



REPORT OF THE ADJUDICATOR

WASPA Member (SP):	Mira Networks
Information Provider (IP):	US Cellcom
Service Type:	Subscription Service
Complainant:	Anonymous Competitor
Complaint Number:	10048
Code Version:	9.0
Advertising Rules Version:	2.3

Complaint

Complaint 10048 was logged by a competitor regarding unsolicited sms's promoting a subscription service as well as misleading advertising in respect thereof.

The formal complaint was sent to the WASP and the SP on 2010-07-23.

The WASP responded on 2010-07-23.

The WASP requested clarification on 2010-07-26, for which the secretariat provided feedback on 2010-07-26.

The WASP requested further assistance on 2010-07-27, to which the secretariat also responded on 2010-07-27.

The WASP replied their formal response on 2010-07-28.

The complainant responded on 2010-07-29 and 2010-07-30, informed that this complaint can be closed informally,

However the secretariat and the Media Monitor believe this complaint requires adjudication.

The Media Monitor supplied documentation on 2010-08-02 informing that a "heads-up" was sent to the SP prior to this complaint about the same service.

Service provider's response

The service provider responded with details of how and where the opt-in and details of the person to whom the commercial message was sent were obtained. It appears

that the MSISDN number on the opt-in form have been incorrectly transposed. The opt-in form is in respect of the number 082 507 0502, but the MSISDN of the complainant and the MSISDN to which the SMS was sent are 082 5070507.

The service provider also set out that the advertisement that you could send unlimited SMS's was true and correct. Although no evidence in this regard was adduced, the service provider invited WASPA to "test" this allegation.

Sections of the Code considered

The service complained of falls within the ambit of the sending of commercial communications, the identification of spam and the rules relating to advertising and pricing. The sections of the Code of Conduct applicable to this issue are sections 5 and 6 respectively.

The requirements of section 5 are set out below:

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. 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.

5.1.6. Where the words "END", "CANCEL", "UNSUBSCRIBE" or "QUIT" are used in place of "STOP" in an opt-out request, the service provider must honour the opt-out request as if the word "STOP" had been used.

5.1.7. 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.

5.1.8. 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 up-front 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 (within the last six months) 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.

The SP's message complied with the requirements of section 5 and they also provided the proof of the opt-in to receive commercial communications. However, it appears as though the MSISDN inserted on the opt-in form was incorrectly transposed by the SP and the last number being a 2 was incorrectly copied across as a 7.

Section 6 of the Code of Conduct relates to Advertising and Pricing. It sets out that:

6. Advertising and pricing

6.1. WASPA advertising rules

6.1.1. In addition to the provisions listed below all members are bound by the *WASPA Advertising Rules*, published as a separate document.

6.1.2. The latest version of the *WASPA Advertising Rules* will always be available on the WASPA web site.

6.1.3. In the case of any conflict between the *WASPA Advertising Rules* and the WASPA Code of Conduct, the Code of Conduct takes priority over the *Advertising Rules*.

6.2. Pricing of services

6.2.1. All advertised prices must include VAT.

- 6.2.2. All advertisements for services must include the full retail price of that service.
- 6.2.3. Pricing must not contain any hidden costs. Where applicable, pricing for content services must include the cost of the content and indicate any bearer costs that may be associated with downloading, browsing or receiving that content.
- 6.2.4. Pricing contained in an advertisement must not be misleading. If multiple communications are required to obtain content, then the advertised price must include the cost for all communications required for that transaction. A clear indication must always be given that more premium messages are required.
- 6.2.5. The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.
- 6.2.6. Unless otherwise specified in the advertising guidelines, the name of the WASP or the information provider providing the service must appear in all advertisements for premium rated services.
- 6.2.7. For menu-driven services such as USSD, the price for the service must be clearly stated at the top of the first page. Any additional costs associated with specific menu selections must be clearly indicated.
- 6.2.8. Pricing on any promotional material must use one of the following generally accepted formats for prices in Rands: "**Rx**" or "**Rx.xx**".
- 6.2.9. During any calendar month, if the total cost of any service exceeds R200 for that month:
- a. Where the WASP is in control of the billing (e.g. an OBS), a notification must be sent to the customer that they have reached this limit and a communication is required from the customer, confirming acceptance of any costs over this amount, prior to any additional costs being billed.
 - b. Where the WASP is not in control of the billing (e.g. the customer sends an SMS to a premium rated number), the member must send a notification to the customer once they have reached this limit.
- 6.2.10. During any calendar month, after the first threshold notification, when the total cost of any service reaches R400, and when it reaches any multiple of R200 thereafter, an additional notification must be sent to the customer notifying them of the total cost incurred for that service so far.
- 6.2.11. The member providing the service must keep a record of the confirmation provided by the customer (for 6.2.9 (a)) or the notification sent to the customer (for 6.2.9 (b)).
- 6.2.12. For any transaction initiated via WAP, USSD, web-browsing, a link in an MMS or by an application:
- a. If the transaction is billed at R10 or more, the member initiating this transaction must obtain specific confirmation from the customer and keep a record of such confirmation.
 - b. If the transaction is billed at less than R10, the price for the transaction must be clearly indicated as part of, or immediately next to, the link or option that will initiate the transaction and must be visible on the same screen as the link.

