



## **ISPA Submission**

in response to

### **ICASA'S DRAFT "CALL TERMINATION REGULATIONS" PURSUANT TO SECTION 67(4) OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005**

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## Contents

Introductory remarks .....	2
Broad statement of support .....	2
Procedural issues.....	3
The fair and reasonable pricing obligation .....	4
Fair and reasonable pricing and non-discrimination.....	7
Towards a convergence of mobile and fixed termination rates .....	9
Relationship between the Regulations and the Draft Number Plan Regulations .....	10
Erratum .....	13
Conclusion .....	13

## Introductory remarks

1. ISPA welcomes the publication of the draft Call Termination Regulations (“the Regulations”) and recognises the long and arduous path which the Authority has walked in reaching this point. ISPA appreciates the publication of the accompanying Explanatory Note for the draft Call Termination Regulations (“the Explanatory Note”), it being evident therefrom that the Authority has duly and properly considered submissions received to date.
2. ISPA is aware that the majority of its members that provide wholesale call termination services are making individual submissions in respect of the Regulations. ISPA is further aware that there is a divergence of views in certain respects amongst its members and does not wish to stand in contradiction of any one set of views while promoting another. This submission is accordingly of a general nature and may, in certain instances, express competing views without pronouncing on the validity thereof.
3. ISPA confirms its acceptance of the Authority’s invitation to make an oral presentation at the public hearings to be convened regarding the Regulations.

## Broad statement of support

4. Notwithstanding the submissions and arguments raised below, ISPA wishes to express – at the outset – its strong support for the intention behind the Regulations and the manner in which this intention has found expression in the Regulations.
5. It has been evident for close to ten years that high interconnection rates – particularly those established by the Mobile Network Operators (“MNOs”) in the early part of the last decade – have constituted a significant obstacle to the development of a more competitive electronic communications industry in South Africa. This anti-competitive effect has been placed in

more acute focus by the outcome of the licence conversion process concluded in January 2009.

6. ISPA unreservedly supports the actions proposed by the Authority to address high mobile interconnection rates in particular. ISPA is however not party to the results of the Authority's investigations into cost-oriented mobile termination rates or to the analysis undertaken of the responses to the call termination questionnaire issued out by the Authority during 2009. ISPA is accordingly unable to comment on the specific rates proposed by the Authority at this time.

### **Procedural issues**

7. ISPA has noted the content of the Guideline for Market Reviews published by the Authority on 8 March 2010 and confirms that it regards the processes outlined therein as both legally correct and practicable. ISPA supports the manner in which the Authority has interpreted the requirements of section 67(4) of the Electronic Communications Act ("the ECA") and the procedure which it has followed in arriving at a set of draft Call Termination Regulations.
8. ISPA, noting the provisions of said section 67(4), in particular supports the Authority's decision to proceed on a market-by-market basis as opposed to the drafting of a set of framework regulations of the form previously released by the Authority (but never finalised) during December 2007. It is ISPA's considered view that the latter approach is not practically viable.
9. Nevertheless ISPA is well aware that incumbent operators will in all likelihood seek to delay the corrective measures which the Authority wishes to apply to the call termination market on a legalistic basis, and that the manner in which section 67(4) of the ECA has been drafted facilitates the raising of arguments that the procedures followed by ICASA in the drafting of the regulations are flawed.
10. As unfortunate as this is, it is naturally the right of such parties to act in this manner and, given the revenues derived from call termination in the past decade, such an approach appears to be rational from their narrow perspective.
11. In the event that such arguments are indeed raised with a view towards creating delay pending a possible review of section 67(4) by the Legislature, ISPA urges the Authority to

remain steadfast in its efforts to remedy what is blatantly anti-competitive conduct and force those who would raise such arguments to justify them both legally and in the eyes of the South African public.

