



ISPA Submission

in response to

**ICASA's Draft Code of Conduct on the sale, lease, rental or
subsidisation of subscriber equipment pursuant to Chapter 12 of the
Electronic Communications Act 36 of 2005**

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Introductory remarks

1. ISPA welcomes the publication of a Draft Code of Conduct on the sale, lease, rental or subsidisation of subscriber equipment (“the Draft Code”) in terms of Chapter 12 of the Electronic Communications Act 36 of 2005 (“the ECA”) and the publication of an accompanying Explanatory Note.
2. We support the need for measures to be taken to protect South African subscribers from unethical and harmful business practices relating to the provision of subscriber equipment and, in particular, the bundling of contracts for the acquisition of subscriber equipment with contracts for the provision of electronic communications services.
3. We further recognise that the regulation of the subsidisation of subscriber equipment has the potential to prevent anti-competitive conduct and address the barriers to entry constituted by switching penalties and lock-in periods.

4. ISPA's members accordingly have a direct interest in the formulation of a regulatory instrument in the nature of the Draft Code and ISPA supports the concept of such a regulatory intervention.
5. In the event that the Authority elects to hold public hearings with regard to the proposed amendments, ISPA requests that an opportunity to present be reserved for it.

Scope of Application of the Code of Conduct

6. ISPA is concerned that the Draft Code is too broad in its application in at least two fundamental respects.
7. The first of these relates to the origins of the Draft Code in the development of regulations designed to address business practices specifically employed in the mobile cellular electronic communications industry. It appears to ISPA that the Draft Code– much like the ICASA End User and Subscriber Service Charter Regulations 2009 – is an attempt to regulate across industries and markets through a regulatory instrument which had (and, to a certain extent, retains) its roots in a very specific market and the licence obligations which applied only to those providing services in that market. The explicit reference to SMS in section 3(4) of the Draft Code is one example of this legacy.
8. Stated differently: the majority of the obligations set out in the Draft Code of Conduct were specifically formulated for insertion into Mobile Cellular Telecommunication Service licences issued under the Telecommunications Act of 1996 so as to address practices employed by such licensees. It does not follow from licence conversion - undertaken on the basis of the application of “no less favourable terms” – that such obligations are now to be applied to all holders of IECS licences, irrespective of the technology employed to provide ECS.
9. Where the Authority, in paragraph 1.2.8 of the Explanatory Note published together with the Draft Code of Conduct (“the Explanatory Note”), refers to its “enquiry into handset subsidies” being “motivated by, amongst other things, general consumers (sic) concerns regarding transparency of costing and billing of handsets”, it is quite evidently referring to general consumer concerns relating to the provision of mobile cellular electronic communications services.

10. ISPA regards it as improper and in conflict with the provisions of the ECA and the ICASA Act for the Authority to seek now to extend the scope of application of the ICASA Handset Regulations 2008 (“the Handset Subsidies Regulations”) to the activities of all licensees irrespective of the market(s) in which they may provide licensed services. In sharp distinction to the process of research and consultation undertaken with the mobile operators prior to the publication of the draft of the Handset Subsidies Regulations (as set out in the Explanatory Note), there has, to the best of ISPA’s knowledge, been no such consultation with licensees providing other services nor has any study been undertaken into markets other than mobile cellular electronic communications service provision.
11. ISPA assumes that the extension of the scope of application of the Handset Subsidy Regulations in this manner has been affected pursuant to arguments raised regarding the observation of the principle of technological neutrality in the formulation of regulatory instruments under the ECA. ISPA urges the Authority to recognise, however, that this principle should not prevent the Authority from achieving its mandates of promoting competition and protecting consumers in specific markets where there is an evident need for intervention.
12. ISPA is accordingly of the view that the scope of application of the Draft Code should be limited to those providing mobile cellular electronic communications services until such time as the necessary research and consultation is undertaken with those providing other forms of electronic communications services.
13. The second element of regulatory over-reach flows from the definition of licensees as meaning any person who has been issued with a licence in terms of Chapter 3 of the ECA. This definition perforce means that holders of electronic communications network services (ECNS) licences will be bound by the finalised Code of Conduct, which is a position at odds with the licensing regime created under the ECA.
14. Chapter 3 of the ECA read with the definition of “electronic communications network service” clearly envisages that ECNS licensees do not provide services to subscribers (which term is used throughout this submission according to its definition under the ECA). It is therefore incorrect to envisage a situation, for example, where the holder of an ECNS licence, in such capacity, offers subscriber equipment bundled with an ECS to a subscriber.

