



Submission to ICASA:

“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”

Government Gazette No. 32803, General Notice 1622 of 2009, 11 December 2009

Submission Date: 27 January 2010

INTRODUCTION

1. On 11 December 2009, the Independent Communications Authority of South Africa (“the Authority”) published General Notice No. 1622 of 2009 (the “Notice”) regarding a proposed “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” (The “Act” or the “ECA”) in Government Gazette No. 32803 (the “Draft Code”).
2. Neotel thanks the Authority for the opportunity to comment on the Notice and the Draft Code.
3. Neotel has taken cognisance of Paragraph 3 of the Notice and would appreciate an opportunity to make oral representations at the hearings to be scheduled.
4. Neotel’s submission will first address a number of general principles followed by specific comments to the Draft Code contained in the Notice and an overview of the impact on Neotel.

GENERAL COMMENTS

5. Neotel welcomes the publication of the explanatory note (Annexure A) as part of the Notice. This is a useful tool for evaluating the Draft Code and is a practice that Neotel supports generally in the promulgation of Regulations and related documents such as a code of conduct.
6. Neotel’s general comments raise a number of conceptual issues with respect to the approach and underlying assumptions of the proposed Draft Code.

Application of the Draft Code to Electronic Communications Network Service Licensees

7. Neotel supports clarity in the electronic communications service industry and assisting subscribers in understanding their rights and promoting effective subscriber choice. One of the ways for new entrants to achieve market penetration is to promote more competitive and cost effective services to subscribers. As such, a code of conduct is in Neotel's own interest as well as in the interest of its current and potential subscribers and Neotel supports the concept of the Draft Code.
8. However, Neotel would like to caution the Authority that placing excessive limitations on innovation in the structure of offerings by new entrants is not in the interests of competition or the subscriber, and may result in the clearly unintended consequence of higher prices to consumers.
9. Neotel has a concern relating to the inclusion of holders of electronic communications network service ("ECNS") licenses (or exemptions relating to ECNS) in the ambit of the Draft Code. The Draft Code relates specifically to services rendered to "subscribers"; however ECNS licences do not include the licence to provide services of any nature and specifically ECNS OR electronic communications services ("ECS"), to subscribers. Only ECS licences (and exemptions relating to ECS) include the licence to provide services to the public and specifically electronic communications services.

10. Accordingly, Neotel submits that only ECS licensees (and holders of exemptions relating to ECS) should be subject to the Draft Code. ECNS licensees (and holders of exemptions relating to ECN services) should NOT be subject to the Draft Code.

Legislative Authority for the Draft Code

11. Neotel has a further concern regards the provisions of Chapter 12 of the ECA, pursuant to which the Draft Code has been developed. As pointed out in the Explanatory Note (Annexure A to the Notice), the Draft Code will be promulgated terms of Chapter 12 of the ECA and specific reference is made to Section 69(2) as the enabling provision.
12. We set out below the provisions of Section 69(1) - (5) for ease of reference:

69. Code of conduct, end-user and subscriber service charter

(1) The Authority must, as soon as reasonably possible after the coming into force of this Act, prescribe regulations setting out a code of conduct for licensees subject to this Act and persons exempted from holding a licence in terms of section 6 to the extent such persons provide a service to the public.

(2) The Authority may develop different codes of conduct applicable to different types of services. All electronic communications network services licence and electronic communications service licensees must comply with the Code of Conduct for such services as prescribed.

(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 and 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.

13. The reference in Section 69(2) to different codes of conduct relating to different types of services applies to both ECNS as well as ECS. The Authority has created different codes of conduct relation to ECS and ECNS. However, Section 69(1) does not contemplate multiple codes of conduct to which a licensee will be subject and refers to the singular, namely “a code of conduct for licensees ...”
14. In addition, the last phrase of Section 69(2) seems to indicate that a licensee must comply with “**the** Code of Conduct” (our emphasis) for such services prescribed. The reason why this term is capitalised the second time it appears in 69(2) while in lower case in Section 69(1) and the first time it appears in 69(2) is not understood and appears to be a typographical inconsistency in Section 69(2) and to have no interpretative effect.
15. The ECA only defines two services, namely ECNS and ECS.. In our view, this means that if a licensee holds a single licence, it can be subject to only one code of conduct and if it holds licences for both ECNS and ECS, it will be subject to a single code of conduct in respect of each such licensed service, a maximum of two codes of conduct.
16. The ECA does not contemplate a licensee being subject to an additional code of conduct or a code of conduct which does not relate to services which are not “prescribed”.
17. Given the basic principles of statutory interpretation, the word “prescribed” means prescribed in the relevant statutory instrument and as indicated above, the ECA only prescribes two services, namely ECNS and ECS..
18. Accordingly, Neotel submits that the Draft Code is *ultra vires* the ECA as it imposes on licensees an additional code of conduct not mandated by the ECA and it relates to services which are not “prescribed” by the ECA.
19. By raising this concern, Neotel is in no way suggesting that the Authority should not regulate the harm the Draft Code seeks to address. Neotel’s concern is that by promulgating the Draft Code in terms of Section 69(2) of the ECA, the Draft Code and any action brought in terms of such Draft Code, may be subject to successful review.

