

CELL C SUBMISSION ON THE DRAFT REGULATIONS IN RESPECT OF THE SALE, LEASE AND RENTAL OF SUBSCRIBER EQUIPMENT AS PUBLISHED ON 11TH DECEMBER 2009 IN GOVERNMENT GAZETTE NUMBER 32803 OF 2009

1. Introduction

Cell C would like to thank the Authority for this opportunity to comment on the Draft Regulations in respect of Mobile Handset Subsidisation and hopes to make a positive contribution towards the process that the Authority has embarked upon.

Furthermore, Cell C commends the Authority as this initiative to finalise the draft regulations, which would, if transformed into regulations, would benefit both consumers and the strengthen competition in the market.

It is our intention, as Cell C, to provide the Authority with suggestions on how to proactively address the needs of the consumer. However, we feel an overall assessment of the impact any policy changes will have on the communications sector as a whole, is necessary. To this end, Cell C requests the Authority to conduct a workshop with the entire industry prior to the conclusion of the regulations. As set out in more detail in the rest of this submission, there are a number of provisions that are ambiguous or unclear. This could lead to a fragmented approach in implementing the regulations, which would not only cause confusion in the market, but could be to the detriment of consumers and licensees alike. It is for this reason that Cell C believes a workshop would be the most effective and efficient approach to resolve difficulties with the current draft of the regulations.

Cell C trusts that its submission will assist the Authority in its endeavour to achieve a well structured and reasoned approach to regulating the sale, lease and rental of subscriber equipment in South Africa. This submission will be structured as follows:

Section 2: General Comments

- Legal Considerations
- Consumer Protection
- Competition

Section 3: Specific comments

2. GENERAL COMMENTS

2.1 Legal Considerations

An important consideration in assessing draft regulations, is the legislative framework on which the regulations are premised. Cell C hereby affirms that it supports the process followed by the Authority in order to reach this point of publishing draft regulations.

Cell C has noted a misconception in the media as to the applicability of these regulations, in that it is believed that only licencees who volunteer to these regulations will be held bound by their terms. For the sake of clarity, Cell C suggests that the Authority formally addresses this misconception, and points out that once the Code of Conduct is promulgated, it will carry the force of the law and will be applicable to all.

Cell C notes that these draft regulations were issued in terms of section 69 of the EC Act. It is Cell C's considered opinion that the intention of these regulations is to protect consumers as intended in these regulations. Section 69(3)-(5) of the EC Act addresses consumer issues and provides that:

.....

- “(3) The Authority must, as soon as reasonably possible after the coming into force of this Act, prescribe regulations setting out the minimum standards for an end-user and subscriber service charters.*
- (4) The Authority may develop different minimum standards for and end-user and subscriber service charters for different types of services.*
- (5) The matters which an end-user and subscriber service charter may address include, but are not limited to –*
- (a) the provision of information to end-users and subscribers regarding services, rates and performance procedures;*
 - (b) provisioning and fault repair services;*
 - (c) the protection of private end-user and subscriber information;*
 - (d) end-user and subscriber charging, billing, collection and credit practices;*
 - (e) complaint procedures and the remedies that are available to address the matters at issue; and*
 - (f) any other matter of concern to end-users and subscribers.”*

It is noted that a number of Codes are prescribed based on this particular provision in the ECA, and Cell C believes it is important that a coherent approach is followed by the Authority. It is submitted that the alignment and

consolidation of all the prescribed Codes will be the first step in efficiently and effectively protecting consumers.

To this end, Cell C confirms that the regulations will only be applicable to new subscriber agreements offered from the implementation date as envisaged in the draft regulation, and that existing contracts will run its course.

It is lastly submitted that the wording throughout the draft regulations, must be amended to reflect the technologically neutral nature of the EC Act.

2.2 Consumer Protection

The *Consumer Protection Act 68 of 2008(CPA)*, published in the Government Gazette on 29 April 2009, will only come into effect 24 October 2010. This has afforded business reasonable amount of time to align their trading practices and systems to comply with the CPA. One of the most prominent statements in consumer policies is the requirement that consumers must receive clear and sufficient information in order to make choices regarding products and services. In Ofcom's (UK) consumer Policy it is stated that the main problem facing consumers has been that it is not always easy to compare the prices of different services, or to get accurate and reliable information on the quality of services¹. Cell C believes that the draft regulations would to a large extent address this concern.