15. It is only the holders of ECS licences and those providing ECS whilst acting under a licence exemption that will provide services to subscribers.
16. ISPA submits that, in order to align the scope of application of the Draft Code with Chapter 3 of the ECA, the definition of “licensee” as it is to apply in the finalised Code of Conduct should be amended as follows:

“**licensee**” means any person who has been issued with an electronic communications service licence or an exemption relating to the provision of an electronic communications service in terms of Chapter 3 of the Act;

Overlap with the National Credit Act and Consumer Protection Act

17. ISPA submits that the Authority is seeking, through the Draft Code of Conduct, to regulate matters which are already catered for in the National Credit Act 34 of 2005 (“the NCA”) and the Consumer Protection Act 68 of 2008 (“the CPA”).
18. The overlap with the NCA relates to the provision of information regarding the financial implications of entering into an agreement where subscriber equipment is being financed through an agreement for the provision of ECS. ISPA understands that the Authority has consulted with the National Credit Regulator (“the NCR”) as regards jurisdiction in respect of the bundling of handsets in the mobile cellular electronic communications market and that the NCR has indicated that ICASA should regulate in this regard.
19. ISPA is of the firm view, however, that this matter should indeed be dealt with by the NCR under the NCA and not by ICASA.
20. As regards the overlap with the CPA, ISPA points in particular to the following:
- 20.1. Section 13 of the CPA prohibits a supplier of goods or services to require (as a condition of offering to supply goods or services or to conclude an agreement with a consumer) that the consumer purchases other goods or services from that supplier or a specific third party supplier. This provision of the CPA together with regulations to be promulgated will cover section 5 of the Draft Code.
- 20.2. Section 4(10) of the Draft Code, relating to the renewal of fixed term contracts is also dealt with under the CPA (section 14).

20.3. There is also an overlap in respect of section 7 of the Draft Code and those sections of the CPA dealing with offences and penalties.

21. ISPA does not within this submission propose to undertake an exhaustive investigation of the manner in which the Draft Code seeks to regulate matters already regulated by primary legislation. ISPA believes that the above examples should be sufficient to indicate to the Authority the need for a thorough review of the Draft Code as against the provisions of the NCA and the CPA.

Definition of “electronic communications provider”

22. This term is not employed in the Draft Code of Conduct and ISPA submits that this definition should be deleted.

23. The term is in any event ill-fitting to that which it seeks to describe – the term “subscriber equipment provider” would be more appropriate. ISPA notes that the term “handset provider” was used in the Handset Subsidies Regulations and is unable to discern why the Authority has preferred an ambiguous and inappropriate term in the Draft Code.

Licensees, agents and resellers

24. The term “licensees, their agents and resellers” is used extensively throughout the Draft Code of Conduct.

25. ISPA notes that it is already explicit from the ECNS and ECS licence documents that a licensee who allows an agent (or contractor) to operate under their licence retains responsibility for the compliance of such agent (or contractor) with the licence terms and conditions. The reference to “agents” is accordingly unnecessary.

26. As regards the term “reseller”, ISPA refers to its proposed amendment to the definition of “licensee” as set out above and submits that the use of such amended definition would remove the need to specify with regard to each obligation that resellers are bound thereby.

27. ISPA accordingly supports the replacement of the term “licensees, their agents and resellers” with the term “licensees” wherever the former appears in the Draft Code.

Definitions of “post-paid subscriber” and “pre-paid subscriber”

28. ISPA cannot identify any justifiable differentiation in the treatment of post-paid and pre-paid subscribers as regards subscriber equipment acquisition that would serve as a rationale for drawing this distinction in the Draft Code. The critical element is the bundling of subscriber equipment with the contract, and not whether such contract is pre- or post-paid.
29. ISPA submits that these definitions be deleted and that the term “subscriber” without qualification be used in the finalised Code of Conduct in their stead.