20. Given the important objective sought to be addressed by the Draft Code, Neotel accordingly suggests that the Draft Code must be reformulated by the Authority so it and any action brought in terms thereof may be completely defensible against any review proceedings.

Finally, Neotel also has concerns that there may ultimately be an overlap with other consumer focussed legislation, such as the Consumer Protection Act. When operational, Neotel suggests that all sectoral Codes and Charters in general are aligned with national legislation on consumer protection.

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21. **Neotel recommends that the Draft Code be reformulated as a minimum requirement of the end-user and subscriber service charter/s contemplated in Section 69(3) of the ECA. This is due to the fact that the provisions of the Draft Code fit well with the provisions of sub-Sections 69(5)(a), (d) and (f).**
22. **In this regard, Neotel recommends that this is done by way of an amendment to the existing regulations setting out the minimum standards for end-user and subscriber charter for electronic communication service licensees.**
23. **This recommendation is made, notwithstanding the provisions of Section 69(4) of the ECA, which in Neotel's view are inconsistent with the ECA as they contemplate multiple services, when (as indicated above) the ECA only provides for two services and only one of these services can lawfully be provided to the public, namely an ECS.**
24. **Neotel submits that this will have the added benefit of bringing broadcasting services licensees within the purview of the proposed regulation, which is not clear in terms of the Draft Code. Neotel submits that this will be beneficial to subscribers, particularly in the "pay television" sector as well as promoting the equitable treatment of licensees.**
25. **The other option may be a general regulation in terms of Section 4(1) of the ECA, however the matters contemplated in the Draft Code do not fit well with sub-Section 4(1)(a) of the ECA and does not fit at all with sub-Sections 4(1)(b) – (d).**
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Application to the Mobile Cellular Industry or to all Electronic Communications Services?

26. The explanatory memorandum clearly indicates that the Draft Code originated in response to practices in the mobile cellular industry in regard to handset subsidies, which practices were investigated by the Authority and became the subject of a discussion document and hearings and then the subject of draft regulations which were withdrawn by the Authority after the threat of a legal challenge.

27. Neotel has concerns that the Authority, having investigated one sector of the market and having found certain practices in THAT sector of the market as being potentially harmful to subscribers, has now taken the radical step of regulating the entire industry without having considered if such practices occur outside of the mobile cellular industry, and without necessarily concluding whether or not such practices are in fact harmful to subscribers.

28. Moreover, the range of electronic communications services that may be provided by ECS licensees is very broad, and, for some such services, the Draft Code has no logical interpretation. The Authority has however, even gone so far as to include in the Draft Code a set of licensees who do not even provide services to subscribers, namely electronic communications network service licensees. In essence, all licensees are thus being treated alike, whether or not their business practices have been investigated or shown to be harmful to subscribers or even potentially harmful to subscribers.
29. While Neotel fully supports the principle of technology neutral regulation and the need for equal treatment of licensees, Neotel also supports the principle that regulation should be targeted narrowly to address an identified problem.. Neotel also submits that in line with administrative justice requirements, an entity being accused of certain practices should have an opportunity to respond and be provided with a hearing on the matter in question. Through the previous process described in the discussion document, the Authority conducted research, made findings, gave the mobile cellular operators the opportunity to deal with such research and findings and then promulgated regulations, which were subsequently withdrawn. The Draft Code however subsumes all licensees, irrespective of whether their conduct has been interrogated in the previous process or not.
30. Neotel submits that far from the equal treatment of licensees, the approach taken in the Draft Code, reflects considerable inequity in the treatment of licensees and may in fact amount to arbitrary and capricious administrative action. As dealt with in more detail below, the exemption of two categories of service by the exemption of the equipment used to provide such services (namely equipment relating to two way radio services and equipment relating to electronic payment services), seems equally arbitrary and capricious.

