



REPORT OF THE ADJUDICATOR

Complaint reference number:	11539
WASPA member(s):	Vodacom Service Provider (Vodacom SP)
Membership number(s):	
Complainant:	Public
Type of complaint:	Unsolicited Communications
Date complaint was lodged:	2011 – 01 - 04
Date of the alleged offence:	Between 2010-10-08 and 2010-12-25
Relevant version of the Code:	10.0
Clauses considered:	1.4, 2.8, 2.18, 2.21, 2.23, 5.1.2 - 5.1.5, 5.2.1, 5.3.1 -5.3.2
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable
Related cases considered:	#6560

Complaint

The complainant had used the Cointel/ Vodacom system/ service via a community operator. The complainant referenced prior complaints and unsuccessful attempts to proceed with legal action in related matters. The complaint in this matter however pertains to the receipt of unsolicited communications from the Vodacom SP, notwithstanding cessation of use of the Cointel system for more than 18 months, a request to terminate system access and subsequent deactivation of the complainant's system password.

The complainant attached to the complaint submitted:

- records of 37 SMSs received that originate from the system in question (the messages chiefly pertained to recharges, available funds and upgrades vis-à-vis the system in question),
- records of unsubscribe requests sent by the complainant on 06 October 2010 and 08 October 2010 requesting to be unsubscribed from the communications pertaining to the Cointel system/ service; and
- a copy of the complainants itemised billing documentation indicating that the unsubscribe request SMSs sent by the complainant to Vodacom SP were premium rated SMSs.

The complainant himself, suggested non-compliance with the following sections of the Code:

- 5.1.2 in that the complainant received 9 SMSs from the WASP member subsequent to the sending of two requests to be unsubscribed from the SMSs; and
- 5.1.4 in that the unsubscribe requests sent by the complainant to Vodacom SP were premium rated SMSs.

Further to the above, the complainant drew attention to the tariffs levied by Vodacom on mobile consumers for itemised billing which in the opinion of the complainant was not necessarily affordable and itemised billing was a requirement for the production of evidence in a WASPA complaint. The complainant considers the tariffs above and the cost of the unsubscribe requests as levied on the complainant to be a barrier to “reducing abuse in your environment” presumably referring to the conduct of WASP members. The complainant requested:

- justification of the itemised billing tariffs considering receipt of such billing documentation via email considered to be a “shared and nominal delivery cost”.

Subsequent to the above lodging of the complaint, an informal complaint was issued by WASPA with Vodacom SP, the Service Provider.

Following query from WASPA to the complainant regarding resolution of the informal complaint, the complainant confirmed that:

- the Service Provider had not contacted the complainant to resolve the matter;
- the complainant had drawn WASPA's attention telephonically, to the fact that the complainant *did not dispute the SMSs sent to the complainants cell phone number generally but took issue rather with the receipt of the unsolicited Cointel system related SMSs post termination of the related contract and following the complainants negative experiences with related services.*

[The Vodacom/ Cointel service refers to a community phone recharge system, that enables community phone-shop franchisees operating in underserved areas to buy bulk airtime from Vodacom using banking facilities for which they previously never qualified. The new recharge system, developed by Vodacom in conjunction with Cointel, Previously, franchisees deposited cash into Vodacom's bank account and fax the deposit voucher to the company before the required airtime could be allocated. The system allows franchisees to re-charge their airtime at any time of the day or night using specific banking facilities.]

1 Service provider's response

The Service Provider, Vodacom SP deleted the complainant's number from the Customer Management System and stated that this was the only manner of ceasing the sending of bulk SMSs to the number as the CMS is directly linked to the bulk SMS database. The Service Provider noted that there were further master numbers linked to the client and one payphone linked to the profile. The internal communications amongst personnel resolving the matter referred to the source of the unsolicited communications (SMSs) as being "allocated to us (Vodacom SP)" and "it looks like its from the Commserv database" referring to a database of cellphone numbers for which the Service Provider is responsible.

