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Attention: Mr Edmund Mhloti Baloyi
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0301069 / C Raffinetti / B Moses | our ref
M Baloyi | your ref

27 January 2010

Email: mbaloyi@icasa.org.za

Dear Mr Baloyi

**ALTECH AUTOPAGE: SUBMISSION IN RESPONSE TO THE CODE OF CONDUCT
(Published in *Government Gazette* 32803, 11 December 2009)**

We act on behalf of Altech Autopage Cellular (Pty) Ltd, which has instructed us to forward a copy of its response to the draft regulations on the sale, lease, rental or subsidisation of subscriber equipment to you for consideration.

Kindly do not hesitate to contact us if ICASA has any further comments or queries.

Yours sincerely



EDWARD NATHAN SONNENBERGS

Per: **CARLA RAFFINETTI**



Submission

to

ICASA

by

Altech Autopage Cellular (Pty) Ltd

in response to the

**Code of conduct the sale, lease, rental or
subsidisation of subscriber equipment**

published in

Government Gazette 32803 of 11 December 2009

Submission date: 27 January 2010

INTRODUCTION

INTRODUCING AUTOPAGE

1. Altech Autopage Cellular (Pty) Ltd ("**Autopage**") wishes to thank the Independent Communications Authority of South Africa ("**ICASA**") for giving it this opportunity to respond to notice published in *Government Gazette* 32803, 11 December 2009, which proposes to regulate the sale, lease and subsidisation of mobile handsets (the "**draft regulations**").
2. Autopage would be grateful to participate in any public hearings that ICASA may hold and asks that it be allocated a speaking slot for this purpose.

PURPOSE OF THE DRAFT REGULATIONS

3. The draft conduct seeks to introduce greater transparency in relation to the practice of selling and subsidising subscriber equipment (such as mobile phones, laptops, etc) ("**handsets**").
4. In particular, the draft regulations deals with the following key theme areas:
 - 4.1. **Bundling**: the tying of handsets to long term post-paid airtime contracts;
 - 4.2. **Contract terms and consumer protection issues**: the terms on which licensees, their agents and other resellers make such handsets available to retail customers ("**consumers**"), such (i) as the forfeiture of unused capacity, (ii) the separate itemisation of handset costs from call usage charges on bills and in adverts, (iii) contract renewals and (iv) contractual penalties payable by consumers;
 - 4.3. **Offences**: statutory offences and penalties.

THE NATURE OF THIS SUBMISSION

5. This submission will be divided into two parts:
 - 5.1. in the first part, Autopage will set out its general comments in relation to the draft regulations;
 - 5.2. in the second part, Autopage will provide detailed comments in response to the draft regulations.
6. In summary, although the objectives of the draft regulations are laudable, there are a number of conceptual problems with them. Our key concerns are as follows:

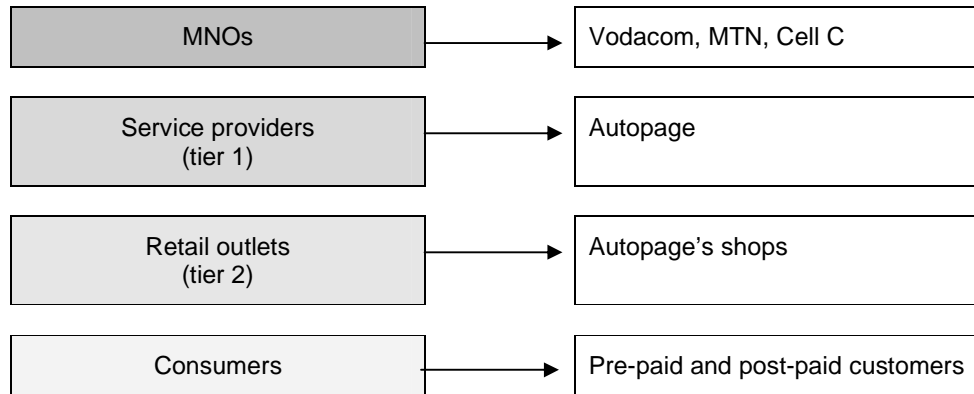
- 6.1. **Ultra vires:** the draft regulations represent ICASA's latest regulation of handset subsidies. In June 2008, ICASA published regulations purporting to regulate handset subsidies.¹ These regulations were never implemented as they were challenged in court on the basis that they were *ultra vires* the Electronic Communications Act 36 of 2005 (the "ECA"). ICASA has attempted to remedy this by publishing the draft regulations as a code of conduct under section 69(2) of the ECA. For the reasons below, Autopage believes that the draft regulations remain *ultra vires* in its current form.
- 6.2. **Overlaps with the CPA:** the draft regulation deals with several issues that are already regulated under the Consumer Protection Act 68 of 2008 (the "CPA"), leading to an unnecessary duplication of statutory regulation. In our view, laws should be rationalised as far as possible. ICASA should only seek to impose sector specific consumer protection regulation where there are gaps in the CPA.
7. We will canvass these and other issues in below. However, we will first give a brief overview of Autopage's business, which will help to place our comments into context.