### **The fair and reasonable pricing obligation**

12. ISPA has noted the rationale for the imposition of a fair and reasonable pricing obligation on those licensees not regarded as Established SMP licensees as well as the further information on this obligation provided in the Explanatory Note. In particular ISPA has noted the “expectation” of the Authority expressed in Annexure 1 to the Explanatory Note:

“Given the imposition of the cost-orientation principle in the provision of call termination services, the Authority expects the following outcome of the “fair and reasonable” obligation for non-established licensees:

- Non-established licensees to charge a reciprocal rate with the rate set for Telkom if these licensees offer a fixed service, and
- Non-established licensees to charge a reciprocal rate with the rate set for Cell C, MTN and Vodacom if these licensees offer a mobile service.”

13. The realisation of this “expectation” would lead to symmetry in termination rates. Insofar as the Authority seeks to distinguish the fair and reasonable obligation from the cost orientation obligation this distinction is therefore not valid – on the basis of the Authority’s expectation – as regards the actual price at which termination rates are set.

13.1. The Authority regards reciprocity as some form of “default” position in the sense that a non-established SMP licensee will need to justify any departure therefrom which cannot be commercially negotiated.

13.2. The basis on which the rate at which this reciprocity will be affected is the cost-oriented obligation imposed on Established SMP licensees.

13.3. It follows that the specific pricing obligations imposed on the Established SMP licensees are being indirectly imposed on non-established SMP licensees.

13.4. This is likely to be reinforced in the marketplace, as it is extremely unlikely that an Established SMP licensee will accept any rate other than a reciprocal one through commercial negotiation and will bring their countervailing buying power to bear in opposing any attempt to deviate from the “expectation”.

14. No basis for the “expectation” expressed by the Authority is laid out in the Explanatory Note and ISPA seeks clarity in this regard. Insofar as the setting of specific cost-oriented rates is the result of analysis of the South African market and a benchmarking exercise, ISPA wishes sight of the analysis and other factor underpinning the “expectation”.
15. A number of ISPA members are of the view that it is neither commercially realistic nor fair and reasonable to limit new entrants to a cost-based interconnect rate when the incumbents have been able to build their businesses on profitable interconnect agreements. It is argued that new entrants trying to expand their network and subscriber base have significantly higher costs, and the Authority recognises the higher unit costs experienced by new entrants at a number of junctures in section 3 of the Explanatory Note.
16. ISPA appreciates that the analysis of the fixed call termination service market was performed based overwhelmingly on data provided by Telkom SA Ltd (“Telkom”) and that the setting of cost-oriented termination rates has been done on the basis of such analysis.
17. The data on which termination rates have been set by the Authority is therefore – through no fault of the Authority – subject to the criticism that notions of efficiency used in setting the rates are those applicable to an incumbent operator which enjoys massive market share and significant economies of scale. The setting of a cost-oriented termination rate for an incumbent cannot simply be used as a benchmark for the setting of a rate for the entire market, or at the least, where unavoidable, should be used with great care in order to ensure that the intention of facilitating competition is not defeated.
18. ISPA recognises the greater scope for achieving efficiencies presented by the Facilities Leasing Regulations and the sharing of facilities but notes that it is open to question whether such efficiencies will be achieved during the period before the first review of the Regulations in 2013 given the urgent need for the imposition of pro-competitive price controls in respect of almost all facilities leasing markets and market segments. Until such time as this is achieved Telkom will continue to control input costs for fixed VoIP providers and enjoy scope to control the market.
19. It is accordingly the view of many ISPA members that recognition of the market realities set out in the section 3 of the Explanatory Note should dictate that fair and reasonable pricing is something other than reciprocal and that non-established SMP licensees should not be

disadvantaged by the indirect imposition of cost-oriented rates which do not recognise the inefficiencies of new entrants as against the network effect benefits and economies of scale enjoyed by Established SMP licensees.

