



10 February 2016

Independent Communications Authority of South Africa

Attention: Mr Godfree Maulana

Per e-mail: ecsecns.compliance@icasa.org.za

Dear Sir

REGULATORY IMPACT ASSESSMENT – RESELLERS

1. Introduction

ISPA refers to the General Notice: Regulatory Impact Assessment: ECS/ ECNS Resellers (“the General Notice”) and is pleased to provide the Authority with its response.

2. Scope of submissions

- 2.1. ISPA’s response is structured as follows:
 - 2.1.1. General remarks and comments on the problem statement and objectives;
 - 2.1.2. Responses to questions posed;

3. General Submissions

3.1. Problem Statement and Objectives

- 3.1.1. ISPA takes note of the problem statement and objectives. In particular, ISPA recognises that the various options (and questions posed in relation to the options) are informed by the objectives, which in turn are informed by the problem statement.
- 3.1.2. Before responding to specific questions, ISPA will therefore comment on and make submissions relevant to the problem statement and objectives as set out in the General Notice

ISPA Management Committee:

Ant Brooks*, Graham Beneke, Anthony Engelbrecht*, Guy Halse, Jenny King, Mlindi Kgamedl*,
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3.2. Comments on Problem Statement

3.2.1. At present it is difficult to know the exact number of resellers in the market due to lack of clarity on what a reseller is as well as the exemption process.

ISPA agrees that there is a lack of clarity, but not necessarily that it is a lack of clarity on what a reseller is. ISPA submits that there is a lack of clarity on the following:

- What exactly constitutes licensable services and which of these may be resold pursuant to a license exemption;
- To whom those licensable services may or may not be sold¹;
- The void between the terms wholesale and resale in the current regulatory framework as opposed to in the ordinary grammatical sense of the words as used in the context of commercial relationships; and
- Whether license exemption is required at all.²

ISPA is of the view that this lack of clarity is largely due to ambiguity created in the definitions of the Electronic Communications Act, 36 of 2005 (“the ECA”).

This ambiguity lies in the fact that the definitions of Electronic Communications Network Service and Electronic Communications Service do not clearly include resellers as recipients of licensed services. Similarly, the definition of “retail” does not include resellers, but assumes a direct relationship between licensees and subscribers. Finally, neither section 6 of the ECA nor the license exempt regulations make reference to reselling of ECNS as service that may be regarded as license exempted and regulation 5(1)(a) requires license exempt parties to hold the appropriate ECNS licenses.

For this reason, ISPA noted in its first response at paragraphs 4 and 5 as follows:

4. It is fair to say that there is a degree of confusion around resale, with particular reference to the distinction to be drawn between the provision of licensed ECS and the resale of ECS.

5. To the extent that this exercise serves to resolve this confusion and to move everyone towards a common understanding of the operation of the licensing and licence-exemption framework under the ECA, it is to be welcomed.

ISPA submits that the ambiguity pertaining to resellers need to be rectified in the ECA. Given that it is an important principle of administrative law that subordinate legislation

¹ See our discussion under the heading Resale of ECNS in response to the first question of the August questionnaire, last paragraph of page 4

² See our discussion under the heading Resale of ECS in response to the first question of the August questionnaire, last paragraph of page 3.

may not enlarge, restrict or alter definitions in the empowering legislation, ISPA submits that the Authority should not attempt to rectify this confusion through regulations. It is for this reason that ISPA concluded its first response with the following paragraph:

It may be prudent for the Authority to consider as a preliminary exercise whether to proceed with a RIA prior to legislative reform to the current position regarding resale under the ECA.

3.2.2. *There are no existing criteria that entities can use in order to identify themselves as resellers in order to apply for the exemption as contemplated by the ECA.*

ISPA does not agree with this statement. Although ISPA has on previous occasions noted that the definition of “Reseller” is “thoroughly unhelpful”, we do not believe this to be the reason for the lack of applications for license exemptions.

In regards to the definition of “Reseller” we submit that the criteria of what constitutes a reseller need to be amended in the definition of “Reseller” in the ECA. The ECA does not empower the Authority to define a reseller, and therefore the Authority may not enlarge, restrict or alter the definition as set out in the ECA.