31. Neotel recommends that the Authority “ring fence” the Draft Code and make it applicable to only those parts of the electronic communications industry whose business practices have been the subject of previous enquiry, until such time as the Authority has had the opportunity to fully investigate the practices in the balance of the electronic communications industry and for the balance of the industry to participate in such investigations and respond to any findings made.

32. At a minimum, Neotel submits that the Authority should remove the terminology, examples and business practices of the mobile cellular industry unless the Draft Code only relates to such sector of the industry. Moreover, that the Authority should attempt to qualify what practices in particular are in fact included to save the regulation from operating far too broadly to be meaningful.

Reference to Sections as Regulations

33. Neotel is concerned by the inconsistency of the reference to the main Sections of the Draft Code as “Regulations”. From the previous Code of Conduct regulations promulgated by the Authority, the Code is separated from the regulations which create it and sections of the Code are not referred to as “Regulations”. This is in Neotel’s view more consistent with the provisions of Section 69(1) of the ECA.

The phrase “a licensee, its agent or a reseller”

34. This phrase seems to originate from the business practices in the mobile cellular industry, however does not resemble the terminology of the ECA.

35. The intent to impose a regulatory instrument on an entity that is not subject to regulatory intervention is *ultra vires* the enabling statute. As such, given that the Authority does not regulate agents, reference thereto should be excluded from the regulations.

36. Neotel assumes that the harm the Authority seeks to prevent by reference to agents is that of licensees arguing that they are not liable for breaches of the Draft Code by virtue of the breach having been perpetrated by an agent. This point is moot, as the well developed law of agency makes it clear that a principle is liable for the actions of its agents and can only exclude such liability in certain limited and specific situations.

37. Neotel recommends that the harm the Authority seeks to prevent can be better addressed by confirming the liability of a licensee for the actions of its agents, rather than reference to a class of persons or entities not contemplated in the ECA, namely agents.

SPECIFIC COMMENTS

38. Neotel notes that the definition of “contract” in the Draft Code indicates that the term only applies to agreements for the “sale, lease, rental or subsidisation of subscriber equipment”. However the common practice in the electronic communications industry and particularly for subscribers who are natural persons, is to combine the service and equipment acquisition in a single agreement.

39. The unwieldy nature of the fiction of a definition that does not recognise agreements for services is demonstrated just a few lines further in the definition of “post-paid subscriber” which definition refers to a “contract for the subscriber equipment, services, any element thereof and/or usage of the network over a specified period.” This is a logical inconsistency however brought about as a result of the overly restrictive definition of the term “contract” rather than [only] the inaccuracy of the definition of “post-paid subscriber”.

40. In addition, it is unclear if certain provisions of the Draft Code are intended to apply to subscriber equipment only or also to services? For example, Sections (or Regulations)

4(10) and 6(2) seems equally applicable to the provision of services, rather than exclusively to subscriber equipment.

41. As such, Neotel suggests that the Authority consider separating the issues of equipment subsidisation and service pricing as it appears that the only reason that the two are treated in the same Code is because of the origins of the Code in the mobile cellular domain.

42. Neotel proposes that the current definition of the term “contract” be amended to read: ““contract” means an agreement entered into between a licensee or exemptee of the one part and a subscriber of the other part, whether in writing, orally or by conduct’.

43. Neotel notes the definition of “electronic communications provider” in the Draft Code. Neotel has not been able to locate the use of the defined term throughout the Draft Code. Moreover, it is a confusing use of the term “electronic communications” (which is defined in the ECA) together with the term “provider”, but in a context which bears little relation to the ECA definition.

44. Neotel proposes that the definition of “electronic communications provider” be deleted.

45. If the Authority is of the view that the terms is need in the Draft Code, then Neotel proposes it be replaced with the term “provider” which should be defined as “a licensee and/or an exemptee”.

46. Neotel proposes the substitution of a definition of “exemptee” to replace the definition of “reseller” and the replacement of the each use of the term “reseller in the Draft Code with the term “exemptee”.

47. Neotel proposes the following definition: ““exemptee” means any person exempted from holing a license in terms of Section 6 of the Act, to the extent that such person provides a service to the public or sections of the public’.

