clause 5.2.1 of the WASPA Code of Conduct) as both complainants had a “direct and recent prior commercial relationship” with the “message originator” (as defined in the WASPA Code of Conduct, in this case the IP) and continue to have such a relationship with the IP as their mobile cellular service provider.

With regard the requirement of clause 5.1.2 of the WASPA Code of Conduct, the adjudicator noted that both the SP and the IP have a facility for a

message recipient to have their details removed from a message originator's database to ensure they do not receive further messages. In the instant case, the complainant in complaint #0160 made use of the facility and his request was not adequately acted upon. While understanding the frustration of the complainant, the inefficiency of such a facility cannot justify the complainant's contention that such a facility does not exist.

In the absence of any indication of "bad faith" on the part of the SP and the IP, the SP's submissions in this regard and particularly the apology tendered and the remedial steps taken, are noted.

Regarding Clause 5.1.3 of the WASPA Code of Conduct, the instant service is not a "subscription service" (as defined in the WASPA Code of Conduct) and as such Clause 5.1.3 would not apply to the instant circumstance.