GENERAL COMMENTS

AUTOPAGE'S BUSINESS

8. Autopage is the largest independent service provider in South Africa. Autopage is a channel partner for third party licensees, notably Vodacom, MTN and Cell C (collectively the "**mobile network operators**" or "**MNOs**", whose licence conditions Autopage is contractually bound to adhere to).
9. Autopage sells airtime packages to subscribers on behalf of these MNOs, but no longer holds any ICASA licences (its I-ECNS and I-ECS licences were transferred to another subsidiary within the Altech group as part of a corporate restructuring exercise).
10. Through its bulk purchasing power, and the incentive fees that it receives from the MNOs, Autopage is able to sell airtime packages and handsets to consumers at discounted rates that are significantly less than the MNO tariffs approved by ICASA.
11. Graphically, the value-chain between the MNO's, Autopage and consumers is as follows:

¹ ICASA, "Regulations on handset subsidies", Notice 751, *Government Gazette* 31156, 17 June 2008.



12. Autopage's relationship to each MNO is regulated contractually by way of a service provider agreement ("**SP agreement**"). Although these agreements differ from each other in the details, they bear many similarities to each other. Notably, the SP agreements all allow Autopage to sell packages to consumers either on a pre-paid or a post-paid basis. In all cases, Autopage may not charge consumers more than the ICASA-approved pre-paid or post-paid tariff.

13. At a retail level, the difference in the treatment of pre-paid and post-paid customers is as follows:

13.1. **Post-paid customers**

13.1.1. Post-paid customers are required to enter into a fixed-term contract with Autopage for a minimum period of 24 months, or for shorter term contracts of 1 month, 6 months, or 12 months if they so wish. (the "**fixed term**").² Each such contract is automatically renewed, not for a further fixed period after the fixed term expires but, but for one month at a time, until it is terminated by either party on one month's prior written notice. Otherwise, the customer may renew the contract for a further fixed term.

13.1.2. Post-paid customers pay a monthly subscription fee in advance in exchange for receiving a pre-determined amount of capacity on the network (such as talktime minutes or SMS bundles). All additional usage fees are billed to customers in arrears each month.

13.1.3. Post-paid customers may acquire a handset or other promotional incentive each time that they sign up for a new fixed term contract or renew the contract for an additional fixed term. The nature of the promotional incentive depends on the

² Altech Autopage's relationship with its customers is regulated by a standard subscriber agreement. The same contractual terms apply, regardless of which MNO package the customer subscribes for. A copy of this agreement can be accessed at <http://www.autopage.co.za/company/legal/termsandconditions>.

package type. The cost of the promotional incentive is usually wholly or partly subsidised. In this way promotional incentives form an important method of marketing and bundling product offerings.

13.2. Prepaid customers

13.2.1. Pre-paid customers purchase airtime credits in advance, which they can use to make calls until they run out of credit. Customers may replenish their credit by paying a top up fee at any time.

13.2.2. Prepaid customers must buy their handsets separately at the full price of the handset. The cost of the handset is not subsidised.

14. Autopage is able to provide cheaper handsets to post-paid customers because it receives a once-off incentive fee from the MNOs for each post-paid subscriber that Autopage signs onto a fixed-term contract. Autopage does not receive any incentive fees for pre-paid customers.

15. The amount of the incentive fees varies according to the package that the subscriber signs up for. Usually, the higher the tariff, the higher the incentive fees. Thus, a customer who signs up for a Talk 500 package with Vodacom attracts a higher incentive fee than a customer who takes a Weekender package.

16. Autopage can decide how to apply the incentive fees in its own discretion. Typically, Autopage uses incentive fees to fund marketing drives, promotional offers, reduce monthly subscription fees, award gift vouchers and subsidise handsets for post-paid customers. However, the connection incentive fee is not exclusively allocated towards subsidising handsets.

17. Autopage may offer discounted phones to consumers who enter into new fixed term contracts or who renew an existing contract for a further fixed term. Autopage can do this by using some or all of the incentive fees that it receives from the MNO to fund all or part of the phone ("**handset subsidy**"). If the cost of the phone exceeds the handset subsidy, then Autopage may require the customer to pay the balance ("**top up**").