20. Furthermore the Authority explicitly recognises that the non-established SMP licensees are not in a position to “harm the market”. It is questionable, with reference to the principles applied by the Authority in deciding upon remedies, whether an obligation which has the effect of indirectly imposing cost-oriented pricing can be regarded as proportionate or justified.
21. On this basis some ISPA members argue that new entrants should be able to set their termination rate at the highest rate (or higher) that the Established SMP licensees are charging, regardless of type of network that they have.
22. It has also been suggested that the Authority should consider imposing a percentage above the cost-oriented rate – set to represent the relative inefficiencies and other disadvantages faced by new entrants – which would represent a “default” for fair and reasonable pricing.
23. Another view is that it is critical that the Authority provides for symmetrical rates between new entrants and the established SMP licensees so as to allow for the standardisation of call charges from the established SMP licensees to new entrants.
  - 23.1. It is argued that this is particularly important for calls from Telkom’s network. The current uncertainty around Telkom call charges to new entrants’ networks hampers the take up of new entrants’ number ranges and the successful roll out of GNP (for example) and is therefore an obstacle to greater competition.
  - 23.2. Furthermore it is evident from the recent once-off reduction in the mobile termination rate that the MNOs do not pass the benefit of lower termination rates onto their subscribers. The MNOs are simplifying their calling bundles and are moving to packages that only differentiate between “on net” and “off net” call charges (true of all Vodacom packages for example).
  - 23.3. The question which is raised is why should new entrants accept asymmetric interconnect rates in favour of the incumbent operators? If new entrants pay lower interconnect rates to the MNOs, they are effectively subsidising the incumbent operators. This is self-evidently the wrong result.

24. ISPA has argued below for a convergence between the mobile and fixed termination rates on the basis, *inter alia*, that the ECA is technologically neutral to encourage convergence and that it is not clear why we should continue to favour one technology over another as regards termination rates. While it is accepted that such a convergence of rates is not immediately implementable, reciprocal rates between the new entrants and the established SMP operators can be used as a pro-competitive tool pending the realization of such convergence.
25. In order to achieve such symmetry ICASA would be required to prohibit the established SMP MNO's from transiting traffic. This is the only requirement to enforce reciprocal rates between new entrants and the established SMP operators and, it is argued, is relatively simple to enforce in practice.
26. There is another lobby within ISPA which is of the view that there is significant merit in setting a standard termination rate in respect of licensees providing similar services, notwithstanding that this would lead to a substantial loss of revenue for new entrants in the voice service provision market. The argument raised in support of this view is that a standard termination rate will eliminate the arbitrage issues arising through the operation of number portability. This is strengthened by the recent release by the Number Portability Company of figures relating to the porting of geographic numbers, which figures far exceed expectations.
27. This view would tend towards supporting the Authority's "expectation" that the fair and reasonable pricing requirement to be imposed on licensees not regarded as Established SMP licensees (or the appropriate nomenclature therefor) will lead towards reciprocity in the pricing of call termination across similar services (mobile or fixed).

#### **Fair and reasonable pricing and non-discrimination**

28. ISPA notes and agrees with the declaration in regulation 6(1) that each ECNS and ECS licensee offering voice call termination services is dominant and has SMP in its own market (as defined in regulation 3) and that the Authority is as a result entitled under section 67 to impose pro-competitive remedies, examples of which are set out in section 67(7).

29. ISPA has further noted the distinction drawn in paragraph 3.3. of the Explanatory Note between:

29.1. Problems relating to inefficient pricing, in that the Authority believes that there are insufficient incentives on licensees to reduce their wholesale call termination charges to an efficient level; and

29.2. Problems relating to non-pricing issues and countervailing buying power (CBP), mainly aimed at delaying market entry and raising a rival's costs.

30. In paragraph 3.4.1 of the Explanatory Note the Authority states:

“The imposition of ex ante obligations does not depend on the abuse of a dominant position. It seeks to prevent such abuse. Therefore the Authority proposes the imposition of non-pricing remedies to ensure access, transparency and non-discrimination to enable all licensees to compete. In addition, the Authority seeks to introduce the pro-competitive remedies to remove the competitive distortions that occur as a result of allocatively inefficient pricing as discussed above.”

(ISPA's emphasis)

31. And further in the same paragraph:

“Furthermore, in terms of Sections 37 - 40 of the ECA and the Interconnection Regulations, the following obligations are in place and apply to all licensees:

- Obligation to interconnect, which is an access obligation;
- Transparency obligations; and
- Non-discrimination obligations with respect to terms and conditions relating to service and quality.”

