

3 January 2018

Independent Communications Authority of South Africa

Attention: Chairperson, Priority Markets and Data Services Committee

Per email: prioritymarkets2017@icasa.org.za

DRAFT END-USER AND SUBSCRIBER SERVICE CHARTER AMENDMENT REGULATIONS

1. ISPA refers to the Draft End-User and Subscriber Service Charter Amendment Regulations published as General Notice 901 in Government Gazette 41263 of 17 November 2017 (“the Draft Regulations”) and to the Authority’s invitation to comment thereon.
2. ISPA currently has a large body of members, the majority of whom hold Electronic Communications Network Services (“ECNS”) Licences and Electronic Communications Services (“ECS”) Licences issued in terms of the Electronic Communications Act, No. 36 of 2005 (“ECA”). These members will be subject to the Draft Regulations and the obligations therein, and they accordingly have a direct interest in the Draft Regulations. ISPA accordingly sets out its comments and concerns on the Draft Regulations herein.

General Comments

3. ISPA recognises the Authority’s intention to protect and educate end-users, and supports the efforts to revise the existing Regulations to do so.
4. The End-User and Subscriber Service Charter Regulations 2016 is fraught with issues, some of which have been raised by ISPA members with the Authority in the course of their compliance reporting. It is unfortunate that the Authority did not seek to address these in this amendment process.
5. The Authority continues to focus on mobile licensees in drafting the Draft Regulations, and continues to ignore the reality that the majority of licensees do not fit into the same category.

ISPA had noted the following in its Supplementary Submissions to the Draft Amendment End-User and Subscriber Service Charter Regulations 2015, and wishes to reiterate this:

- 5.1. The ISP market in South Africa is highly competitive. ISP contracts are available on a month-to-month basis meaning that consumers have choice and the ability to quickly change providers if they do not like the product or customer service which they are receiving.
- 5.2. Indeed, in this market subscribers can easily change providers because a lower price is offered or temporarily use a provider to take advantage of a special offer. This is the essence of a functioning and efficient market.
- 5.3. This level of competition does not apply in other retail ECS markets, such as that for mobile broadband.
- 5.4. The Authority should therefore be cautious in adopting consumer protection regulations which simply ignore the different levels of competition in different sub-markets. As a general principle, there is less need for such regulations in competitive markets where consumers have real choice and mobility such that they can easily vote with their feet.

Amendment of Regulation 4 of the Regulations

6. ISPA recommends that the Authority redraft regulation 4(2) as follows:

(2) A licensee must conduct random checks on a representative sample of its points of sale and services outlets to monitor ...

Amendment of Regulation 8 of the Regulations

7. ISPA notes that the deletion of sub-regulation 7 has the effect of removing sub-regulation 7(b) – end-user acceptance for subscription to third-party services.
8. ISPA proposes that this regulation should be redrafted as follows:

5. Amendment of regulation 8 of the Regulations

Regulation 8 of the Regulations is hereby amended by the deletion of sub-regulation 7(a).

Insertion of Regulations 8A, 8B and 8C respectively in the Regulations

Proposed Regulation 8B(1)

9. ISPA wishes to highlight a minor error in the wording of regulation 8B(1)(d), which should read:

(d) provided an option through SMS, push notification, USSD or any other applicable means to opt-in or opt-out of out of bundle usage per session.

Proposed Regulation 8B(3)

10. While the Explanatory Memorandum is clear that the Authority intends that all pre-paid data bundles should only expire after 3 years save where they have been exhausted prior to the expiry of this 3-year period, ISPA submits that the wording of regulation 8B(3) as it currently stands can be read to mean that a licensee merely needs to provide an option of data bundles with a minimum expiry period of 3 years along with its usual bundles with shorter expiry periods. ISPA accordingly recommends that the Authority redraft this regulation as follows:

(3) A licensee must ensure that all prepaid data bundles are provided with a minimum expiry period of ...

11. Whilst the Authority quotes section 63 of the Consumer Protection Act, No. 68 of 2008 ("CPA") in its Explanatory Memorandum, ISPA notes the Authority should also be mindful of section 64 of the CPA. Many licensees invoice data bundles monthly in advance. This billing methodology blurs the lines between post-paid and pre-paid (as per section 63 **and/or** section 64 of the CPA). ISPA therefore suggests that the Authority insert a definition of "Pre-Paid" and "Post-Paid" in the Draft Regulations, to read as follows:

"Pre-Paid" means when a Subscriber, without any prior contractual obligation to do so and without having to be invoiced therefor, purchases a single Data Bundle or Voice or SMS bundle by making full payment of the relevant bundle prior to the allocation of the bundle.

"Post-Paid" means when a Subscriber, on the basis of a contract and upon presentation of an invoice, pays for a recurring subscription to a Data Bundle or Voice or SMS bundle, whether the said payment by the Subscriber is payable in advance or not.

Proposed Regulation 8B(4)

12. The proposed regulation 8B(4) illustrates a flagrant disregard for the difference between ECNS and ECS, which leads to some absurd consequences. The Authority must consider that the data bundle is allocated to the end-user by the ECS licensee, who in turn is provided access to a **network** by an ECNS licensee. This means that end-users on the same network do not necessarily have the same electronic communications service provider.
13. The ability to transfer rolled over data to another user on the same network will pose the following significant challenges:
 - 13.1. Same network – same service provider:
 - This functionality will require software development that the majority of licensees would not be able to afford;
 - The development of such functionality for most licensees would take a considerable amount of time.
 - 13.2. Same network – different service providers:
 - Services provided on networks that are not mobile networks (such as DSL, wireless or fibre networks) are more often than not provided by multiple services providers (ECS licensees) and resellers of those ECS on the same network;
 - It will **not** be possible for those service providers to transfer unused data bundles to another user on the same network where the other user has a different service provider.
14. ISPA submits that the option to transfer data to another end-user must be removed from the Draft Regulations. Such service offerings should be devised by service providers to differentiate its service offering from its competitors.
15. ISPA further notes the practice of many licensees who roll over unused data to first deplete the new months' allocation – i.e. “newest” data first. This has the effect that rolled-over data often expires without being fully depleted because the “newer” data allocation is depleted first. ISPA submits that this model defeats the Authority's objectives.

16. ISPA accordingly recommends that regulation 8B(4) be replaced with the following:

Utilisation of rolled over data

(4) Where data has been rolled over for post-paid users, a Licensee must account for the data in such a manner that the oldest allocation of data is depleted before more recent allocations of data.

Proposed Regulation 8C

17. ISPA appreciates the intention of the Authority in setting out the education awareness campaign requirements in regulation 8C of the Draft Regulations, but draws the Authority's attention to the different services provided by ECS licensees. ISPA is of the view that regulation 8C is aimed firmly at the mobile operators (based on the stated content for these education awareness campaigns), and suggests that the Draft Regulations be explicit in this regard. It is not reasonable to expect all ECS licensees to run such education awareness campaigns, nor is it feasible for all ECS licensees to do so.

Conclusion

18. ISPA extends its appreciation to the Authority for its consideration of these comments, and trusts that it will be of assistance to the Authority in finalising the Draft Regulations.

19. Should the Authority hold oral hearings or workshops, ISPA hereby gives notice of its intention to participate.

Regards,
ISPA Regulatory Advisors