

REPORT OF THE ADJUDICATOR

WASPA Member (SP): Cointel

Information Provider

(IP): Vodacom (Pty) Ltd
(if applicable)

Service Type: Unsolicited texts

Complainant: Member of the public

Complaint Number: 0213

Adjudicator: Kerron Edmunson

Code applicable: v3.2

Complaint

This complaint was made by email on 10 March 2006. The complainant received 12 unsolicited commercial messages from numbers 082 001 5008 on 10 March 2006 from approximately 13h40 to approximately 14h02. Although he attempted to reply to the number he found it impossible to do so. The complainant called his service provider but they were not at that time (the same afternoon) able to tell him from which content provider the messages originated nor how the content provider came to be in possession of his details.

The complainant does not state how it is that he knew the sender was Cointel but I have assumed the identification followed his complaint. The complainant states that he has never had previous business dealings with Cointel before, is not an existing customer of their's, and does not want to receive anything from Cointel or its corporate clients ever again.

Specifically the complainant avers that the SP has contravened sections 3.1.2, 5.1.1, 5.2.1 and 5.3 of the Code and sections 45(1) and 45(3) of the Electronic Communications and Transactions Act 25 of 2002 ("ECT Act").

SP Response

The SP responded as follows:

- Cointel is an aggregator for and on behalf of Vodacom SA
- Vodacom is not bound by the Code therefore WASPA has no jurisdiction
- Vodacom is bound by its licence terms and conditions and is responsible to ICASA, the telecommunications regulatory authority to whom the complaint should be directed

#0213

- As a gesture of good faith but without prejudice, Vodacom has agreed that Cointel should respond on its behalf
- Cointel therefore advise that the message received by the complainant was sent as part of a “bona fide loyalty programme that Vodacom recently launched.... The complainant is a customer of Vodacom’s and therefore has a direct and recent prior commercial relationship with Vodacom and would reasonably expect to receive marketing communication from Vodacom. This message was therefore not spam and in the circumstances, Vodacom was entitled to have sent the message.”
- Because the complainant “used the SIM in a telemetry device” the device didn’t recognise what the message was and it responded with a message of its own...which our system interpreted as an invalid entry and responded in turn According to our records the above process repeated itself 10 times, before it was stopped.”
- Ad breach of clause 3.1.2: “there is no evidence that Vodacom acted unlawfully. The alleged breach of this clause is therefore denied.”
- Ad breach of clause 5.1.1: “the originating message contains the originating number: 082 001 5008. The alleged breach of this clause is therefore denied.”
- Ad breach of clauses 5.2.1 and 5.3: “as indicated above, the complainant has a direct and recent prior commercial relationship with Vodacom and would reasonably expect to receive marketing communications from Vodacom. This message was therefore not “spam”. The alleged breach of this clause is therefore denied.”
- Ad breach of sections 45(1) and 45(3) of the ECT Act: “As indicated above, the complainant is a customer of Vodacom’s and it is pursuant to this relationship that Vodacom has his information. Moreover the complainant has now been removed from the database of person’s (sic) that will receive this message in future. The alleged breach of these clauses is therefore denied.”

Consideration of the WASPA Code

In considering this complaint I would like to look first at the ECT Act, then at the SP’s allegation that Vodacom is not bound by the Code and therefore that WASPA has no jurisdiction, and finally, at the sections of the Code referred to by the complainant and the SP’s response to each one.

ECT Act

This Act is intended to provide for the facilitation and regulation of electronic communications and transactions, amongst other things which include the prevention of abuse of information systems. Chapter VII is entitled “Consumer Protection” and it is within this chapter that section 45 falls. Whilst WASPA is not empowered to enforce the provisions of this Act, it may be useful to consider them in relation to the jurisdiction of WASPA and the factual liability of the parties referred to in this complaint.

Section 42 states that the chapter applies only to electronic communications and at subsection (3) it states that the chapter does not apply to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions. At time of considering this complaint, WASPA has submitted an application to the Minister to be recognised as an industry body in terms of Chapter 11, but aggregators cannot enjoy the benefits of the Act until such

#0213

time as the Minister recognises WASPA. Thus a WASP is considered to be providing an information system service and may incur liability for their own and third party content which they provide.

An “information system service” is defined in the ECT Act as including “the provision of connections, the operation of facilities for information systems, the provision of access to information systems, the transmission or routing of data messages between or among points specified by a user and the processing and storage of data, at the individual request of the recipient of the service^[ME1].”

Section 45 is intended to address “unsolicited goods, services and communications”. Section 45(1) provides that:

“Any person who sends unsolicited commercial communications to consumers must provide the consumer – (a) with the option to cancel his or her subscription to the mailing list of that person; and (b) with the identifying particulars of the source from which that person obtained the consumer’s personal information, on request of the consumer.”

Section 45(3) provides that:

“Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).”

The Code was created to address the concerns of this Act within the wireless application services arena. The Code contains its own consumer protection provisions and particularly provisions concerned with spamming which I will consider below. WASPA is not empowered to enforce the ECT Act.