18. Post-paid customers are not obliged to acquire handsets when they sign up for or renew a fixed term contract. The contract price (monthly subscription fee) remains the same, regardless of whether the customer receives an accompanying handset or not, except that no top up is payable if the customer does not take a handset with the contract.

19. The MNOs impose penalties on Autopage if post-paid customers terminate their contracts before the initial term or renewal term expires. The penalties differ, depending on the MNO.

20. Under Autopage's standard subscriber contract, Autopage may recover the following amounts from post-paid customers who breach the contract:
- 20.1. the outstanding monthly subscription charges due until the expiry of the fixed term plus the notice period; and/or
- 20.2. the handset subsidy, which may not be less than R675.

GENERAL COMMENTS

ICASA'S POWERS TO REGULATE THE PROVISION OF HANDSETS

21. We do not believe that ICASA has the power to regulate the provision of handsets and handset subsidies, for the reasons given below. Neither is ICASA empowered to impose regulations on persons who do not provide ECNS and ECS to the public.

General regulatory principles

22. Other than in relation to type approvals, neither the Independent Communications Authority of South Africa Act 13 of 2000 (the "**ICASA Act**") nor the ECA expressly allows the ICASA Act to regulate handsets (referred to in the ECA as "subscriber equipment").
23. Accordingly, ICASA is seeking to imply its powers to do this in terms of section 69 of the ECA, which empowers ICASA to prescribe codes of conduct ("**codes**") and the minimum standards to be contained in end-user and subscriber charters ("**charters**") by way of regulation.
24. Section 1 of the ECA does not define either a code or a charter, but ICASA's powers in relation to each are different:
- 24.1. **Codes of conduct:** ICASA may, by way of regulation, prescribe codes of conduct applicable to ECNS, ECS and BS licensees and licence exemptees.³ ICASA may develop different codes for different types of "services". Compliance with the codes is compulsory.⁴

³ ECA, sections 69(1) and (2). The terms below bear the following meanings:

- ECNS means electronic communications network services
- ECS means electronic communications services
- BS means broadcasting services

⁴ ECA, section 69(2). Note that the ECA only specifically mentions that the codes are binding on ECNS and ECS licensees. However, in our view, the very nature of a regulation (which is binding in law) is sufficient to require obligatory compliance from BS licensees and all licence exemptees to whom the codes apply.

- 24.2. **End-user and subscriber charters:** ICASA may, by way of regulation, prescribe the minimum standards that must be contained in charters. ICASA may not prescribe the contents of charters themselves,⁵ the intention being that charters will be developed independently of ICASA, but consistent with the regulations (unlike codes which appear to be directly binding). ICASA may develop different minimum standards in respect of different types of “services”.
25. Although the header of the draft regulations refers to them as a “code of conduct”, the header goes on to state that the draft regulations have been published under section 69(3) of the ECA, which regulates charters, not codes.⁶ By contrast, the explanatory note states that it has been published in terms of section 69(2), which regulates codes.⁷
26. The draft regulations themselves do not take the form of a set of minimum standards, but rather take the form of a regulation complete with penalties. In all likelihood, ICASA meant for the draft regulations to be a “code of conduct” within the meaning of section 69. Nevertheless, ICASA needs to provide greater clarity on this.
27. In either case, the draft regulations are *ultra vires* the ECA as:
- 27.1. their subject matter (handsets) falls beyond ICASA’s jurisdiction to regulate; and
- 27.2. their application is too wide, as the regulations extend to the agents and resellers of licensees, and not only to licensees.
28. As a statutory body, ICASA must adhere to the four corners of its empowering legislation, in this case, the ECA and the ICASA Act. ICASA’s general powers regulation-making powers derive from section 4 of the ECA and section 4 of the ICASA Act. These sections empower ICASA to prescribe regulations on any matter that the empowering legislation allows it to determine by way of regulation

⁵ ECA, section 69(3).

⁶ ICASA sought to rely on the following provisions of the ECA and the ICASA Act:

- **Section 4(1)(a) of the ICASA Act:** this section empowers ICASA to “exercise the powers and perform the duties conferred and imposed on it” by the ICASA Act, the ECA and any other law.
- **Section 4(3)(j) of the ICASA Act:** this section confers broad regulation-making powers on ICASA to prescribe regulations that are “consistent with the objects” of the ICASA Act and the ECA or that are “incidental or necessary” for the performance of ICASA’s functions. The relevant objects of these statutes include the regulation of “electronic communications” in the public interest, ensuring “the provision of a variety of quality electronic communications services at reasonable prices”, promoting “the interests of consumers with regard to the price, quality and the variety of electronic communications services”.
- **Sections 69(3), (4), (5)(a) and (5)(d)-(f) of the ECA:** these sections empower ICASA to prescribe regulations setting out minimum standards for charters.