Definition of “Subscriber Equipment”

30. ISPA submits that it is undesirable to assign terms defined in the ECA a different meaning in a regulatory instrument passed in terms of that Act.
31. ISPA submits that this definition should be deleted and that reliance should be placed on the definition of “subscriber equipment” as set out in the ECA.

Purpose of these Regulations (Section 2)

32. ISPA proposes that the Authority employ a more targeted description of the purpose of the Draft Code which makes specific reference to the central focus of the document, *viz.* the bundling/subsidisation of subscriber equipment into agreements for the provision of ECS.
33. The sale, lease and/or rental of subscriber equipment is not *per se* a licensed service and therefore cannot be the subject of a regulatory instrument promulgated under the ECA.
- 33.1. The ECA definition of “electronic communications network” explicitly excludes subscriber equipment. The sale, lease, rental and/or subsidisation of subscriber equipment is accordingly not *per se* a licensed service or an element of ECNS. Nor is there any basis for bringing such dealings with subscriber equipment within the ambit of licensed services authorised by the holding of an ECS licence.
- 33.2. Section 69 of the ECA in no way contemplates the promulgation of a code of conduct which relates to a service which is not a “prescribed service”.

34. It is only where such sale, lease and/or rental forms part of a bundled package and is subsumed within an agreement for the provision of ECS that such activity will fall to be regulated under the ECA.
35. ISPA submits that the reference to “consumers of the services” in section 2(2) should be amended to refer to “subscribers to the services”.
36. ISPA’s members have further expressed the view that it is not the role or mandate of the Authority to interfere with the specifics of the business models employed by licensees, and ISPA notes that there is a fine line to be walked between regulating the bundling of subscriber equipment for the purposes stated in the Draft Code and undue interference in the business arrangements of licensees. ISPA urges the Authority to ensure that the net effect of the finalised Code of Conduct should be to facilitate open competition in the market while allowing market forces to dictate what products and services are to be offered.
37. To reiterate the submission made regarding the scope of application of the Draft Code: the business practices of licensees in entering into subscriber contracts should not be the subject of a regulatory instrument until such time as the impact of current practices and a regulatory intervention on subscribers has been the subject of the necessary research and consultation.
38. ISPA also wishes to point out that the current title of the Draft Code is a misnomer in that the document purports to deal with a far wider range of activities than those relating to the subsidisation of subscriber equipment.

Applications of these regulations (Section 3)

39. ISPA repeats the submissions raised in the preceding paragraph regarding the need for the Code to explicitly state that it applies to the sale, lease or rental of subscriber equipment only where this is bundled with a contract for the provision of electronic communications services.
40. ISPA regards section 3(1) of the Draft Code as being too vague in this regard and proposes the following reformulation thereof:

3 (1) These regulations are applicable to the sale, lease, rental and/or subsidisation of subscriber equipment offered by a licensee, its agent or resellers to the extent that such

sale, lease, rental and/or subsidisation of subscriber equipment is offered and provided in terms of a contract for the provision of electronic communications services entered into or to be entered into between such licensee and a subscriber. ~~they provide services to the public in terms of a contract concluded with a subscriber.~~

41. ISPA appreciates the need for section 3(2) of the Draft Code but notes that there is already a multiplicity of Acts and other regulatory instruments which are applicable to certain of the obligations introduced in the Draft Code of Conduct.

Contractual issues (Section 4)

42. ISPA refers to its comments regarding the application of the provisions of the NCA to this section.

43. ISPA refers to section 4(3) of the Draft Code and submits that this section should be split into two distinct sections as it deals with two very distinct issues.

44. As regards section 4(5) of the Draft Code, ISPA refers to its comments above relating to the CPA, and, while supporting the intention of the section, viz. that subscribers should receive the services which they have paid for, wishes to raise the following specific concerns.