In terms of applying for exemption, the confusion does not arise from the lack of identifiable criteria. It arises from the wording of Regulation 3(2) of the Licence Exemption Regulations 2010. If the resale of ECS procured from a licensed provider does not require a license³, how would one apply for a license exemption if no license is required in the first place?

3.2.3. *Different upstream providers whom are licence holders engage resellers differently, with some requiring entities to hold licences.*

ISPA agrees with statement. However, ISPA does not agree that this situation exists because of an inability to identify resellers.

ISPA is of the view that those entities who do not wish to provide “wholesale” services to license exempt parties may very well be acting under an incorrect or misconstrued interpretation of the law. Regardless of differences in interpretation of the law, ISPA is very well aware and submits to the Authority that the differences in interpretation of the law flow from the ambiguities highlighted herein by ISPA.

³ See Regulation 3(2) of the Licence Exemption Regulations 2010 and our discussion under the heading Resale of ECS in response to the first question of the August questionnaire, last paragraph of page 3

ISPA reiterates that these ambiguities must be corrected through an amendment of the ECA, and that the Authority is not empowered to enlarge, restrict or alter these ambiguities through subordinate legislation.

ISPA furthermore also recognises each licensee's right to determine its own minimum qualifying criteria for conducting business. This may be based on volume commitments, risk profiles, skill levels or even requirements pertaining to accreditation or licensing. It therefore follows that even if it was clear that licensees were allowed to provide wholesale offerings to exempted resellers, that they may still choose to set a minimum requirement that their clients must have ECNS or ECS licenses. In such case the Authority would only be able to intervene in such policy decisions of licensees if it is found to have an adverse impact on competition or pricing in the market.

In short, the disparate engagement models of upstream service providers highlight ambiguity in the ECA, but regulatory intervention with regards to "Resellers" would not resolve this particular issue, as the licensees will retain the right to choose with whom they conduct business.

3.2.4. There is no linkage between entities operating as resellers and mechanism in place to hold resellers accountable and responsible for the products and services they provide in the market.

ISPA does not agree with this statement.

Firstly, the subscriber will generally be knowledgeable as to who its service provider is. In the absence of the Authority having jurisdiction over an entity that does not hold an ECS and/or ECNS license, the subscriber nonetheless has access to the civil courts and provided the subscriber is a consumer, also to the National Consumer Commission for recourse.

Secondly, ISPA is of the view that it is arguable that resellers can be held accountable, whether they have been granted individual exemptions or not. There is however some ambiguity that arises out of the following conflicts:

- On the one hand: -
 - A literal interpretation of the definition of "license exemption" in the ECA could arguably be that a license exemption has to be granted by the Authority. In other words, it cannot be deemed to have been granted to a person.
 - This interpretation seems to be consistent with the definition of "licensee" in the ICASA Act, 13 of 2000 where a license includes a person to whom an exemption has been granted.

- On the other hand: -

- In contrast section 6(1) of the ECA provides that the Authority may determine which classes of services may be provided **without a license**. Section 6(1) does not empower the Authority to issue license exemptions to applicants, but rather empowers the Authority to prescribe services that may be provided **without a license**.
- In this context, the wording of section 7 of the ECA provides that “*Except for services exempted in terms of section 6, no person may provide any service without a licence*” makes more sense. Note that the exception applies to exempted services, NOT to exempted persons.
- Although the Authority has a form and a process for applying for exemption, the license exemption regulations do not require any person to apply for exemption. In fact, regulation 5 of the Licence Exemption Regulations lists items from which licence-exempt services are not absolved, and application for exemption is not one of those requirements.

Therefore, if a literal interpretation is taken that licence exemptions must be applied for and granted by the authority by each reseller, then in the event that a reseller has not applied for exemption, that reseller would be providing a service in contravention of section 7 of the ECA and can be held accountable under the provisions of section 17B(a)(iii) of the ICASA Act for non-compliance with the ECA.

ISPA however favours an alternative interpretation: that any person who provides any of the services as listed in the section 6(2) of the ECA read with the Licence Exemption Regulations provides a service exempted from licensing, and is thus deemed to have been granted an exemption. In this interpretation, the reseller will fall within the definition of “licensee” as contained in the ICASA Act and the Authority and the CCC will have the jurisdiction to hold the reseller accountable for compliance in the event of a complaint against such reseller.