⁷ Explanatory note, clause 2.1.

only. Any ICASA decision which exceeds these statutory boundaries accordingly falls to be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000 (the “PAJA”).

The subject matter of the draft regulations is too wide

29. Sections 69(2) and 69(4) permit ICASA to prescribe codes and minimum charter standards in relation to “services”.
30. The ECA does not define what “services” mean, although this term is used elsewhere in the Act. The most prominent use of “services” appears in section 7, which prohibits any person from providing a “service” without a licence. In this context, two possible interpretations are possible:
 - 30.1. One (narrow) interpretation is that “services” refer to ECNS, ECS and BS only and that any activity that falls outside the definition of an ECNS, ECS or a BS (such as the provision of handsets) would fall completely outside the scope of the ECA, and would therefore be beyond ICASA’s powers to regulate.
 - 30.2. An alternative (broader) interpretation is that the concept of a “service” is a wider notion which encompasses other electronic communications-related services that do not qualify as ECNS, ECS and BS.
31. The problem with the wider interpretation is that it is too vague to be enforceable, and catches a vast array of previously unlicensed activities within its ambit. It is unlikely that the legislature intended to cast the net of regulation so widely. In all likelihood, the word “services” was meant to refer to ECNS, ECS and BS only.
32. We base this view on the well-established principle of our law of statutory interpretation that where two interpretations of a piece of legislation are possible, and the literal interpretation of the words will lead to an absurd result, then the statute will be interpreted to avoid the absurdity.⁸
33. If the narrower interpretation is correct, ICASA may prescribe codes and minimum charter standards in relation to ECNS, ECS and BS only. The significance of this is that the provision of handsets on its own does not constitute an ECNS or an ECS, as section 1 of the ECA excludes handsets (“subscriber equipment”) from the definition of an electronic communications network (“ECN”), and by implication from the definition of an ECNS or an ECS.⁹ To the extent that this is the case, then

⁸ EA Kellaway, *Principles of legal interpretation of statutes, contracts and wills* (1995) Butterworths, Durban, 160-162.

⁹ ECA, section 1 defines the concept of an ECN, ECNS and ECS as follows:

- “**electronic communications network**” means any system of electronic communications facilities (excluding subscriber equipment) ...”

ICASA cannot extend the application of the codes and the charters to activities that do not fall within the definition of an ECNS, ECS or BS.

34. In our view, the fact that section 69 gives ICASA a very wide discretion to determine the subject matter of codes and charters cannot save the draft code from legal invalidity. Sections 69(1) and (2) do not give ICASA any express guidance as to what matters the codes should deal with.¹⁰ By contrast, section 69(5) is more determinate, and lists various issues in respect of which ICASA may prescribe minimum charter standards (although this is not a closed list), including: the provision of information regarding services and rates, “end-user and subscriber charging, billing, collection and credit practices”, and “any other matter of concern to end users and subscribers”.¹¹
35. At first blush, this creates the impression that ICASA’s decision-making powers are open-ended. However, this does not mean that ICASA’s discretion is completely unfettered. ICASA would not be able to prescribe packaging standards for blue cheese, for example, which would be the logical consequence of a completely unencumbered decision-making power.
36. Legally speaking, the exercise of a discretion invariably involves the making of a choice according to certain standards or in terms of certain criteria. In his leading textbook on administrative law, Lawrence Baxter said the following about the exercise of statutory discretion:

“Much confusion has resulted from a failure to appreciate the complex nature of the concept of discretion. A ‘choice’ is only one aspect of the exercise of discretion, yet the presence of an element of choice has led writers to equate discretion with ‘arbitrariness’. Judges have in the past misleadingly described as discretionary powers as ‘free’ or ‘unfettered’ merely because the outcome was not dictated by a specific rule ... This overlooks the non-‘choice’ elements of discretion which *do* operate as fetters ... Thus it is not surprising that the courts have more recently accepted that the notion of ‘unfettered’ discretion is a contradiction in terms. Properly understood, discretionary power is no more than ‘a compromise between the idea that people who possess power should be trusted with a free hand, and not be tied down by a narrow formula, and the competing notion that some contingent control must be retained over them in case they act in an unreasonable way’.”¹²

37. It is an entrenched principle of statutory interpretation that statutes must be interpreted with reference to their context, being not only the language of a statute, but also its subject matter,

-
- “**electronic communications network**’ means a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise ...”
 - “**electronic communications service**’ means any service provided to the public ... which consists wholly or mainly of the conveyance of electronic communications over an electronic communications network ...”