44.1. This issue is already dealt with by the CPA and its inclusion in the Draft Code is accordingly undesirable.

44.2. While ISPA is not aware of any research or consultation undertaken with regard to this provision, it is evident that its introduction will have a significant cost and technical impact on the management of service provision by licensees and will require the overhaul of billing systems currently employed.

44.3. ISPA's members have indicated that the introduction of such a provision will have the result of making the management of core network infrastructure far more complex and impractical.

44.4. It is not clear whether the Authority appreciates the distinction to be drawn between the purchase of data bundles (implying the purchase of a specific quantity of bandwidth) as against the purchase of a capped service (implying the purchase of a variable quantity of data between zero and the upper limit of the cap imposed). Stated differently: it does not appear that the Authority has understood the significant

differences in the structure of ECS packages offered by licensees outside of the mobile cellular electronic communications service market.

45. ISPA submits that section 4(7) of the Draft Code should refer to the term “potential subscribers” throughout and not only in the first paragraph. This flows from the fact that the section applies solely to potential as opposed to existing subscribers.
46. As regards section 4(10) – which ISPA has already identified as an issue covered by the CPA – ISPA notes that the current formulation is once again linked to the provision of mobile cellular electronic communications services and is very difficult to apply within other service provision environments.
47. By way of example: a provider of ECS in the form of managed data services will find adherence to this section impractical as:-
 - 47.1. Complex solutions are provided which could take up to 12 weeks (or more) to migrate to another service provider;
 - 47.2. Subscribers often have multiple services with multiple start and end dates, some or all of which are interdependent; and
 - 47.3. In contradistinction to providers of voice services, start and end dates are not the same dates as the dates contracts are signed, thus making tracking of start and end dates very difficult to manage in an automated manner.

Freedom to purchase subscriber equipment (Section 5)

48. ISPA refers to its comments set out above regarding the overlap of this section with the provisions of the CPA.
49. ISPA is of the view that the current formulation of this section of the Draft Code has been drafted with mobile GSM handsets in mind and that it requires significant revision before it can be cogently applied to other forms of subscriber equipment.
50. With regard to section 5(4) of the Draft Code, ISPA wishes to raise the following concerns:
 - 50.1. It is entirely feasible and reflected in commercial reality that the cost of support to be provided in respect of subscriber equipment may be increased should a subscriber

elect to exercise his or her freedom of choice to purchase subscriber equipment which, although it is technically possible to be used to access the ECS offered, is not standard to or not supported by such licensee.

50.2. This issue may be of lesser importance in the mobile cellular electronic communications service market given that the import and sale of GSM handsets is tightly controlled by the three major operators in this market. But in other markets, licensees – who may have undertaken in-depth research in order to evaluate the optimum subscriber equipment to be used with a particular service and then developed contractual and other arrangements for the support of such subscriber equipment – will be put to additional expense in supporting other subscriber equipment chosen by a subscriber without, according to section 5(4), being able to recover such additional cost.

50.3. Subscriber equipment which is not supported by a licensee may also lead to challenges to network performance and integrity on the one hand, while leaving subscribers in a position where the licensee may not be able to provide the full service and/or subscriber equipment support to such licensee.

50.4. ISPA supports the principle of empowering subscriber choice but submits that such choices can and do have pricing implications in reality.

Offences and Penalties (Section 7)

51. ISPA notes that section 2.7 of the Explanatory Note states that “penalties imposed will be relative to the offence committed”. ISPA is unable to discern the rational basis on which the penalties as presented in the Draft Code of Conduct have been set and calls on the Authority to provide clarity in this regard.

Date of Commencement (Section 8)

52. ISPA submits that, given the nature of the obligations which the Draft Code seeks to introduce, it would be preferable to allow affected parties a greater lead time than one month within which to study the final regulations and implement such requirements as may be set out therein.

53. In its current form the Draft Code contemplates a number of obligations which will require the revision of contractual documentation and marketing materials and campaigns. ISPA regards

it as unlikely that such revisions could be affected within one month and calls on the Authority to grant a longer period of at least three months post publication to allow licensees to properly prepare for the commencement of the finalised Code of Conduct.

Conclusion

54. ISPA trusts that the above submissions will be of assistance and will gladly provide any further assistance which may be asked of it.