Lastly, ISPA assumes that consumer protection is the main driver behind seeking to hold resellers accountable. Within the context of this assumption, ISPA has noted the issue of accountability of resellers has not been raised as an issue of concern in either of the last two annual reports issued by the Authority, even though some level of detail is provided on exactly how consumer complaints are categorised and dealt with. The Authority reports high levels of resolution of consumer complaints.

There does not, therefore, appear to be empirical support for a view that non-accountability of resellers is a consumer concern.

3.2.5. Likewise there is no mechanism to link the upstream provider with reseller so as to hold the two accountable and responsible for the products and services in the market.

For various reasons listed below ISPA does not agree with a universal principle of joint and several liability by reseller and upstream provider. These reasons include: -

- Many resellers procure services from multiple upstream providers, and *vice versa*.
- Many resellers bundle, re-package or otherwise re-group the services obtained from upstream providers, thus creating new product and service definitions over which the upstream provider does not have control.
- Many resellers combine, link or use the upstream providers' services in connection with electronic communications networks or electronic communications facilities owned by the reseller over which the upstream provider does not have control.
- Even when the services obtained from an upstream provider is resold in identical form, the reseller is still more often than not responsible for billing, first line support, problem resolution and other value added services.
- Very often, resellers that are start-up business will buy and resell retail services and the upstream provider may not even be aware that its customer is in fact reselling its service.

3.3. Objectives

3.3.1. Clarifying the definition of reseller

ISPA submits that this objective is necessary, but should be done by amending the primary legislation, and not through subordinate legislation.

3.3.2. Re-emphasising the process of exemption to be followed by entities (resellers)

ISPA however favours an alternative interpretation that any person who provides any of the services as listed in the section 6(2) of the ECA read with the license exemption regulations provides a service exempted from licensing, and is thus deemed to have been granted an exemption.

This approach is also in line with the approach set out in Option 2.

3.3.3. Providing the necessary mechanism for linking resellers and upstream providers for purposes of accountability and responsibility for services.

ISPA submits that no evidence is available that justifies the problem statement that informs this object and that this objective is based on an overstated problem statement. This objective is therefore neither necessary nor a helpful objective.

4. Responses to questions posed

Option 1

5.1.1. Regulatory Assessment Impact requires that a Regulator consider doing nothing thus retaining the status quo. In this regard it means no action is taken by the Authority the identified problems are left to industry to rectify. **Do you agree or disagree with this statement? Kindly provide your reasons in support of your response.**

ISPA does not agree with this statement.

As set out in our comments to the problem statement, ISPA believes that the problem statement is either not relevant or overstated. To this extent, ISPA believes that the authority has overstated the extent and seriousness of “the identified problems [that] are left to industry to rectify”

ISPA is however of the view that the problems set out in the problem statement that it agrees with is not symptomatic of problems caused by resellers, but rather by the regulatory regime created by the ECA (and to a lesser extent by the ICASA Act). ISPA submits that these issues need to be rectified in the ECA and the ICASA Acts, and not through subordinate legislation.

Option 2

5.2.1. The option requires the reseller and upstream provider to agree on a set of commitments that would be binding and that they will be held accountable and responsible for. The Authority will use this commitment to enforce compliance. **Kindly share your views with this approach.**

The general interests of ISPA members lie in favour of a vibrant reseller market subject only to such light-touch regulation as is required to ensure consumer protection. ISPA’s preference is for the Authority to continue to regulate resellers of ECS indirectly, i.e. through imposing obligations on licensees that must be observed in the resale of ECS.

Considering that:

- Many resellers bundle, re-package or otherwise re-group the services obtained from upstream providers, thus creating new product and service definitions over which the upstream provider does not have control.
- Many resellers combine, link or use the upstream providers’ services in connection with electronic communications networks or electronic communications facilities owned by the reseller over which the upstream provider does not have control.

ISPA submits that such an approach would have to be very carefully considered and implemented.

This approach would also require a clear distinction to be drawn between wholesale agreements

and reseller agreements. Wholesale agreements and reseller agreements are two distinct types of commercial relationships and have different agreements governing the two types of relationships. The nature of commitments and obligations imposed between contracting parties thus varies greatly between these two types of relationships, although the sale of the services procured from the upstream provider of either of these relationships will resort under the definition of “resale” as defined by the ECA.