2 Complainant's Response

The complainant was disappointed with Vodacom SP's response and stated that the SP had in fact effected the opposite of the requests made by the complainant and removed the complainant from the lists that the complainant had specifically request not to be removed from. The complainant had more generally, not resolved the complaint.

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4 Sections of the Code considered

The definitions of a commercial message, a notification service, a premium rated service and SPAM were considered in order to consider the complainant's allegations of unsolicited communications and unwarranted premium rates for unsubscribing to the communication and any potential rationale for same on the part of the Service Provider.

The scope of the Code was examined for the purposed of understanding whether the issue of the tariffs for itemised billing falls within the scope of the Code and the adjudicator's decision making powers.

Section 5 was considered in detail to examine the Service Provider's conduct vis-à-vis the prohibitions in the Code pertaining to commercial communications and the Service Provider's manner of dealing with the complaint brought before the Service Provider.

1.4	Unless otherwise specified, this Code of Conduct applies to all wireless application services accessed by a customer in South Africa, transmitted by a wireless application service provider and carried by a South African network operator. Where the Code addresses services provided by members, it applies only to wireless application services provided by a WASP, and not to other types of services that the member may provide. Where the Code addresses services provided by members, it applies only to wireless application services provided by a WASP, and not to other types of services that the member may provide.
2.8	A "commercial message" is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.
2.18	A "notification service" is any service where there are ongoing charges for the service that are not individually authorised by the customer, but which are not subscription services, because the billing is not repeated/regular.
2.21	A "premium-rated service" is any service charged at a higher rate than the standard rate set by the network

	operator for that particular service.
2.23	" Spam " means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.
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	For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word "STOP". If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply "STOP" procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.
5.1.4	For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying "STOP" as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.
5.1.5	Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.
5.2.1	Any commercial message is considered unsolicited (and hence spam) unless: the recipient has requested the message; the message recipient has a direct and recent (within the last six months) prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.
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.

Decision

I find that the SMSs received by the complainant were unsolicited commercial messages and spam as the message as defined in the Code of Conduct and further due to none of the exceptions expressed in 5.2.1 of the Code of Conduct being present.

I find the Service Provider in violation of:

- 5.1.2 of the Code of Conduct in that the SP did not appear to 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 of the Code of Conduct in that the complainant should have been able to stop receiving messages from any service by replying with the word "STOP", and the "STOP" procedure was not made clear to the recipient at the start of the message.
- 5.1.4 in that the complainant should have been able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates).
- 5.1.5 in that there was no confirmation message sent to the complainant to confirm that the complainant had opted out of receipt of the SMSs.
- 5.3.1 in that the SP did in fact send spam to the complainant.
- 5.3.2 in that the SP's handling of the complaint did not address the actual complaint by the complainant and as such the SP failed to expeditiously deal with the complaint.

Finally, I find that the issue of the reasonableness of the tariffs pertaining to itemised billing notwithstanding the billing documentation's bearing on the adjudications out of scope of this adjudication which pertains to wireless application services. I further draw the complainant's attention to the ability of WASPA adjudicators to request such itemised billing the course of reviewing the facts of the adjudication.

1 Related Cases Considered

The complainant recorded in the complaint a previous complaint against the Service Provider, # 6560, which dealt with the Service Providers complaints procedures also called into question in this complaint. I tend to agree with the findings of the relevant adjudicator in complaint particularly since the Service Provider did not respond to the informal complaint in this matter either and the ineffectiveness of the response received to the formal complaint.

Sanctions

The Service Provider is ordered to pay a fine of R 10,000.00 to the WASPA Secretariat within five (5) days of publication of this Report for violation of sections 5.1.2, 5.1.3, 5.1.4 and 5.1.5 of the WASPA Code of Conduct.

The Service Provider is ordered to pay a fine of R 10,000.00 to the WASPA Secretariat within five (5) days of publication of this Report for violation of section 5.3.2 of the WASPA Code of Conduct.