¹⁰ ECA, sections 69(1) and (2).

¹¹ ECA, section 69(5).

¹² L Baxter, *Administrative Law* (1991, Juta) 87-89

apparent purpose and scope.¹³ It is in this context that in turn necessarily places limits on the exercise of a discretion conferred on an administrative body.

38. Viewed in this way, the parameters of ICASA's discretion to prescribe codes and minimum standards for charters, must necessarily be defined within the context of section 69, which refers in various places to "services", "electronic communications services" and "electronic communications network services", to the exclusion of "subscriber equipment" (handsets).

The application of the draft regulations is too wide

39. Clause 3 of the draft regulations seeks to extend their scope to agents and resellers, regardless of whether such agents or resellers are ECNS / ECS licensees or licence exemptees themselves.

40. Using the statutory interpretation principles discussed above, the various references in section 69 to licensees and licence exemptees (collectively "**ECNS, ECS and BS providers**") suggests that ICASA's discretion to prescribe codes and minimum charter standards is necessarily limited to ECNS, ECS and BS providers.

40.1. Section 69(1) expressly limits ICASA's powers to prescribe codes are expressly limited to licensees and licence exemptees.¹⁴ Somewhat incongruously, section 69(2) only expressly requires ECNS and ECS licensees to comply with the codes. This could mean that compliance with the codes is compulsory for licensees only and voluntary for exemptees and BS licensees. Alternatively, this could mean that section 69(2) is not a closed list, and that codes are binding on licence exemptees and BS licensees as well.¹⁵

40.2. Sections 69(3)-(6) are silent as to whom the charters are meant to apply to. However, section 69(6) permits end-users and subscribers to lay complaints with ICASA in terms of section 17C of the ICASA Act once the dispute resolution procedures in a charter have been exhausted. Section 17C is in turn restricted to licensees, which seems to imply that the codes apply to licensees only.

¹³ L du Plessis, *Re-interpretation of statutes* (2002) Butterworths, Durban, 111-115.

¹⁴ Section 69(1) states as follows:

"The Authority must ... prescribe regulations setting out a code of conduct for licensees and persons exempted from holding a licence ... to the extent that such persons provide a service to the public".

(Our emphasis)

¹⁵ The exact wording of section 69(2) states:

"The Authority may develop different codes of conduct applicable to different types of services. All electronic communications network service licensees and electronic communications service licensees must comply with the code of conduct for such services as prescribed."

41. In either case, the activities of service providers such as Autopage do not fall within the definition of an ECNS, ECS (or BS). This is because such service providers do not operate networks or electronic communication facilities or operate their own switches and routers. They merely sell tariffed packages to the public. As such service providers are not ECNS, ECS or BS providers,¹⁶ ICASA does not have the jurisdiction to extend the application of codes or minimum charter standards to them.

In summary:

The draft regulations are *ultra vires* the ECA for the following reasons:

- ICASA may apply codes of conduct and minimum charter standards to licensees (and possibly also to licence exemptees), and then only in relation to licensable “services”, that is ECNS, ECS and BS.
- The provision and subsidisation of handsets are not licensable services and accordingly fall outside of ICASA’s jurisdiction to regulate.

However, many of the issues that the draft regulations seek to address are already regulated by the CPA. We hope that this fact provides some level of comfort to ICASA, as the CPA will undoubtedly help to curb undesirable practices in the future once the CPA comes into force (the scheduled commencement date is 29 October 2010).

¹⁶ For the sake of clarity, service providers such as Autopage do not constitute “resellers” as defined in section 1 of the ECA. This is because they are not strictly providing ECNS or ECS to their clients on a resale basis, only subscriber packages. The MNO is the entity that provides ECNS and ECS to subscribers at all times. As such Autopage’s activities fall completely outside the scope of the ECA. In this regard, section 6 of the ECA only empowers ICASA to issue licence exemptions to entities who provide ECNS and ECS. Section 1 of the ECA defines a reseller as follows:

“**reseller**” means a person who –

- (a) acquires, through lease or other commercial arrangement, by any electronic communications network service or electronic communications service; and
- (b) makes such electronic communications network service or electronic communications service available to subscribers for a fee, whether or not such electronic communications network services or electronic communications services made available by the reseller –
 - (i) are identical to the electronic communications network service or electronic communications service acquired;
 - (ii) are packaged, bundled or otherwise re-grouped to form new or varied service offerings;
 - (iii) are combined linked or used in connection with electronic communications networks or electronic communications facilities owned by the reseller; or
 - (iv) add value to such electronic communications network services or electronic communications services,
 and ‘resale’ is construed accordingly.”