48. Neotel refers to its comments above regarding the erroneous inclusion of electronic communications network service licensees in the Draft Code.

49. Neotel proposes that the current definition of “licensee” be amended to read: ““licensee” means any person who has been issued with a licence to provide electronic communications services and/or broadcasting services in terms of Chapter 3 of the Act’.

50. The defined term “offering” bears no relation to the practices in the electronic communications industry as a whole. Certainly in the consumer market (natural persons as well as small micro and medium enterprises), the common practice is for a licensee or exemptee to solicit offers from the potential subscriber. The offer may also be from an existing subscriber for an extension of an existing agreement or for additional products or services. The offer may be solicited in person or by other channels (call centre, Internet web site and the like) by the licensee or exemptee or through agents such as retailers, franchisees, service providers / channel partners and the like.
51. Furthermore, the term is then incorrectly used, for example in the definitions of “post-paid offerings or packages”, “pre-paid offerings or packages” and at Section (Regulation) 4 (2).
52. Confusion is also created by referring almost interchangeably to “deals”, “contracts”, “offerings” and “offerings or packages”. As this sits at the core of the Code, Neotel submits that reference to these various terms should be accompanied by precise and clear definitions.

53. Neotel proposes that the Draft Code refer to two main concepts, the first being the “contracts” as defined above; and the second being the subject of the contract. This is known in contract law as the *merx* and as long as the subject of the contract includes subscriber equipment on its own or in conjunction with services provided by a licensee, then it should be subject to the Draft Code.

54. Neotel proposes the term “package” for the subject of the “contract” and Neotel proposes the following definition for such term: “package” means the subject of an actual or potential contract which includes the transfer of ownership, or risk or the right to use subscriber equipment to a subscriber on a temporary or permanent basis, whether on its own or combined in any formulation with electronic communications services provided by a licensee or an exemptee and whether or not a contract is entered into, including all descriptions and advertising of the subject of a potential contract as well as reference offers for a potential contract’.

55. Neotel seeks further clarity as to why the terms “post-paid subscriber” and “pre-paid subscriber” have been defined so differently? Neotel is further unsure of the need for the definitions of “post-paid offerings or packages’ and “pre-paid offerings or packages”.

56. Neotel also questions the need for the differential treatment of so called pre-paid and post-paid subscribers. If a pre-paid contract provides for the acquisition of some form of subscriber equipment, then it should be treated identically to a post-paid contract. If a pre-paid arrangement is only for services, then it will not fall within the definition of a “contract” or a package in terms of the Draft Code.

57. Neotel proposes that all four of the aforementioned definitions be deleted and where the terms “post-paid subscriber” and “pre-paid subscriber” appear, they should be replaced with the term “subscriber” and where the terms “post-paid offerings or packages’ and “pre-paid offerings or packages” appear they should be replaced with the term “package”.

58. To the extent that the Authority persists in its view that pre-paid and post-paid subscribers should be treated differently, then where appropriate the relevant concept can be inserted referring to defined terms, namely “pre-paid” means payment in advance’ and “post-paid” means payment in arrears’.

59. Neotel notes that the defined term “Subscriber Equipment” is capitalised, while the usage of the term in the Draft Code is not capitalised. Possibly this is to differentiate the term defined in the ECA “subscriber equipment” from this new category of equipment contemplated in the Draft Code. Neotel submits that there is no need to include such definition as it is confusing, contradicts the ECA and is arguably an unnecessary inclusion.

60. Since the scope of the Code has been broadened from the original intent to cover services other than mobile, the question of what constitutes subscriber equipment, and what does not, becomes critical. Many electronic communications services (and, importantly, electronic communications network services) make use of equipment on the customer’s premises, or in the customer’s possession. In a few cases (e.g. mobile, or a fixed line telephone) it is easy to determine the boundary between network and subscriber equipment. In most cases, this boundary is not clear technically, and is chosen arbitrarily for the convenience of the licensee and the subscriber. Similarly, costs are often recovered for equipment that is actually inside the arbitrary network boundary, simply because it is solely associated with that subscriber, but the equipment (e.g. terminal equipment) remains entirely the property of the licensee.

