



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	SMSPortal (Pty) Ltd
Information Provider (IP):	Not applicable
Service Type:	Not applicable
Complainant:	Public
Complaint Number:	20916
Code Version:	12.1
Advertising Rules Version:	Not applicable

Complaint

The complainant lodged a complaint against the SP on the basis, in essence, that the SP was sending spam direct marketing messages.

The examples of the wording of one such message is apparent from the papers as follows:

MNR. L RADEMEYE, you are in CONTRAVENTION of the BROADCASTING ACT, further actions may be instituted. Call VVM 0877401214 for your TV Lic ref:420796062

RADEMEYER MNR L "Limited Offer" 100% penalty discount of R1217.50 iro arrear SABC TV Lic a/c 420796062, PAY 12 x R105.75 p/m 1st pmnt 25/6/2013. VVM 0877401214

The complainant submitted that while there was an element of debt collection to the message, it remained a direct marketing message. He made the analogy of the following example:

MNR. L RADEMEYE you might have bed bugs and they could bite you. Call Kirby 0891111111 for your Vacuum Cleaner ref:BEDBUGS123

Service provider's response

The SP submitted, in essence, that the message is a debt collecting message that does not fall within the ambit of the relevant sections of the Code. In support of this argument they submitted argument on precedent set out in matter 10759, and argument around the interpretation of the Code.

Sections of the Code considered

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

2.13. A "direct marketing message" is a commercial 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.

2.8. A "commercial message" is a message sent by SMS or MMS or similar protocol for commercial purposes. (See also "direct marketing message" below.)

Decision

There are a number of issues that appear to be common cause in this matter – most central of which is agreement that IF this message is a direct marketing message, then the SP WOULD be in breach of Clause 5.1.2.

The argument is, however, around the question of whether or not the messages amount to direct marketing or a commercial message in the sense of Clause 5 of the Code.

It also does not seem to be disputed that the complainant is in arrears on his television licence, although if this *were* in dispute it would not change the outcome of this matter.

The crux of a direct marketing message is that it must "promote the sale or demand of goods or services". The complainant seems to be trying to say that because the

message calls on him to pay the debt through a particular channel, it is a direct marketing message.

I disagree. The message is not trying to promote the sale or demand for goods or services. It is trying to collect a debt that appears to be *prima facie* owing, or that the creditor believes is owing, through a debt collection agency appointed by the creditor. Should the complainant choose to pay his debt in this way, he will not have to pay the agency for their services, so the message cannot be seen as promoting their services. The analogy is with receiving a letter of demand from a lawyer in the post, which is clearly not direct marketing.

I am slightly uncomfortable with the marketing style wording "Limited offer", but do not believe that it changes the essential nature of the message.

The question arises as to whether, despite not being a direct marketing message, it is a commercial message and should therefore an opt out option should exist.

The definition in the Code is, admittedly, fairly wide. However, it is very clear to me, reading Clause 5 and the definitions together, that the intention is that the provisions of Clause 5 apply to a situation where the message is providing or offering a commercial service **to** the recipient. Debt collecting is not the type of commercial service envisaged by the Code.

I therefore find that the message is not a direct marketing message, nor is it a commercial service in the sense meant by Clause 5, and it therefore does not fall within the ambit of the WASPA Code.

If the complainant believes that the debt collection strategy used by the SABC is inappropriate or illegal, he should take this matter up with the Financial Services Board (FSB). Should the complainant dispute the debt, he should take this up directly with the debt collector or the SABC.

Sanctions

No sanctions are necessary in this matter.