Section 1 of the ECA defines a subscriber as follows:

“**subscriber**” means a person who lawfully accesses, uses or receives a retail service of a licensee referred to in Chapter 3 for a fee or the retail services of a person providing a service pursuant to a licence exemption”.

OVERLAPS WITH THE CONSUMER PROTECTION ACT

42. As we have indicated above, various provisions in the draft regulations replicate aspects of the CPA. This duplication of laws is not only unnecessary, but is also problematic, as this can lead to complications with the interpretation and application of these laws, especially if the wording used to describe equivalent concepts is inconsistent in different statutory instruments.
43. As a general policy principle, laws should be as streamlined as possible. It is not necessary for ICASA to impose regulation in relation to matters that are already governed by other laws, except where ICASA wishes to impose more detailed regulation than such other laws provide for, or where there are gaps in the existing legislation (subject of course to ICASA having the jurisdiction to do so).
44. Some of the matters in the draft regulations that overlap with the CPA are as follows:

44.1. Form of contract

44.1.1. Clause 4(7) requires all subscriber contracts to be available in the consumer's preferred official language and to be explained to consumers beforehand.

44.1.2. Previous drafts of the CPA required written consumer contracts to be published in official languages as prescribed by the Minister of Trade and Industry, but this requirement was ultimately omitted from the final Act as it was too onerous and costly to comply with. However, the CPA contains other mechanisms that protect consumers by facilitating their understanding of the contracts that they sign up for:

44.1.2.1. **Plain language:** section 22 of the CPA requires written consumer contracts to be drafted in plain language form.

44.1.2.2. **Illiteracy, ignorance, etc:** section 40(2) precludes suppliers from knowingly taking advantage of consumers who are unable to protect their own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor;

44.1.2.3. **Limitations of liability, etc:** section 49 requires certain provisions of consumer contracts to be drawn to the attention of consumers in advance (either by being marked prominently in consumer contracts or in some other way). Specifically, the following types of clauses must be drawn to the attention of customers, namely clauses that:

(i) limit the risk or liability of the supplier or any other person, (ii) constitute an assumption of risk or liability by the consumer, (iii) impose an obligation on the consumer to indemnify the supplier or any other person for any reason, or that (iv) constitute an acknowledgement of any fact by the consumer. In addition, contractual provisions must be brought to a consumer's attention if the provision concerns any matter that is subject to any risk (i) of an unusual nature, (ii) the presence of which the consumer could not reasonably be expected to be aware, or (iii) that could result in serious injury or death.

44.2. **Bundling of airtime contracts and handset acquisition**

44.2.1. Clause 5 of the draft regulations states that licensees, their resellers and their agents (collectively "**suppliers**") must give post-paid customers the choice to sign up for airtime contracts with or without handsets.

44.2.2. The bundling of goods and services is regulated by section 13 of the CPA, which precludes suppliers from requiring consumers who are buying a particular good or service to purchasing other goods and services as well. However, the compulsory tying of goods and services can be justified if the supplier can show that (i) the balance of convenience to the consumer outweighs the limitation of the consumer's right to choice, (ii) this results in an economic benefit to consumers, or (iii) offers bundled goods or services separately and at individual prices.

44.3. **Expiry and renewal of fixed-term agreements**

44.3.1. Clause 4(3) requires suppliers to give post-paid consumers a choice regarding the term of their contracts. Clauses 4(8) and (9) of the draft regulations requires suppliers to notify post-paid customers by SMS or email of the impending expiry of their contracts at least one month before the term expires. Clause 4(10) seeks to prohibit suppliers from renewing fixed term contracts automatically when they expire.

44.3.2. The expiry and renewal of fixed-term contracts is already dealt with in section 14 of the CPA, which allows the Minister of Trade and Industry to prescribe the maximum term applicable to different types of fixed term contracts. The CPA states that where a consumer enters into a fixed term

contract, the supplier must (i) allow the consumer to cancel the contract without incurring liability to the supplier when the contract expires, (ii) notify the consumer in writing of the impending the expiry of the contract. However, if the consumer does not cancel the contract when it expires, then the contract will automatically renew on a month-to-month basis. A consumer must be given the right to cancel a fixed term contract prematurely, by giving 20 business days' notice to the supplier, in which case the supplier may impose a reasonable cancellation penalty on the consumer with reference to the goods and services supplied, or discounts granted to the consumer during the fixed term.