61. Neotel proposes the deletion of the definition of “Subscriber Equipment.”

62. With regard the definition of “subsidisation” (also spelled “subsidization” in the Draft Code), it is usual practice in statutory drafting to provide a definition of the thing itself, (a noun), and not of the action of applying the thing (a noun derived from the verb for the action). Where necessary, the definition can then indicate the mode in which the any other form is to be construed.

63. Neotel proposes that the definition of the term “subsidisation” be deleted and replaced with the following: “subsidy” means any incentive, allowance, discount or rebate (including so-called “free” goods or services) offered by a licensee or exemptee to a subscriber or potential subscriber in relation to the transfer of ownership, possession or use of the subscriber equipment’.

Ad Section 2

64. Neotel is confused by Section 2(1) as it seeks to regulate both a code of conduct as well as minimum standards for end-user and subscriber service charters. Neotel cautions against a “shotgun” approach and for the reasons set out above, recommends that the Draft Code be reformulated as an amendment to the existing end-user and subscriber service charters applicable to ECS licensees and broadcasting services licensees.
65. Neotel further notes the reference in Section 2(1) to “consumers”, a term not defined in the ECA or the Draft Code. Neotel questions the relevance of this and recommends instead that the Authority restrict itself to the guidance of Section 69(5)(a), (d) and (f) of the ECA.
66. Neotel notes the promulgation in 2009 of the Consumer Protection Act. In various Sections of the Draft Code however, the Authority has attempted to regulate issues already regulated in terms of that Act. . As we noted earlier, Neotel suggests that all sectoral codes/charters that cover consumer protection issues in any format should be examined for overlap and streamlining with national legislation on consumer protection.

Ad Section 3

67. While the aims of Section 3(2) are laudable and no licensee or exemptee should be able to avoid compliance with other legislation due to the provisions of the Draft Code, this is only true where the Draft Code does not duplicate other laws or obligations or is itself not duplicated by other laws or obligations. While the Authority is rightfully concerned that licensees and exemptees should not avoid their responsibilities and obligations in the event of overlapping legislation, Neotel is similarly concerned that it should not be subject to a punitive regulatory and administrative burden as well as jurisdictional multiplicity.
68. In this regard Neotel specifically refers to the provisions of Section 4(5), an issue exhaustively covered in the Consumer Protection Act, as well as the Section on Offences and Penalties (Section 7) which is also an overlap with the Consumer Protection Act.
69. Neotel’s comments regarding Section 4(5) are set out below and may be more difficult to reconcile. However Section 7 can easily be dealt with by the Authority applying to the Minister of Trade and Industry for exemption for licensees and exemptees from certain sections of the Consumer Protection Act on the basis that they are already bound by a code of conduct and end-user and subscriber charter under the ECA.
70. Finally, Neotel has a concern regarding Section 3 and action taken or not taken in respect of persons providing ECS and broadcasting services without the requisite licence or exemption under the ECA. These persons are contravening the ECA and are then able to flout the Draft Code as they will not be bound by it. Our suggestion to remedy this situation is proposed below.

71. Neotel proposes the insertion of a new Section 3(3) to read: “The minimum standards applicable to the end-user and subscriber service charters of licensees and exemptees shall apply equally to any person who purports to enter contracts with subscribers or provide packages without the requisite licence or exemption. If any such person does not comply with these regulations, they shall be subject to the provisions of Section 7 of these regulations, in addition to any action in terms of the Act or the ICASA Act.

Ad Section 4

72. Section 4(1)(c) appears of limited value to subscribers and potential subscribers and Neotel instead recommends that the sub-section be split in two, the first (Section 4(1)(c)) referring to “the monetary value of the subsidy offered by the licensee or exemptee” and the second (Section 4(1)(d)) referring to the “monetary value of the services offered by the licensee or exemptee”. The following sub-section (4(1)(d)) will then be renumbered consecutively.

73. Section 4(3) combines two unrelated issues, namely contract term and billing. Neotel recommends that these be removed from the Draft Code. Neither of these issues have relation to subscriber equipment, though subsidies may have some impact on contract term. Neotel has previously raised the question whether the Draft Code only intends dealing with subscriber equipment or other issues as well. In addition, Neotel notes the provisions of the Consumer Protection Act with regard contract term and billing and suggests that these provisions would be a needless duplication. In this regard, we again advocate removal of these provisions.