Furthermore, where entities enter into reseller agreements the reseller may either “white label” the product or promote it under the name and brand of the upstream provider. In either of these cases, the rights and obligations of the parties will also vary substantially.

5.2.2. This approach in a nutshell proposes that (excluding the reseller registering with the Authority) the upstream service provider⁴ keeps and reports a register of all resellers and make submission to the Authority annually. **Kindly share your view of this approach. Is there any regulatory administrative cost that the regulator should be aware of that the upstream service provider will incur in doing so? Kindly provide the Authority with the said costs.**⁵

ISPA supports this in principle, but submits that the Authority should keep in consideration that:

- Many resellers procure services from multiple upstream providers, and *vice versa*;
- It is common practice for licensed service providers to resell each other’s services.
- Very often, resellers that are start-up businesses will buy and resell retail services and the upstream provider may not even be aware that its customer is in fact reselling its service.
- Often resellers re-sell service of licensees that are not licensable services

ISPA further notes that this approach would be more in line with the interpretation that it favours, namely that the exemption applies to the types of services being provided, and does not require each and every individual reseller to be granted an exemption by ICASA.

5.2.3. This approach will seek the basic information between upstream service provider and its reseller/s, excluding any commercially sensitive information/agreements. **Would this be an acceptable approach? If not in favour kindly provide reason/s thereof.**

ISPA submits that this approach is acceptable.

⁴ Kindly note the term upstream service provider is also used in reference the Licensed entity that provides the reseller with products and services, it also means the licence holder as licensed by the Authority under Chapter 3 of the ECA.

⁵ Please note all the information provided relating to cost shall be used only for RIA cost comparison for this process only and shall not be used for any other. The cost need to be confined to staff and any operation expenses (administrative) associated in executing the task only.

5.2.4. The approach also seeks to reduce or avoid over regulation, given that there is already regulated processes with regards to resellers. **Would you agree with this statement? If not in agreement kindly provide reason/s.**

ISPA agrees with statement. Resellers are a class of persons provided services pursuant to a license exemption, and therefor need to comply with all provisions of the ECA and ICASA Act, to the extent that it applies to services provided pursuant to a license exemption.

Furthermore, the definition of licensee in the ICASA Act includes a person who provides a service that is exempted from licensing under the provisions of section 6 of the ECA.

Option 3

5.3.1. This option proposes an amendment to the current Exemption regulations as published. **Kindly provide your view/s on this approach.**

ISPA is of the view that there are issues that needs to be addressed in the current exemption regulations, but that this should not be the primary remedy to the current problems.

ISPA submits that the regulatory regime needs to be rectified in the ECA and the ICASA Acts, and not through subordinate legislation.

5.3.2. If the regulation is to be amended. **What specific amendments should be considered and why?**

The wording of regulation 3(2) that provides that the resale of ECS does not require a license needs to be amended to state that it is exempted – as opposed to does not require a license.

The resale of ECNS should be included as a category of license exempt services. ISPA submits that the provisions of section 6 of the ECA sufficiently empowers the Authority to exempt the resale of ECS, as the wording of section 6(2) makes it clear that the services listed there is not a closed list of services that may be exempted from licensing.

5.3.3. Considering your response to 5.3.2. **If an amendment is to be considered isn't that adding more regulation?**

No, it would be aimed at removing ambiguity and making more clear that which is already accepted by ISPA members as the status quo.

5.3.4. If further amendments are made. **What are the additional regulatory administrative cost that the upstream service provider will incur? Kindly provide the Authority with the said costs.**

None, it would simply clearly legislate conduct which is already prevalent amongst service

providers and resellers.

5.3.5. One of the theoretical discourse is that listing products and services that are to be in the resale market might stifle innovation. **Would you agree with this statement? If not in agreement with this statement would you recommend the Authority provide a list and how exhaustive will that list be considering the technology neutral licensing framework?**

ISPA submits that there should not be any limitation on the list of products and services that may be resold, and that each upstream provider should be given the freedom to choose which of its services it wishes to make available for resale to the market.

We trust that the above will prove to be of assistance and look forward to further constructive engagement with the Authority in this regard.

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ISPA REGULATORY ADVISORS