44.4. **Forfeiture of unused capacity**

44.4.1. Clause 4(5) of the draft regulations seeks to preclude suppliers from requiring customers to forfeit unused capacity, and requires them to credit them for such capacity if a contract is terminated. Clause 4(4) requires suppliers to notify their customers if they have any unused capacity left at the end of every month.

44.4.2. Section 63 of the CPA states that pre-paid credits may not expire until the earlier of (i) the date on which the full value has been redeemed in exchange for goods or services or for future access to services, or (ii) 3 years after the date on which the credits were issued, unless the consumer and the supplier agree to a longer period of time. These provisions of the CPA apply both to pre-paid and post-paid customers. With airtime contracts, pre-paid subscribers purchase all of their airtime on a pre-paid basis, whereas the monthly subscription fee payable by post-paid customers covers for a fixed amount of pre-paid airtime upfront, with any excess airtime used in any month being payable in arrears according to the actual amounts of capacity used.

44.5. **Disclosure of distinct price components and itemised billing**

44.5.1. Clause 4(1) of the draft regulations requires suppliers who provide subsidised handsets to pre-paid or post-paid customers to clearly indicate the capital costs of the handset, interest payable on the handset, the amount of the subsidy offered and separately detail any other charges for goods and services. Although not explicit, these provisions in the draft regulations appear to apply to advertisements and other promotional communications.

- 44.5.2. Clause 4(2) requires suppliers to separately itemise these charges on post-paid subscribers' bills and to separately indicate what penalties will be payable if a post-paid customer terminates a fixed term contract early.
- 44.5.3. There are a number of provisions in the CPA which require suppliers to advertise and to otherwise advertise goods and services to customers in a clear and transparent manner. For example:
- 44.5.3.1. section 23 precludes suppliers from charging consumers a higher price for goods and services than the displayed price;
 - 44.5.3.2. section 29 precludes suppliers from engaging in misleading advertising;
 - 44.5.3.3. section 34 regulates promotional offers, including offers for free or discounted goods and services; and
- 44.5.4. Section 41 prohibits suppliers from making false, misleading or deceptive representations to consumers.

In summary:

The issues that the draft regulations seek to address are already adequately addressed by the CPA, thus mitigating the fact that ICASA does not have the jurisdiction to regulate the provision of handsets.

Moreover, unlike section 69 of the ECA (which is restricted to ECNS, ECS and BS providers), the application of the CPA is far wider in that it extends to all goods and services, consumers and suppliers in various industries, subject to limited exception, which do not apply here.

SPECIFIC COMMENTS

45. Although the regulations are not within ICASA's powers to prescribe, we will nevertheless comment on the substantive issues raised by the regulations. However, this should not be construed to as an admission on our part that the draft regulations are legally valid.

DEFINITIONS

Definition of subscriber equipment (clause 1)

46. "Subscriber equipment" is already defined in section 1 of the ECA. We accordingly suggest that this definition be deleted.

Purpose of the draft regulations (clause 2)

47. Clause 2(1) states that the primary purpose of the draft regulations is to regulate the provision and subsidisation of handsets. For the reasons above, this does not fall within ICASA's powers to regulate.
48. Clause 2(1) further states that the draft regulations will seek to impose the minimum standards that must be contained in charters. As already indicated, the status of the regulation is not clear (as a code of conduct versus a set of minimum charter standards).

Separate itemisation of handset costs in marketing materials and itemised bills (clauses 4(1)-4(2))

49. The draft regulations seek to require licensees, their agents and their resellers to separately itemise handset costs in their marketing materials and to disaggregate these costs in the bills of post-paid customers. For the reasons above, this does not fall within ICASA's powers to regulate. These matters are also already adequately covered in the CPA.
50. In any event, Autopage already provides itemised bills to its post-paid customers, although handset details are not separately itemised. Autopage is prepared to separately reflect the full cost of the handset, the subsidy, excess capital costs payable by the subscriber (in cases where the incentive fee is less than the cost of the handset) and the penalties payable in the case of premature termination.

Duration of fixed-term contracts (clause 4(3))

51. Clause 4(3) requires licensees, their agents and resellers to give their customers a choice as to the term of a fixed term contract. This does not fall within ICASA's powers to regulate in relation to agents and resellers.
52. Moreover matters such as the duration of fixed-term contracts, and the structuring of packages (such as in relation to the cost of pre-paid airtime covered by the monthly subscription fee and post-paid airtime in excess of this) is a tariffing matter that falls exclusively within the domain of ECNS, ECS

and BS providers. In the mobile cellular market, it is accordingly the prerogative of the MNO to file tariffs with ICASA for shorter fixed term contracts.