The importance of consumers being informed about the products and services they use, is recognised globally (i.e. the OECD issued an ordinance requiring transparency in prices², Australia published a consumer code that specifically addresses customer's rights to information on prices and terms and conditions³). The CPA has also addressed these issues as it states that disclosure is extremely important, as consumers are entitled to information in

¹ <http://www.ofcom.com>

² <http://www.oecd.org/dataoecd/35/51/1866066.htm>

³ http://www.acma.gov.au/ACMAINTER.131402:STANDARD::pc=PC_2030

plain and understandable language⁴. This is especially true with regards to consumer contracts, terms must be fair and reasonable, and notice must be given to the consumer⁵.

Cell C accordingly submits that the CPA and these regulations should be read together as their objectives are for the most part in line. In addition, Cell C also submits that the requirements of transparency incorporated into the draft regulations are in line with international best practice on consumer protection.

Due to the similar nature of the intention of these draft regulations and the CPA and preparations made for the implementation of the CPA, as well as further considerations discussed in the rest of this submission, Cell C appeals to the Authority to consider the time frames allowed for compliance in the CPA. It is furthermore proposed that the implementation date of these draft regulations be aligned, to the extent possible, with the implementation date of the CPA in October 2010. This is proposed with the proviso that the industry will at least be allowed 7 months to prepare for the implementation of these regulations.

2.3 Competition

Cell C supports the Authority's proposal that the process of unbundling of subscriber contracts would ensure that two distinct contracts, one for subscriber equipment and another for services are offered to mobile subscribers. Should this be done, consumers will be in a position to make a more informed decision regarding the costs of both the service and those of the subscriber equipment.

2.4 Mobile Number Portability

Switching costs are currently not transparent and consumers will only become aware of the costs of either handset or airtime bundles when they choose to

⁴ s22-28 Consumer Protection Act 68 of 2008

⁵ s48-52 of Consumer Protection Act 68 of 2008

move from one service provider to another. The higher the switching costs are (real or perceived), the more difficult would it be for consumers to switch⁶ and therefore improve competition. It is submitted that if consumers are aware that they can cancel their contracts at any time, and retain the use of their current subscriber equipment, through upholding the contract in terms of which a subscriber equipment contract which was obtained from the donor operator, on the network of the recipient operator, it would make the porting decision much easier.

2.5 Handset Manufacturers

The benefits of competition within a market are well-known. Just as a separation between service and subscriber equipment contracts, will increase competition at the service level between mobile operators. It is submitted that such separation will increase competition between subscriber equipment manufacturers, with the ensuing effect of improved service levels.

3. Specific Comments

3.1 Section 1- Definitions

3.1.1 Subscriber equipment:

Cell C takes note of the Authority's decision not to define all the terms in the Code of Conduct, but rather only those deemed to be necessary. In light of the above, we would like to point out that the definition of "subscriber equipment" in this Code of Conduct, differs from the definition given in the EC Act. It is Cell C's considered opinion that for the purpose of consistency, and to avoid any potential confusion, that the definition should be changed to fall in line with that of the Act or else, to remove the definition from the draft regulations all together.

It is therefore proposed that the definition of "Subscriber equipment" be amended to read as follows:

⁶ Competition Commission submission 5 July 2005

“Subscriber equipment” means any device which is used by a subscriber to access, use or receive the services of a licensee referred to in Chapter 3 or the services of a person providing a service pursuant to a licence exemption, including limitation, a telephone, regardless of technology such as IP (internet protocol) phones, mobile phones, publicly available phones; a handset, a computing device such as a personal digital assistant or a personal computer; a device for receiving a sound radio broadcasting service and a television; or other device equipment, and any associated software.”

3.1.2 Pre-paid subscriber:

Cell C would like to correct the misnomer that pre-paid services are paid for in advance. Rather, the subscriber pays as the service is used. It is therefore only recognized as revenue by the licensee, once the minute is actually used. In other words, a subscriber can give unused minutes to another subscriber. Cell C accordingly propose the inclusion of the following definition:

“Pre-paid” means access by a subscriber to wireless services that is paid for upon use, where there is no commitment with the licensee and the subscriber does not receive a monthly bill.

3.2 Section 4 - Contractual issues

3.2.1 Section 4(4)

This section requires licensees, to notify subscribers on a monthly basis of any unused units, data, capacity or minutes. Cell C would like to point out to the Authority that all Cell C subscribers can at any point in time receive all the relevant information from balance enquiries service at 14302. It is accordingly submitted that a requirement on the licensee to contact the subscriber, if the subscriber can access the information at any point in time, is onerous and unnecessary.