- c. If the transaction is to initiate a subscription service, then the price and frequency of the service must be included directly in the text of the WAP link or immediately adjacent to it and must be visible on the same screen as the link.

6.2.13. A customer may enter into a contract with a WASPA member to opt-out of the reminders specified in clauses 6.2.9 and 6.2.10 for a specified service provided that:

- a. Any such contract between the service provider and the customer is clear and easily understood.
- b. The provisions in the contract which deal with opting out from reminders must be obvious to the customer and not hidden in the general terms and conditions or otherwise.
- c. The contract contains a description of the service provided, the duration for which the service will be provided, the frequency and amount of any billing, and information on the mechanism the customer can use to terminate the service.
- d. A copy of the contract is retained by the service provider.
- e. A copy of the contract is made available to WASPA in the case of any dispute.
- f. The contract must provide the customer with the ability to request the resumption of the reminders specified in clause 6.2.9 and 6.2.10.
- g. This contract cannot be concluded via WAP, USSD, SMS or a web page.
- h. This contract must be legal, must not be against public policy and must not limit the consumer's rights under any law.

6.3. General provisions

6.3.1. For services such as MMS, that have specific handset requirements, advertisements must make it clear that the customer needs to have a compatible handset that has been correctly configured to use that service.

6.3.2. For services which are likely to have a shelf-life of three months or more, a statement must be included in any advertisement that the information given is correct as at the date of publication, and that date must also be stated.

6.3.3. Promotional material must not be of a nature that unduly encourages unauthorised calls or use of services.

6.4. Use of a short code as a brand

6.4.1. Where a short code is used as a brand, there is no requirement to display pricing information next to the short code, provided there is no directly associated call to action.

6.4.2. Where a short code is used as a brand and there is an associated call to action, the standard requirements for the display of pricing information are required, as set out in the Advertising Rules.

6.5. Use of the word "free"

6.5.1. The keyword "free" or words with the same or similar meaning (in any language) may not be used for any service unless that service has no associated charges whatsoever, excluding network bearer charges.

In addition, the WASPA Advertising Rules set out guidance with regard to advertising services.

Neither the Code of Conduct or the Advertising Rules set out any guidance around when you can or cannot use the term "unlimited" without offering concrete proof that there are no limitations.

Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her.

With reference to (i) the SP's response to the complaint, (ii) the complainant's reply, (iii) the proof of opt-in, and (iv) the sections of the Code and the Advertising Rules considered.

It appears from the information provided, and when looking at the fact that the handwritten MSISDN number could easily have been confused, that an honest error in transcription was made and that the SP did not intend to SPAM the complainant and in their view had proof of the opt-in required for that MSISDN.

Furthermore, in the absence of any requirements around when you can and cannot utilise the word "unlimited", I feel until it is shown otherwise, the SP's say so that the service is unlimited must be sufficient proof.

I feel three points are worth mentioning at this stage: 1) The complainant is a self-confessed competitor; 2) the complainant did in fact withdraw the complaint; and 3) the allegation was made that in utilising the source number in question, that the SP was routing Vodacom's messages through international gateways which is in contravention with Vodacom's WASP agreement with the SP.

The Media Monitor requested that, notwithstanding the fact that the complainant considered the matter settled, that this case be adjudicated.

In my view the SP has not contravened the Code or the Advertising Rules and in terms of that should not be sanctioned. I find myself in a difficult position in determining whether or not I am mandated and empowered to decide anything differently based on the third allegation set out above, namely that the international routing of these SMS's was in contravention with Vodacom's contract with the SP. I have come to the conclusion that the Code itself does not deal with the international routing of Vodacom messages and that same would be a private contractual relationship between Vodacom and the SP. WASPA is not a party to the contract nor is it privy thereto. As a WASPA adjudicator I have no jurisdiction to rule on the contract and to pronounce a verdict on the SP into his forum based on an allegation around a contract that I have not seen and that is not part of the evidence in this dispute would be exceeding my powers and accordingly ultra vires. Should the SP be breaching their contract with Vodacom, that is a matter for Vodacom and Vodacom's legal team to address.

It is therefore my decision after careful consideration that I cannot rule that the SP has breached the Code. I feel their mistake in transcribing the MSISDN number was an honest and easily made error.

Claim dismissed.

Sanctions

None.