Rollover of unused capacity (clause 4(4))

53. The draft regulations seek to preclude suppliers from allowing unused capacity to expire – indefinitely. It is not within ICASA’s powers to impose these obligations on non-licensees or non-licence exemptees.
54. In any event provisions of the draft code are far more onerous than the equivalent provisions in the CPA (which allows pre-paid credits to expire after a minimum of 3 years). In our view, the CPA standard should apply.
55. Clause 4(4) requires licensees, their agents and resellers to notify customers by SMS if they have any unused capacity left over in any month. This is unduly onerous and may be expensive to implement, particularly if these text message costs and equipment upgrade costs cannot be recovered from consumers. Moreover, service providers (such as Autopage), other resellers and agents do not have this capability built into their systems, as this information is held and controlled by the MNO. For this reason, it is only appropriate to impose an obligation of this nature on an MNO.
56. We also do not believe that it is necessary to require the provision of this information on a “push” basis (ie without solicitation from the customer). The MNOs already make this information available to customers on a “pull” basis (ie when customers request it). Thus, customers have access to this information whenever they require.

Alerting customers to onerous contractual provisions and use of official languages (clause 4(7))

57. These matters are also already adequately covered in the CPA. It is therefore unnecessary to duplicate these provisions in the draft regulations. The draft regulations should only regulate consumer protection issues to the extent that the CPA is insufficient or silent on a particular matter that is germane to the provision of ECNS, ECS or BS by a licensee or licence exemptee.

Renewal and expiry of fixed term contracts (clauses 4(8)-(10))

58. These matters are also already adequately covered in the CPA. It is therefore unnecessary to duplicate these provisions in the draft regulations. The draft regulations should only regulate consumer protection issues to the extent that the CPA is insufficient or silent on a particular matter that is germane to the provision of ECNS, ECS or BS by a licensee or licence exemptee.

59. For ICASA's information, Autopage already complies with the CPA standard. No fixed term contract is ever automatically renewed for another fixed term, but only on a month-to-month basis unless the customer terminates the contract or chooses to renew it for a further fixed term.

Recoupment of charges (clause 4(11))

60. This clause requires licensees, their agents and resellers to specify whether and how charges for services will be recouped from subscribers before a pre-paid or post-paid contract is entered into. For the reasons above, this is not within ICASA's powers to regulate in relation to non-ECNS, ECS or BS providers.
61. For ICASA's information, the current recoupment regime operates at the MNO level (rather than at the service provider level) and is structured as follows:
- 61.1. As indicated above, the MNOs pay service providers an incentive fee for each new post-paid customer that they sign up.
- 61.2. The MNOs structure their post-paid tariffs (inclusive of the price, duration and so forth) so as to ensure that the MNO recoups the cost of the incentive fee from subscribers over the lifetime of the contract.
- 61.3. If a customer terminates a post-paid contract prematurely, then Autopage may recoup the cost of the early termination penalty levied by the MNO on Autopage, but does not recoup the cost of the handset.

Freedom to purchase subscriber equipment, prohibition against SIM locking (clause 5)

62. For the reasons above, this does not fall within ICASA's powers to regulate. These matters are also already adequately covered in the CPA. These matters are also already adequately covered in the CPA. It is therefore unnecessary to duplicate these provisions in the draft regulations.
63. For ICASA's information, Autopage does not engage in the practice of SIM-locking. Neither does Autopage require post-paid customers to acquire handsets with their contracts. However, the monthly subscription fee payable by the customer remains the same. This is because, except in the case where a top up is payable, handsets are provided to post-paid customers free of charge using the incentive fees that Autopage receives from the MNOs.

Offences and penalties (clause 7)

64. For the reasons above, ICASA is not empowered to impose penalties in relation to handsets, only in relation to licensable activities (ECNS, ECS and BS).

Commencement date (clause 8)

65. Clause 8 states that the draft regulations will come into force within 1 month of being promulgated. Depending on the nature of the regulations and the nature of the regulatory compliance exacted by them, licensees may need a longer period of time to prepare and upgrade their systems before the regulations are passed into law.

CONCLUDING REMARKS

66. Autopage wishes to thank ICASA again for this opportunity to comment on the draft regulations.
67. We realise that some of the views that we have expressed in this submission may be controversial. Nevertheless, it is in the best interests of the industry to build legally infeasible frameworks, as this reduces the threat of litigation and ultimately promotes regulatory stability.
68. Autopage would be willing to provide any further assistance or answer any additional questions that ICASA may require.