Jurisdiction of WASPA

WASPA was created to uphold public perception of mobile services and to protect against bad practises. The Code was created to protect the interests of both consumers and its members, and it has the backing – both financial and ethical – of all the network operators in South Africa including Vodacom. Members of WASPA interact on a regular basis both with the regulator of the industry, ICASA, and members of the industry including network operators. Indeed, without their support, it would be difficult to enforce the Code at all.

Cointel alleges that it is responding to the complaint on Vodacom’s behalf and with its permission. This in itself suggests that Vodacom recognises that WASPA has a role to play in the complaint and that it is itself, implicated in it. The fact that no network operator is itself a member of WASPA indicates to me merely that they regard themselves as infrastructure providers. However, it is obvious to any customer of any network that they offer far more to their customers than mere access to infrastructure.

Any entity offering service across a network will have had to have entered into a commercial relationship with the operator in terms of which certain parameters are set within that entity can provide service. I believe I am safe in assuming that Cointel will have entered into just such an arrangement. It would also be prudent for Vodacom to require content aggregators providing services intended to drive traffic to the network, to comply with appropriate codes of practise, like the Code. Finally, I am quite sure that Vodacom would not want to become known for spamming its customers.

#0213

In all the circumstances therefore, WASPA has as a matter of fact, jurisdiction in relation to any service which can be termed a “wireless application service”.

As an aside, it is my view that Vodacom is quite able to act and probably does in fact act, both as content or information provider *and* network operator and therefore should be bound by the Code.

The Code

The complainant has made light work of citing the sections applicable to his complaint. They are the following:

3.1.2: Members are committed to lawful conduct at all times.

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

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.

5.3: 5.3.1 provides that 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 provides that members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

Decision

It may be helpful to consider the Code together with the response, so I have set these out in tabular form:

Relevant part of the Code	SP response	Finding
3.1.2: Members are committed to lawful conduct at all times.	There is no evidence that Vodacom acted unlawfully. The alleged breach of this clause is therefore denied.	This is a general over-arching principle of the Code. Whilst WASPA is not empowered to enforce the ECT Act it regards itself as bound by it and considers that the Code mirrors the provisions of section 45 in relation to unsolicited communications. If it is found that the sending of messages to the complainant constitutes spam then it follows that the conduct complained of is unlawful.
5.1.1: All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.	The originating message contains the originating number: 082 001 5008. The alleged breach of this clause is therefore denied.	Agreed. However the provision requires BOTH the name or identifier of the message originator and the originating number, OR at least the name or identifier of the message originator.
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	As indicated above, the complainant has a direct and recent prior commercial relationship with Vodacom and would reasonably expect to receive marketing communications from Vodacom.	The provisions of section 5.2.1 suggest that either (a) or (b) or (c) should apply. Whilst it appears to be true that the complainant has a commercial relationship with Vodacom, it is not clear to me that

Report of the Adjudicator Complaint

#0213

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.	This message was therefore not "spam". The alleged breach of this clause is therefore denied	this in and of itself would entitle Vodacom to instruct a third party to send messages to its customers on its behalf, if it is not itself identified as the message originator. On the SP's version, (a) does not apply, (b) does not apply and therefore only (c) can apply. The complainant avers that he has not consented to receive messages from Cointel therefore it is not clear that he gave consent under (c), in which case I do not agree with the SP's response.
5.3: 5.3.1 provides that 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 provides that members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.	As above.	Unless Vodacom has consent from its customers to send them marketing messages such as the message sent to the complainant by Cointel, using its content providers or aggregators, then Cointel has promoted the sending of spam. It would be reasonable, in my view, for any content aggregator to require assurances from message originators that they have consent from their customers to send them messages over information systems.

In summary, I uphold the complaint and find that the SP has not complied with sections 3.1.2, 5.1.1, 5.1.2 and 5.3 of the Code. Given the "grey" area surrounding the way in which Vodacom is bound by the Code, if at all, I have modified my sanction accordingly.

Sanction

1. In relation to the breach of 5.1.1, I believe the wording of the Code to be unclear and potentially confusing and give the SP the benefit of the doubt. However the SP is required to include BOTH the number of the originator of the message AND the name or other identifier of that originator in future messages, with effect from the date of publication of this finding.
2. In relation to the breach of section 5.2.1 I find that no prior relationship existed between the complainant and Cointel. The SP is a WASPA member and therefore liable for breach of the Code by its customers including Vodacom. However, taking into account the relationship alleged between Vodacom and the complainant which the complainant has not denied, I am not able to find that the complainant did not authorise Vodacom to pass on his details to entities unspecified in terms of his contractual relationship with Vodacom. I am therefore not able to impose a sanction in relation to this breach.
3. I have made much of the likelihood that there is a commercial relationship in place between Cointel and Vodacom as this appears both from the SP's response and the general environment in which wireless application services are provided. However, it is not clear to me from the SP's response in relation to the breach of 5.3 of the Code that Cointel took all "reasonable" measures to ensure that Vodacom did in fact have permission to send marketing communications to its customers. Therefore it is my view that Cointel is in breach of 5.3. In this case, Cointel has also acted unlawfully. Cointel is directed to pay a fine to WASPA of R3,000 within 5 days of the publication of this decision.