(ISPA's emphasis)

32. ISPA submits that the Authority is incorrect in indentifying non-discrimination as it finds expression in regulation 10(3) of the Interconnection Regulations 2010 (“the Interconnection Regulations”) as being a “non-pricing remedy”.

33. Regulation 10(3) aforementioned of the Interconnection Regulations will apply to all licensees providing wholesale call termination services as a direct result of the determination of SMP made in the Regulations. This regulation explicitly refers to “rates and charges”:

“10 (3) An interconnection provider must apply similar terms and conditions, including those relating to rates and charges, in similar circumstances to itself, affiliates and other interconnection seekers, providing similar services, unless otherwise requested by the interconnecting party.”

34. It is accordingly evident that non-discrimination is both a pricing and a non-pricing remedy.

35. ISPA is concerned that the application of regulation 10(3) of the Interconnection Regulations to all licensees in their respective markets may be interpreted as being in conflict with the obligation to apply fair and reasonable pricing. The obligation not to discriminate in setting rates and charges as between itself, affiliates and other licensees to which similar services are being provided under similar circumstances may be argued as reinforcing inflexible reciprocity, whereas the fair and reasonable obligation imports a degree of flexibility in setting rates where this can be justified.

36. Stated differently: Under the regime proposed by the Authority, SMP licensees will be required to apply fair and reasonable pricing as specified by the Authority and will also be bound by regulation 10(3) of the Interconnection Regulations as regards non-discrimination.

37. ISPA believes that this apparent conflict may serve to confuse the rights of parties in setting rates, disadvantage new entrants and defeat the objectives expressed in paragraph 3.4.1 of the Explanatory Note:

“The remedies are furthermore aimed at providing certainty to the market with respect to the treatment of wholesale call termination charges and terms and conditions in the period under review. This legal and policy certainty is critical in the interests of investors and consumers alike.”

## **Towards a convergence of mobile and fixed termination rates**

38. There is a strong view amongst ISPA's members that the distinction drawn between fixed and mobile termination rates is artificial and that the Authority should be guiding industry towards a point in the short-to-medium-term at which this distinction is no longer relevant in determining termination rates.
39. ISPA is of the view that a convergence of fixed and mobile termination rates is a natural consequence of the multi-level convergence taking place in the industry and that the rationale for a convergence of rates will only become stronger over the period for which the Regulations are intended to apply.
40. ISPA understands all too well the historical underpinnings of the distinction and the rationale behind its use in the Regulations. Nevertheless, the consequence of the undue retention of the distinction is the continuing opportunities for arbitrage presented and the continuing scope for anti-competitive conduct on the part of the MNOs in particular.
41. Already there appears to be a general view that the fixed call termination rate will apply in respect of operators such as Telkom and that the mobile call termination rate will apply in respect of operators such as Vodacom. This completely overlooks the fact that the converged licensing regime of the ECA allows all holders of i-ECNS and i-ECS licenses to provide both fixed and mobile services as well as services that are neither fixed nor mobile (e.g. toll-free and value-added services).
42. ISPA accordingly calls on the Authority to issue a forward-looking statement which indicates its intention to engineer a convergence in fixed and mobile convergence rates during the first review of the Regulations. ISPA appreciates the need for the management of consumer protection issues and the implications of number portability in this process.

### **Relationship between the Regulations and the Draft Number Plan Regulations**

43. ISPA is of the view that there is a critical relationship between the Regulations and the regulations which pertain to the number plan and numbering in general.
44. In this regard ISPA has noted the content of the draft Number Plan Regulations released for comment by the Authority on 4 June 2010 and that it is evident from these that the Authority is well aware of the critical nature of this relationship.

