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GENERAL NOTICE

NOTICE 1622 OF 2009



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

CODE OF CONDUCT ON THE SALE, LEASE, RENTAL OR SUBSIDISATION OF SUBSCRIBER EQUIPMENT PURSUANT TO CHAPTER 12 OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005 ("THE ACT")

1. The Independent Communications Authority of South Africa ("the Authority") in terms of Section 4(1)(a) and Section 4(3)(j) of the Independent Communications Authority of South Africa Act No. 13 of 2000, ("the ICASA Act") and Section 69 of the Electronic Communications Act (Act no. 36 of 2005) hereby gives notice in terms of Section 4(4) of the Act of its intention to prescribe the code of conduct on the sale, lease, rental or subsidisation of subscriber equipment, including minimum standards for end-user and subscriber service charters in that regard and as contemplated in terms of Sections 69(3), 69(4) and 69(5)(a),(d),(e) and (f) of the Act.
2. Interested persons or organizations are invited to submit written representations or documentation on this draft code of conduct on the sale, lease, rental or subsidisation of subscriber equipment no later than thirty (30) days from the publication of this notice (no extensions will be granted) by post, hand delivery, facsimile transmission, or electronically for the attention of:

Mr. Edmund Mhloti Baloyi
ICASA
Private Bag X10002
Sandton
2146

or Block B
Pinmill Farm
164 Katherine Street
Sandton

Fax: (011) 566 3006
Telephone: (011) 566 3005

- E-mail: mbaloyi@icasa.org.za; cc spantshwa@icasa.org.za, cokie@icasa.org.za.
3. Persons or organizations making any submission or submitting any relevant documents must also indicate whether they would like an opportunity to make oral representation at a hearing to be scheduled, which will not exceed one (1) hour in duration.
 4. All written representations or documentation submitted to the Authority pursuant to this notice will be made available for inspection by interested persons at the Authority's library and copies of such representations will be obtainable on payment of the prescribed fee.
 5. Interested persons or organizations who submit written representations or documentation should indicate, upon submission, whether there is any part thereof which should be treated as confidential. The request and reasons why any part of the representation or documentation should be treated as confidential must be submitted at the same time with the written representation.
 6. At the request of any person who submits written representations pursuant to this notice, the Authority will determine whether such representations or any portion thereof is confidential in terms of section 4D of the ICASA Act. If the request for confidentiality is refused, the person or organisation making the request will be allowed to withdraw such representation or documentation or portion thereof and the Authority will not take it into consideration when making its findings.
 7. The final code of conduct will be published in the Government Gazette.



PARIS MASHILE
CHAIRPERSON

CODE OF CONDUCT ON THE SALE, LEASE, RENTAL OR SUBSIDISATION OF SUBSCRIBER EQUIPMENT

Definitions

1. Unless the context otherwise indicates, any expression or word used in this code of conduct, to which a meaning has been assigned by the Electronic Communications Act, No.36 of 2005, as amended ("the Act"), and/or the Independent Communications Authority of South Africa Act, 13 of 2000, ("the ICASA Act") shall bear the same meaning in this code of conduct. The following words and phrases shall have the meanings ascribed to them below:

"contract" means an agreement entered into between a licensee, or its agent or a reseller, and a subscriber in respect to the sale, lease, rental or subsidisation of subscriber equipment;

"electronic communications provider" means any natural or juristic person that sells, leases, or rents subscriber equipment to members of the public;

"licensee" means any person who has been issued with a licence to provide services in terms of chapter 3 of the Act;

"offering" means any offer made by a licensee, its agent, or any reseller to a subscriber or potential subscriber, including but not limited to an invitation to do business;

"post-paid subscriber" means any subscriber who enters into a contract with a licensee, its agent or reseller to pay on a monthly basis for the subscriber equipment, services, any element thereof and/or usage of the network over a specified period;

"post-paid offerings or packages" means offerings linked to deals or contracts or packages where payments are made in arrears;

"pre-paid offerings or packages" means offerings linked to deals or contracts or packages where payments are made in advance;

"pre-paid subscriber" mean subscribers that pay in advance for retail services;

"Subscriber Equipment" means any equipment which may be used by an end user to access electronic communication services, including mobile handsets, portable computers, fixed line telephones, 3G data cards, wireless modems, but excluding electronic payment terminals and two way radios;

"subsidisation" means any incentive, allowance, discount or rebate offered by a licensee, or its agent, or reseller to the end user in relation to the sale, lease, rental or subsidisation of subscriber equipment, and "subsidy" shall be construed accordingly.

Purpose of these Regulations

2. The purpose of these regulations is to:

- (1) prescribe a code of conduct in relation to the sale, lease, rental or subsidisation of subscriber equipment and minimum standards in that regard for end-user and subscriber service charters;
- (2) protect consumers of the services envisaged in Section 69 of the Act.