74. Neotel does not understand the reference to a specific technology (SMS) in regulations applicable to an entire industry, in which regard, we refer you to our comments above. Neotel repeats its request to delay the implementation of the Draft Code on those sections of the industry whose business practices have not been studied and restrict the application thereof to the mobile cellular industry. If such request is denied, then at a minimum, Neotel suggests that reference to all mobile-centric technology be deleted.

75. Neotel notes the extremely controversial provisions of Section 4(5). Neotel notes further that this issue is already dealt with in the Consumer Protection Act and encourages ICASA not to create regulatory complexity and jurisdictional uncertainty by seeking to regulate an issue which has already been legislated by Parliament. Neotel is of the view that the impact of the Section has not been carefully enough considered and requests that the Authority engage industry and subscribers further in respect thereof. In particular, Neotel notes:

- a. This Section does not deal with subscriber equipment at all;
- b. If subscriber's are able to "roll-over" their bundled service entitlements (voice, data or other) this could result in a subscriber or a group of subscribers placing an unwarranted strain on a licensee's network and causing that licensee to breach its other code of conduct and charter obligations with regard to network performance. A licensee has to plan its network based on estimates of usage, which will be impossible without some limitation on roll-over. For example, traffic volumes on a network node (base station, exchange, switch and the like) may appear stable and within the capacity of that node, however a subscriber who has entered into a two year contract with 100 bundled minutes per month, could not use a single minute until month 24 and then try to use all these minutes in a single month. This could result in a node being overloaded, other subscribers being negatively affected as well as a huge variation in network usage, which makes planning almost impossible. In the case of a wireless network, this mechanism is typically used as a means of controlling the load on the access network, which is a finite resource based on available spectrum. Similar controls may be necessary in other parts of networks, such as international, where costs are high, and are shared across all users;
- c. As drafted, this Section is apparently referring only to services sold explicitly as bundles (e.g. of minutes or download). However, many services are not sold as bundles at all, but merely have a usage cap, defined purely as an upper limit to the amount of usage within any given month. Any confusion between these two concepts will make this Section unworkable in practice;
- d. Monthly caps create a great deal of certainty for both the subscriber and the licensee – a fixed amount can be budgeted by both, as a cost for the one, and revenue for the other. In determining the price of a monthly capped service, a licensee typically calculates its costs based on the average monthly usage of all the users of that service. By interpreting the monthly cap as a permanent bundle, the associated costs would immediately rise to the cost of the entire cap, particularly where such costs are direct, rather than shared overheads. The net effect would clearly be a proportional price increase for all subscribers;
- e. Requiring a licensee to add up all the "unused" data in monthly caps, and roll this over forever (or pay it out in cash at the end of the contract), creates a liability for the company that could grow rapidly and exponentially until the licensee is technically bankrupt. No company with sound corporate governance would be able to enter into any contract that would create such an unpredictable liability;
- f. Licensees and exemptees may require a banking licence as they will be holding deposits for third parties on a potentially massive scale;
- g. The provision may facilitate money laundering by allowing subscribers to make payments to a licensee or exemptee (for example by buying pre-paid vouchers in cash, or by making transfers of a low enough amount so as not to be reportable under the Financial Intelligence Centre Act or the Prevention of

Organised Crime Act) from undeclared or unlawfully obtained funds and then “legitimising” such funds by receiving a credit from a licensee or exemptee;

- h. The provision may require massive billing systems upgrades;
- i. The consequences of the provision are so severe as to encourage circumvention, which may in the end result in no subscriber benefit;
- j. The provision may impact the payment of licence fees, as all licensees will need to retain amounts in respect of as yet unused but paid for services as a contingency for the period of a contract and only then can a licensee determine its licence fee liability. However, this will be occurring on an ongoing basis, making revenue determination and recognition extremely complex; and
- k. While the intent of this Section is laudable, namely only charging subscribers for services they use, the formulation of the Section without full consideration of possible unintended consequences is in Neotel’s view extremely fraught.
- l. **Neotel recommends that the Authority engage further on this issue before taking such a radical step.**

76. Section 4(7) seems to relate solely to potential subscribers and as such the term “potential subscriber” should be used throughout, in the place of the term “subscriber”.

77. With regard Section 4(9), Neotel refers the Authority to the provisions of the Electronic Communications and Transactions Act and suggests that the entire 4(9) is superfluous and may be deleted.