45. Specifically ISPA notes that:

- 45.1. The draft Number Plan Regulations seek to link fixed call termination to geographic number ranges. A failure to do so would create potential ambiguity in that a service assigned a geographic code may well be a mobile service within the geographic area served by such code. Having the mobile termination rate apply in respect of geographic number ranges will create huge problems with arbitrage in respect of ported numbers. For example: a number block operator (donor operator), terminating calls to that number block at 15c per minute will have to onward route the call and pay 65c per minute to the recipient operator (to whom the number has been ported), and will be out of pocket by 50c per minute. It is only logical that the "Fixed call termination" rate should apply in respect of calls to any geographic number ranges. However, unless this is clearly stated, there is potential for disputes and litigation that arise out of inconsistency of definitions used in the call termination regulations versus those used in the numbering regulations.
- 45.2. The Call Termination Regulations assume that licensees provide either fixed or mobile services, which ignores the reality that most licensees offering termination services also provide other types of services, such as toll-free and value-added services (e.g. fax-to-email, conferencing, info services, directory services, premium-rate, etc).
- 45.3. ISPA is of the view that a functional cross-network toll-free regime requires that either:
  - 45.3.1. the termination rate in respect of 080 (toll-free) numbers should be zero; or
  - 45.3.2. the terminating operator should pay the originating operator a rate equivalent to the fixed termination rate in respect of calls terminating towards an 080 (toll-free) number on its network.
  - 45.3.3. In the absence of such a framework on the wholesale side, it becomes impossible for licensees to implement cross-network toll-free service at a retail level and consumers will be misled into thinking calls they're dialling to 080 numbers are free. ISPA appreciates that the Authority has already provided licensees the option to play a recording stating "Calls to this off-network toll-free number will be charged for" before connecting the call, but is of the strongly-held view that such a provision serves no purpose other than to effectively defeat the toll-free concept and limit the provision of toll-free service to the established licensee who currently has more than 98% of the fixed line market (i.e. Telkom).

46. The relationship between numbering and wholesale call termination is also critical in ensuring that consumers are placed in a position in which they are aware of the costs of the calls they are making. Specific termination rates need to apply in respect of calls to Value Added Services (VAS) (and therefore VAS number ranges). In the absence of such clarity from the Authority, termination towards VAS services (which fall under neither the definition of "Fixed call termination" or "Mobile call termination") remains unregulated and the retail tariffs that operators charge for calls to such numbers will accordingly vary wildly. This is complicated by the fact that such services are typically provided on numbers assigned on an individual basis or in very small number blocks (of 1,000 or fewer numbers). By way of example: the call rate to a number such as 0867 123 000 may vary hugely from the rate to call 0867 124 000 (both at the wholesale and retail level).
47. Further underpinning the need for appropriate regulation in this regard and the setting of minimum and maximum acceptable termination rates applicable in respect of 087 number ranges is:
- 47.1. The current disparity between the definitions employed in the current Number Plan Regulations and the draft Call Termination Regulations;
  - 47.2. The fact that 087 numbers have been allocated for use in the provision of VoIP services (and are held by many ISPA members for this purpose) but the Authority has specifically shied away from further defining VoIP into fixed VoIP, fixed-mobile VoIP or mobile VoIP services categories;
  - 47.3. The definition of "Fixed call termination" in the Regulations is explicitly appended with "and includes licensees providing call termination using VoIP to a fixed location and fixed wireless services"; and
  - 47.4. The definition of "Mobile call termination" is not appended with "and includes licensees providing call termination using VoIP to mobile subscriber equipment enabled by wireless technology".
48. ISPA wishes to make it explicit that, insofar as the above matters are satisfactorily dealt with by the draft Number Plan Regulations, there is no need to address them in the Call Termination Regulations. Insofar, however, as neither document has been finalised, ISPA's

support of the Regulations in this regard remains conditional on the final version of the draft Number Plan Regulations continuing to deal with these issues as currently proposed.

### **Erratum**

49. Regulation 14(1) appears to be missing the words “up to”:

“14(1) A licensee which fails to comply with regulation 8(1) is liable to a fine of up to Five Hundred Thousand Rand (R 500 000.00)”

### **Conclusion**

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

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