Cell C therefore proposes that section 4(4) be amended to read as follows (additions in **bold and underlined**, deletions ~~strike through~~)

(4) A licensee, or its agent or reseller must **ensure that all subscribers have access to a service that provides the subscriber with information** ~~at least once a month, notify subscribers via short message service “sms” or any other convenient means agreed to between the subscriber and the licensee or its agent or reseller~~ of any unused units, data, capacity or minutes accruing to the subscriber in a particular month including such units, capacity or minutes as may have been accumulated from previous months.

3.2.2 Section 4(5)

Cell C notes that this section prohibits the licensee from forfeiting any subscriber’s unused units, capacity or minutes. Cell C would like to point out that this recommendation is extremely problematic from both a technical and commercial point of view. A regulation such as this should take the practical realities of providing a service into account, as required in the objectives of the Act. In order to “provision for minutes on the network” there are a number of requirements on the network, that should be considered:

- Software licensing to keep the number active;
- Radio network dimensioning and capacity (as the use of minutes should be evenly spread out); and
- Billing system development

In addition, and very importantly, in order to comply with financial reporting standards, all expense recognition must be reported on a quarterly basis, and it is not possible to accurately report unless the minutes are either used or expired. A requirement to carry over minutes indefinitely would result in inaccurate reporting and be a disincentive to invest.

A further reality to consider, is the potential for abuse of these minutes by using it in Least Cost Routers and other illegal means as explained below. Licensees have to monitor the usage patterns on its networks 24 hours a day to identify and root out fraud and abuse. This requirement would severely affect the capability to continue with such pre-emptive measures, which will ultimately result in higher costs to consumers.

Cell C is particularly concerned about the unintended consequences that the crediting of unused minutes to customers may have on the market. This could potentially expose the industry to money laundering offences by creating a platform to trade in currency other than money i.e. minutes, which will ultimately be converted into money. In other words this could indirectly assist fraudsters to conduct “suspicious and unusual transactions”, in terms of section 29 of FICA⁷, “money laundering” and result in “assisting another to benefit from proceeds of unlawful activities” in terms of section 4 and section 5 of Prevention of Organised Crime Act⁸.

The expiry of minutes is an established practice in this industry worldwide, which is a requirement by the Authority for pre-paid to ensure the efficient use of allocated numbers and inevitably for mobile number portability. It is submitted that from a commercial perspective, minutes should be carried over for a maximum of 90 days in line with current “Active 3” reporting practices.

In light of the significant impact that the carryover of minutes would have on its business, should this provision be included into the regulations, Cell C will be left with no choice but to remove all inclusive minutes from its offerings. This will undoubtedly be to the detriment of consumers, but will be the only feasible option available. We therefore strongly suggest this regulation be either totally removed or alternatively, changed to read as follows (additions in **bold and underlined**, deletions ~~strike through~~):

⁷ Financial Intelligence Centre Act, 2001

⁸ Prevention of ORGANISED CRIME ACT, 1998

“A licensee, its agent or reseller shall not be entitled to require the subscriber to forfeit any unused units, capacity or minutes, as the case may be, **for a maximum of three (3) months** in respect of any period. ~~A licensee, its agent or reseller shall give subscribers a credit for any unused units, capacity or minutes, as the case may be, upon termination of the contract”~~

3.2.3 Section 4(7)

This section defines an “informed decision”, Cell C currently provides the information listed in section 4(7)(a) and (b) at the point of sale, but despite best efforts, often receive complaints that subscribers did not understand the contracts when it was explained, although such subscriber confirmed at point of sale that they were comfortable with the information provided. To this end, all Cell C subscribers are welcome to contact its call centre at 140 for any further explanations that may be required following the conclusion of the contract. It is however important to note that a contract is a legal agreement that is enforceable, in line with the laws of this country.

However, in as far as clause 4(7)(c) is concerned, Cell C submits that it is impossible to comply to the requirement to point out the consequences of breach or termination prior to the expiry date of a contract and the amounts payable in respect of such breach or termination prior to the conclusion of the agreement. The reason for the concern is that the amounts payable will: (1) depend on the product; (2) contract duration, and (3) depend on how long the customer has been using the service. It will therefore be very difficult to cater for each scenario at the time when the contract is concluded. It would be more practical to make the information available prior to the conclusion of a contract, upon receipt of a written request stating the specific contract package that information is required for, and a specified termination date.

It should be noted that this information is also made available on a monthly basis on the bill sent to all post-paid subscribers.

