

17 June 2022

Independent Communications Authority of South Africa

Attention: Chairperson of the End User Subscriber Service Committee

Per email: eussc@icasa.org.za

DRAFT END-USER AND SUBSCRIBER SERVICE CHARTER AMENDMENT REGULATIONS, 2022

1. ISPA refers to the Draft End-User and Subscriber Service Charter Amendment Regulations, 2022 (“**the Draft Regulations**”) published as General Notice 1958 in Government Gazette No. 46153 of 31 March 2022 and the invitation to comment thereon.

Scope of application

2. ISPA’s central difficulty is the one-size-fits-all nature of the EUSSC Regulations, a feature entrenched throughout the Draft Regulations.
3. The vast majority of the substantive provisions to be introduced by the Draft Regulations relate to the provision of mobile services by mobile network operators. Bluntly, it is hard to escape the impression that the Draft Regulations have been conceived of and drafted solely with the mobile network operators in mind.
4. The challenges which this causes are detailed in the submissions below.

Regulatory burden

5. ISPA understands the objectives of the Authority in embarking on this process but is concerned that there is no evidence at all that the Authority has considered the additional regulatory burden which will be imposed on all licensees through the implementation of the proposed amendments.
6. This is part of a broader lack of recognition on the part of the Authority around the increasing regulatory compliance burden placed on licensees by its regulations.
7. This is particularly true for SMEs. It is ISPA’s position that regulatory compliance and the continued imposition of a one-size-fits-all regulatory framework is itself a significant barrier to entry into the industry as well as a reason for international companies choosing not to do business in South Africa.
8. Further, ICASA regulation applicable to licensees is costly and difficult to comply with. In the highly competitive ISP market, additional compliance costs are generally passed on to consumers.

9. The President in his 2022 State of the Nation Address made it clear that reducing the regulatory burden for SMEs is a government priority:
“This year, we are undertaking far-reaching measures to unleash the potential of small businesses, micro businesses and informal businesses.
These are the businesses that create the most jobs and provide the most opportunities for poor people to earn a living.
....
There are too many regulations in this country that are unduly complicated, costly and difficult to comply with. This prevents companies from growing and creating jobs.”
10. There is no evidence that the considerations articulated by the President have been taken into account by the Authority in the preparation of the Draft Regulations.
11. This is aggravated by the fact that the Authority refuses to differentiate between the compliance burden of licensees based on the nature of the license (i.e., individual or class) or on the annual turnover from licensed services of the licensee. As a result, there is one-size-fits-all regulation that applies to MNOs with multi-billion Rand licensed revenue and SME ISPs turning over less than R10 million Rand a year.
12. ISPA questions the utility of uniformly applying regulation in this manner. Smaller licensees have a limited socio-economic impact, and it is information supplied by the incumbent operators and larger ISPs and other operators which is of value to the Authority.
13. In the current process the Authority itself acknowledges that “the overwhelming majority of voice and data services are accessed through 3G and 4G technologies” and there is an abundance of evidence that the mobile networks serve the vast majority of South Africans with access to the Internet.
14. The Authority, however, has made the EUSSC Regulations and the service level parameters proposed in the Draft Regulations applicable to all licensees.
15. ISPA requests that the Authority:
 - 15.1. Expressly consider the manner in which it can reduce the regulatory compliance burden for SME licensees when finalising the Draft Regulations.
 - 15.2. Expressly consider distinguishing between licensees based on annual revenue from licensed services or other relevant metric when determining regulatory compliance obligations.

- 15.3. Carefully consider any regulatory compliance obligation placed on licensees with specific reference to the relationship between the purpose of the obligation and the cost of compliance.

Amendments to Regulations 8A and 8B

16. ISPA – after extensive consultation with its members – supports the extension of the roll-over period for unused voice, SMS and data bundles to a period of six months.