78. Section 4(10) does not relate to subscriber equipment. In addition, Neotel questions whether licensees and exemptees are simply to terminate fixed period contracts on expiry? In addition, month by month contracts and other non-fixed terms contracts may be prohibited as an unintended consequence of this Section. In fact, all pre-paid services could not roll over beyond the contracted validity date and if a service is not immediately “recharged” it would seem to have to terminate, without any grace period at all.

Ad Section 5

79. Neotel is concerned that technical possibility may have an impact on service levels, be they contracted services levels or mandated by regulation.

80. For example, ABC Networks may elect to use a particular brand of subscriber equipment because of its reputation for reliability and the experience its staff has in configuring, repairing, replacing and generally working with that brand of equipment. ABC Networks then builds up a large stock holding of such equipment as well as spare parts for that equipment to deal with possible equipment failures. Can ABC Networks argue it is not technically possible for them to use any other equipment? What if ABC Networks has negotiated a warranty extension on the equipment or a “swap out” arrangement with the equipment supplier in the case of failure to improve reliability? Is it then technically not possible to use other equipment?

In fact, unless the subscriber brings equipment which is exactly to ABC Network's specification with regard make, model, software and firmware version, patches, security, virus and malware protection, not only can ABC Networks not guarantee services to that client but that client could cause network issues for ABC Networks. What if the subscriber's subscriber equipment is not type approved by the Authority?

81. This is also applicable in Section 5(4) where a provider may be willing to offer a service to a subscriber which has its own equipment, but without any service levels, or at a higher cost.
82. Neotel suggests that this Section was drafted from the perspective of GSM handsets, and assumes on a number of GSM technology-specific concepts, such as cross-network compatibility of equipment (and, without explicitly mentioning them, SIM cards that enable this approach), and network locking. In most other technologies, and on (former) PSTNs, network compatibility is often explicitly specified by the operator of the network, a concept that has historically been supported by various regulations and national standards. The Section may hence actually contravene some regulations. Neotel suggests that this Section requires significant revision to be applicable to all licensees and exemptees.

Ad Section 6

83. The drafting of Section 6 would seem to mandate a discounting structure not just between licensees/exemptees and subscribers (which Neotel supports) but also between licensees/exemptees and their agents, franchisees, channel partners, resellers and others in the value chain. Neotel submits that this second issue is an unwarranted intrusion into licensees'/exemptees' commercial operations and is unnecessary in the Draft Code.
84. Neotel accordingly suggests the deletion of the second sentence in Section 6(1).

Ad Section 7

85. Neotel is uncertain as to how the Authority derived the fines contemplated in Section 7(2) and on what basis the contravention of certain Sections of the Draft Code were determined to be more or less severe than others. Further clarity from the Authority is sought in this regard.

IMPACT ON NEOTEL

86. As a new entrant, Neotel has completed an analysis of the Draft Code and is very positive that with the changes proposed above and further engagement and consultation, significant additional competitive benefit will be available to customers and subscribers, as well as new entrants in the market.

CONCLUSION

87. Neotel supports the Authority's efforts to ensure that subscriber equipment is provided on a fair and equitable basis under the ECA, as well as to protect subscribers from harmful business practices.

88. At a conceptual level, strongly regulated subscriber equipment provision may be useful for the viability and sustainability of a new entrant, but only to level the playing field and ensure a greater churn in the market and lower the costs of customer acquisition. However, regulation should in no way hinder the commercial underpinnings of subscriber contracts. In addition, business practices should not be regulated unless and until their impact on subscribers, and on the level of competition in the market, has been studied.

89. Neotel remains at the Authority's disposal to assist with this process and thanks the Authority for its efforts to implement the ECA.