It is accordingly proposed that section 4(7)(c) be amended to read as follows (additions in **bold and underlined**, deletions ~~strike through~~)

- (c) **Upon receipt of a request in writing, wherein a specific product offering and other required details are clearly specified, the licensee, its agent or reseller** must clearly state in writing the actual charges or penalty in respect of the services and/or subscriber equipment, and how the licensee, its agent or reseller intends to recoup them from the the post-paid subscriber in the event of a breach or early termination of the contract. A written statement to this effect should be made to the subscriber before a contract is concluded with the licensee, its agent or reseller, whatever the case may be.

3.2.4 Section 4(10)

Cell C has found that a number of subscribers are content with the service provided by mobile operators but are not necessarily interested in concluding a new agreement at the end of their contract term. Some consumers may still be deciding which upgrade offer to accept, and may be left without a service and mobile number should the contract automatically terminate. It is accordingly proposed that subsection (10) be amended to allow the contract to continue on a month to month basis and on the same terms and conditions, until such time as the customer would like to terminate the agreement, or conclude a new agreement. This approach is in line with the arguments that were raised, and accepted in the process to finalise the Code of Conduct regulations. The following amendment is proposed (additions in **bold and underlined**, deletions ~~strike through~~):

“A contract must not be be automatically renewed. Post-paid subscribers must be given the opportunity to re-negotiate terms and conditions before the expiry of a contract. **Should the post-paid subscribers not inform the licensee, its agent or reseller regarding the renewal or renegotiation of the contract prior to the expiry of a contract, the subscriber will be converted to a month to month**

contract. Where a contract is to be renewed, a post-paid subscriber must be entitled to negotiate terms and conditions upon which a contract is to be renewed, including the duration of the new contract.

3.3 Section 5 – Freedom to purchase subscriber equipment

Cell C believes that the freedom of customers to purchase their own handsets and not to be penalised in any manner whatsoever when doing so, is an important provision to ensure consumer choice in the market. This may also serve to prevent anti-competitive practices by dominant operators in the broader sense, such as “tying” – the sale of a good or service on condition that you purchase another good or service, which you may or may not need.

It is noted that bundling is not prohibited in terms of these regulations, and therefore operators will still be able to enjoy the efficiencies of bundling products. The distinction is however, that it cannot happen in an anti-competitive manner.

3.4 Section 8 - Date of Commencement

Cell C submits that the timeframe given for the implementation of these regulations is not sufficient, as there are many considerations from a network perspective. Cell C submits that it would require at least seven (7) months from the date the final regulations are published to ensure that it is able to provide reliable information to subscribers in the required form.

Although the separation of information may not appear to be a significant amendment to the Authority, from a network perspective it has a huge impact on the following systems:

- CRM (Customer Relations Management);
- Wholesale Billing System; and

- Customer Billing

Cell C would need to make technical changes to the above systems and conduct extensive testing, to ensure it provides reliable information to its subscribers. This process is complicated by the fact that external vendors are utilised to implement some of the system changes, and therefore Cell C is also depended on the time frames of third parties.

Once the system changes and testing is done, its sales staff in each province would have to be retrained, as well as its call centre staff. Lastly, this will require the redrafting of subscriber agreements, and the revision of all marketing material.

Cell C implores the Authority to take the above considerations into account, as it would not be physically possible for Cell C to comply to the regulations earlier than 7 (seven) months after the final regulations are published. In addition, it is submitted that the implementation of the penalty provisions, should be delayed for three (3) months after the implementation date, to ensure that all systems are running smoothly prior to sanctions being imposed.

The implementation of the Regulation of Interception of Communication and Provision of Communication related Information Act (“RICA”) is a good example of the impact that system changes have on a network. In this instance the networks were granted a total of seven (7) months (effectively January to August) to implement RICA legislation, and the networks experienced technical challenges for up to four months after the effective date.

4. Conclusion

Cell C trusts that the Authority will take its proposals into account in the process of finalising these very important regulations, and to keep in mind that that if the financial, administrative and business risk burdens imposed on

licensees are too onerous, this could lead to increased costs to consumers and the reduction of investment into the country. This will, unfortunately defeat the object of this legislature, as consumer protection and facilitation of fair competition are at the heart of effective regulation.

Cell C believes that with a revision of the regulations, as proposed above, this process could go a long way towards improving transparency in the industry and ensuring more flexible products to consumers. It is however important that there is a uniform approach in the industry, and Cell C again requests the Authority to conduct a workshop with the industry prior to the conclusion of the final regulations, to ensure there is a homogeneous understanding of the provisions contained in the regulations.