Amendments of Regulation 9(13) of the 2016 Regulations

17. Regulation 9(12) stipulates that the service level parameters set out in regulation 9(13) apply to “fixed, fixed wireless and mobile services”.
18. It is, however, immediately apparent that the proposed parameters do not all apply or do not apply equally to these three categories of service.
19. The Authority is requested to specify in respect of each proposed parameter which category of service it applies to. For example: parameters in respect of “3G voice service” only apply where a licensee is providing a mobile service.
20. In support of this request ISPA notes that:
 - 20.1. It would require very little effort for the Authority to be specific as to the application of the proposed parameters.
 - 20.2. Section 69(4) of the ECA allows the Authority to develop different minimum standards and different end-user and subscriber service charters for different types of services. The Authority has highlighted in the Explanatory Memorandum that the parameters proposed are aligned with section 69(4)¹. This is at odds with the proposed regulation 9(12), which makes the parameters of blanket application to three very different types of service provision.
 - 20.3. Clarity on the scope of application facilitates compliance by licensees and reduces over-reporting and incorrect reporting.
21. Of the four sets of parameters proposed, ISPA’s tentative understanding is that only the last – End User Test Cases – is potentially of application to providers of fixed wired and fixed wireless services, which would include the majority of ISPA members as providers of electronic communications services in the form of Internet access and voice services.
22. If it is the Authority’s intention that the End User Test Cases parameters are to apply to Internet service providers (ISPs) in respect of Internet access services, then the parameters as proposed are unworkable and would require reformulation.

¹ Para 8.12

- 22.1. The proposed parameters appear to assume service provision by a vertically integrated licensee. How will the parameters be applied where service provision is split between an ECNS licensee providing connectivity and an ECS licensee providing Internet access and other services?
- 22.2. The proposed parameters can only be assessed with reference to factors beyond the control of a licensee. Is the user accessing other services? Is the user utilising a Wi-Fi network for indoor distribution and is that network functioning properly? The type of browser, the age and quality of the device, the operating system and whether the connection is via mobile, fixed line or Wi-Fi can all influence the overall result.
- 22.3. ISPA has extensive experience with the dangers of speed tests as a basis for assessing whether an ISPA member is providing services as advertised and has issued educational media releases in this regard².
23. The Explanatory Memorandum notes that “the relationship with the operators is important in defining appropriate parameters and in finding the right solutions to measure and improve quality considering external factors that may be beyond the operators’ control”³.
 - 23.1. ISPA has not been approached by the Authority for input on appropriate parameters. It is not clear to ISPA whether the mobile network operators were consulted during the formulation of these parameters.
 - 23.2. The Authority has not referenced any external factors and it is not clear whether or how these were taken into account in developing the proposed parameters.
23. ISPA requests that the Authority clarify the scope of application of the proposed service level parameters during public hearings to be held towards the finalization of the Draft Regulations.
24. As a general comment, ISPA has severe reservations regarding the appropriateness and utility for consumers of the proposed parameters.

Amendments to Regulation 11

25. The Authority proposes a new Regulation 11 requiring a licensee to notify affected end-users of service upgrades and network upgrades via SMS, social media platforms, and its own website. This must be done both seven days before and one day before any planned service interruptions due to service or system upgrades.
26. Licensees must further notify customers and the Authority – via social media platforms, SMS and its website – of any major network outage that results in “poor quality of service as soon as it occurs”.
27. ISPA raises the following in respect of this proposed amendment.

² See for example https://ispa.org.za/press_releases/internet-speed-tests-are-useful-as-rough-guides-ispa/

³ Para 8.5.4

- 27.1. Notification on social media results in notifications being visible to parties other than "affected end-users". This quickly creates a situation where competitors and 3rd parties (e.g., media) take information that is not meant for their benefit out-of-context, quote elements of it in isolation, and distort the reality to their commercial benefit. While it's reasonable for affected parties to be notified, it is not reasonable to require that these notifications be posted to public forums where they are available to unaffected parties.
- 27.2. Bulk SMS can be truly invasive and annoying to the recipients. Provision must be made for consumers to opt-out of notifications and for licensees to respect this choice.
- 27.3. It should also be the case that the consumer should be able to select his or her preferred method of receiving notifications. Provision must be made for such a choice and for licensees to respect this choice.
- 27.4. The requirement to use SMS is another instance of the Draft Regulations being geared towards the operation of mobile networks and the provision of mobile services. Licensees that do not offer SMS services to their users should not be compelled to use SMS to communicate with such users.
- 27.5. The requirement to provide 7 days advance notice without any consideration of the nature of the changes may lead to unintended consequences. For example, where a security vulnerability for a system has been published and is being actively exploited (or has the potential to be actively exploited by nature of the details having been published), placing systems and end users at risk of breach of their confidential information or their services being disrupted just to enforce a 7-day notice would be disproportionately harmful to them.

Conclusion

28. ISPA extends its appreciation to the Authority for its consideration of these comments, and trusts that these will be of assistance to the Authority in finalising the Draft Regulations.
29. Should the Authority hold oral hearings or workshops, ISPA hereby gives notice of its intention to participate.

Regards,

ISPA Regulatory Advisors