Applications of these regulations

3. (1) These regulations are applicable to the sale, lease, rental or subsidisation of subscriber equipment offered by a licensee, its agent or any resellers to the extent that they provide services to the public in terms of a contract concluded with a subscriber.
- (2) The obligations imposed upon a licensee, its agent or resellers, in terms of these regulations should not be regarded as relieving them from any obligations imposed upon them in terms of any other law (including regulations or codes of conduct) including but not limited to the obligations relating to the advertisement of retail services and protection of consumers of such services.

Contractual issues

4. (1) Post-paid and pre-paid offerings or packages that are purported to include a subsidy with respect to the sale, lease, rental or subsidization of subscriber equipment must clearly indicate the following -

- (a) capital cost of the subscriber equipment;
 - (b) the interest charged in respect of the repayment of the capital cost;
 - (c) the subsidy offered and the monetary value of the services offered by the licensee, its agent or a reseller; and
 - (d) distinctly specify any other items charged by the licensee, its agent or reseller in respect of such post-paid or pre-paid offerings or packages.
- (2) Post-paid offerings must indicate clearly in the billing statement and on a monthly basis –
- (a) the outstanding amount of the capital cost payable by the subscriber in respect to the sale, lease, rental or subsidisation of the subscriber equipment ;
 - (b) the number of remaining installments for the settlement of the capital cost and interest in respect of the subscriber equipment;
 - (c) the charges, including penalties payable by a post-paid subscriber for terminating a contract before the expiry date.
- (3) A subscriber intending to enter into a post-paid contract shall be given a choice of the various contractual periods available and be made aware of the full financial implications for each such choice, including the consequences for default and early termination thereof. A licensee, or its agent or reseller must ensure that billing in respect of free and non-free units, capacity or minutes, as the case may be, and other ancillary charges, is transparent and easily understandable by subscribers.
- (4) A licensee, or its agent or reseller must, at least once a month, notify subscribers via short message service "sms" or any other convenient means agreed to between the subscriber and the licensee or its agent or reseller of any unused units, data, capacity or minutes accruing to the subscriber in a particular month including such units, capacity or minutes as may have been accumulated from previous months.

- (5) A licensee, its agent or reseller shall not be entitled to require the subscriber to forfeit any unused units, capacity or minutes, as the case may be, in respect of any period. A licensee, its agent or reseller shall give subscribers a credit for any unused units, capacity or minutes, as the case may be, upon termination of the contract.
- (6) Charges, if any, for the renewal or reconnection of a contract by post-paid subscribers, shall be transparent, fair and reasonable.
- (7) A potential subscriber will not be regarded as being in a position to make an informed decision, unless a licensee, its agent or reseller:
 - (a) explains in clear detail and makes reasonable efforts to interact with the subscriber in his or her preferred official language, and makes available in writing, the terms and/or conditions and consequences of each offering to the potential subscriber;
 - (b) specifically points out to a post-paid subscriber the consequences arising from a breach or early termination of the contract by such a subscriber, and penalties payable in respect of such a breach or early termination;
 - (c) clearly states in writing the actual charges or penalty in respect of the services and/or subscriber equipment, and how the licensee, its agent or reseller intends to recoup them from the post-paid subscriber in the event of a breach or early termination of the contract. A written statement to this effect should be made to the subscriber before a contract is concluded with the licensee, its agent or reseller, whatever the case may be.
- (8) A licensee, its agent or reseller must ensure that a post-paid subscriber is notified in writing of the expiry or termination of the contract, at least one (1) month before the expiry of the contract.
- (9) The notification referred to in paragraph 8 above shall be done by means of sms, e-mail or in any other written form which shall serve as proof of such notification and accepted by the subscriber in a similar manner.
- (10) A contract must not be automatically renewed. Post-paid subscribers must be given the opportunity to re-negotiate terms and conditions before the expiry of a contract. Where a contract is to be renewed, a post-paid subscriber must be entitled to negotiate terms and conditions upon which a contract is to be renewed, including the duration of the new contract.

- (11) A licensee, its agent or reseller must clearly state in writing the actual charges of services, as well as how the licensee, its agent or reseller intends to recover or recoup service charges from the subscriber. The explanation should be given to the customer before a post-paid or pre-paid contractual relationship is established.

Freedom to purchase subscriber equipment

5. (1) Subscribers must be given a choice not to conclude an agreement for the acquisition of any subscriber equipment in conjunction with the purchase of retail services or other offerings from the licensee, its agent or reseller, unless it is technically not possible to use or provide the service or offering other than through the subscriber equipment offered by the licensee, its agent or reseller.
- (2) Both post-paid and pre-paid subscribers must have the option to purchase, lease or rent any subscriber equipment, independently of, or in combination with other product or service offerings.
- (3) A licensee, its agent or reseller must not make it a prerequisite for the provision of any element of the service or offering that a customer must acquire subscriber equipment offered by such a licensee, its agent or any reseller, unless it is technically not possible to provide to such a subscriber the service required by him or her without such a subscriber equipment
- (4) A licensee, its agent or reseller shall not penalise or prejudice a subscriber for choosing not to use subscriber equipment offered to him or her by such licensee, its agent or reseller together with the services or product offerings required by the subscriber.
- (5) Any equipment purchased by the subscriber must not be subjected to any network locks, a subscriber must be able to use the equipment independent of where it was purchased or acquired.