SUMMARY OF RECOMMENDATIONS

1. Neotel submits that only ECS licensees (and holders of exemptions relating to ECS) should be subject to the Draft Code. ECNS licensees (and holders of exemptions relating to ECN services) should NOT be subject to the Draft Code.
2. Neotel recommends that the Draft Code be reformulated as a minimum requirement of the end-user and subscriber service charter/s contemplated in Section 69(3) of the ECA. This is due to the fact that the provisions of the Draft Code fit well with the provisions of sub-Sections 69(5)(a), (d) and (f).
3. In this regard, Neotel recommends that this is done by way of an amendment to the existing regulations setting out the minimum standards for end-user and subscriber charter for electronic communication service licensees.
4. This recommendation is made, notwithstanding the provisions of Section 69(4) of the ECA, which in Neotel's view are inconsistent with the ECA as they contemplate multiple services, when (as indicated above) the ECA only provides for two services and only one of these services can lawfully be provided to the public, namely an ECS.
5. Neotel submits that this will have the added benefit of bringing broadcasting services licensees within the purview of the proposed regulation, which is not clear in terms of the Draft Code. Neotel submits that this will be beneficial to subscribers, particularly in the "pay television" sector as well as promoting the equitable treatment of licensees.
6. The other option may be a general regulation in terms of Section 4(1) of the ECA, however the matters contemplated in the Draft Code do not fit well with sub-Section 4(1)(a) of the ECA and does not fit at all with sub-Sections 4(1)(b) – (d).
7. Neotel recommends that the Authority "ring fence" the Draft Code and make it applicable to only those parts of the electronic communications industry whose business practices have been the subject of previous enquiry, until such time as the Authority has had the opportunity to fully investigate the practices in the balance of the electronic communications industry and for the balance of the industry to participate in such investigations and respond to any findings made.
8. At a minimum, Neotel submits that the Authority should remove the terminology, examples and business practices of the mobile cellular industry unless the Draft Code only relates to such sector of the industry. Moreover, that the Authority should attempt to qualify what practices in particular are in fact included to save the regulation from operating far too broadly to be meaningful.

9. Neotel recommends that the harm the Authority seeks to prevent can be better addressed by confirming the liability of a licensee for the actions of its agents, rather than reference to a class of persons or entities not contemplated in the ECA, namely agents.
10. Neotel proposes that the current definition of the term “contract” be amended to read: “‘contract’ means an agreement entered into between a licensee or exemptee of the one part and a subscriber of the other part, whether in writing, orally or by conduct’.
11. Neotel proposes that the definition of “electronic communications provider” be deleted.
12. If the Authority is of the view that the terms is need in the Draft Code, then Neotel proposes it be replaced with the term “provider” which should be defined as “a licensee and/or an exemptee”.
13. Neotel proposes the following definition: “‘exemptee’ means any person exempted from holding a license in terms of Section 6 of the Act, to the extent that such person provides a service to the public or sections of the public’.
14. Neotel proposes that the current definition of “licensee” be amended to read: “‘licensee’ means any person who has been issued with a licence to provide electronic communications services and/or broadcasting services in terms of Chapter 3 of the Act’.
15. Neotel proposes that the Draft Code refer to two main concepts, the first being the “contracts” as defined above; and the second being the subject of the contract. This is known in contract law as the *merx* and as long as the subject of the contract includes subscriber equipment on its own or in conjunction with services provided by a licensee, then it should be subject to the Draft Code.
16. Neotel proposes the term “package” for the subject of the “contract” and Neotel proposes the following definition for such term: “‘package’ means the subject of an actual or potential contract which includes the transfer of ownership, or risk or the right to use subscriber equipment to a subscriber on a temporary or permanent basis, whether on its own or combined in any formulation with electronic communications services provided by a licensee or an exemptee and whether or not a contract is entered into, including all descriptions and advertising of the subject of a potential contract as well as reference offers for a potential contract’.
17. Neotel proposes that all four of the aforementioned definitions be deleted and where the terms “post-paid subscriber” and “pre-paid subscriber” appear, they should be replaced with the term “subscriber” and where the terms “post-paid offerings or packages” and “pre-paid offerings or packages” appear they should be replaced with the term “package”.

18. **To the extent that the Authority persists in its view that pre-paid and post-paid subscribers should be treated differently, then where appropriate the relevant concept can be inserted referring to defined terms, namely “pre-paid” means payment in advance’ and “post-paid” means payment in arrears’.**
19. **Neotel proposes the deletion of the definition of “Subscriber Equipment.”**
20. **Neotel proposes that the definition of the term “subsidisation” be deleted and replaced with the following: “subsidy” means any incentive, allowance, discount or rebate (including so-called “free” goods or services) offered by a licensee or exemptee to a subscriber or potential subscriber in relation to the transfer of ownership, possession or use of the subscriber equipment’.**
21. **Neotel proposes the insertion of a new Section 3(3) to read: “The minimum standards applicable to the end-user and subscriber service charters of licensees and exemptees shall apply equally to any person who purports to enter contracts with subscribers or provide packages without the requisite licence or exemption. If any such person does not comply with these regulations, they shall be subject to the provisions of Section 7 of these regulations, in addition to any action in terms of the Act or the ICASA Act.**