Tariffs

6. (1) The tariffs lodged by the licensees with the Authority constitute maximum charges which a licensee, its agent or reseller may levy in respect of its offerings. A licensee, its agent or reseller shall be entitled to offer discounts, to subscribers on such tariffs.

- (2) A licensee, its agent or reseller may not enter into a contract with a subscriber that prohibits discounts on tariffs.

Offences and Penalties

7. (1) Any subscriber who is aggrieved by the failure of a licensee, its agent or reseller to comply with this code of conduct may lodge a complaint with the Authority for investigation, and where appropriate, adjudication by the Complaints and Compliance Committee as envisaged in Sections 17B and 17C of the ICASA Act and for the imposition of a sanction by Council as envisaged in Section 17E of the ICASA Act.
- (2) Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:
- (a) R250 000. 00 (two hundred and fifty thousand rand) for the contravention of regulation 4;
 - (b) R150 000. 00 (one hundred and fifty thousand rand) (for the contravention of regulations 5 and 6(2);
 - (c) R50 000. 00 (fifty thousand rand) for the contravention of all regulations not specified in regulation 7(2) (a) and (b) above.

Date of Commencement

8. Unless otherwise prescribed, these regulations will become effective a month from the date upon which they are published.

ANNEXURE A

EXPLANATORY NOTE: CODE OF CONDUCT ON THE SALE, LEASE, RENTAL OR SUBSIDISATION OF SUBSCRIBER EQUIPMENT PURSUANT TO CHAPTER 12 OF THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005

1. INTRODUCTION

1.1 Purpose

1.1.1 The purpose of this explanatory note is to provide stakeholders with an explanation of the contents of the draft code of conduct on the sale, lease, rental or subsidisation of subscriber equipment pursuant to chapter 12 of the Electronic Communications Act no. 36 of 2005 ("the Act").

1.1.2 Given that:

1.1.2.1 The regulations on Handset Subsidies that were published on the 17th June 2008 under Government Gazette No. 31156 were withdrawn by the Authority in July 2009;

1.1.2.2 The Authority undertook to promulgate draft regulations on the Handset Subsidy for further consultation; and

1.1.2.3 The contents of the draft code of conduct on the sale, lease, rental or subsidisation of subscriber equipment differ from the regulations on Handset subsidies published on the 17th June 2008

this explanatory note seeks to:

(a) Explain certain provisions that are used in the code of conduct;

(b) explain why certain provisions have either been included or omitted with reference to the history of the regulations on handset subsidies;

1.1.3 This explanatory note is not legally binding, nor is it a legal opinion. It is published purely to assist stakeholders and to provide insight into the thinking behind the code of conduct on the sale, lease, rental or subsidisation of subscriber equipment.

1.2 Background

- 1.2.1 In the electronic communications sector the subsidisation of subscriber equipment is used as a strategy to attract customers and to promote market penetration. At the same time the subsidisation of subscriber equipment could be used as a means of lowering the cost of entering the electronic communications sector by new subscribers.
- 1.2.2 The subsidisation of subscriber equipment could also be seen as the reason for the rapid growth in subscriber numbers, especially for mobile communications.
- 1.2.3 On the other hand the subsidisation of subscriber equipment has the tendency of locking subscribers to a particular service provider for the duration of the contractual period. This is because the subscriber has to pay a penalty fee for terminating its contract with its service provider or for switching to another service provider.
- 1.2.4 The contractual lock-in period can also serve as a barrier to entry for new market entrants given that subscribers would be locked-in for the duration of the contract.
- 1.2.5 The code of conduct is intended to prescribe minimum standards to be adhered to by all Licensees, their agents or resellers to the extent that they provide services to the public in terms of a contract concluded with the subscriber
- 1.2.6 The process for prescribing the code of conduct on the sale, lease, rental or subsidisation of subscriber equipments began in May 2005 with the publication of a discussion document on mobile handset subsidies. Interested parties were invited to make representations on the regulation of handset subsidies.
- 1.2.7 To facilitate an orderly enquiry into the matter the Authority compiled a list of 24 pertinent questions in the discussion document to which written and oral submissions had to respond.
- 1.2.8 The Authority's enquiry into handset subsidies was motivated by; amongst

other things, general consumer concerns regarding transparency of costing and billing of handsets.

1.2.9 On the 17th February 2006 the Authority published its findings which were published in Government Gazette no 28516 of 17 February 2006.

1.2.10 The following findings were reached by the Authority:

1.2.10.1 There was lack of transparency regarding the cost of various handsets offered in various packages, which limited the customers' ability to make informed choices;

1.2.10.2 There was a need for consumers to be able to easily compare the value of various options on offer;

1.2.10.3 There was no real choice given to consumers with respect to call charges;

1.2.10.4 Pre-paid call charges were higher than post-paid charges;

1.2.10.5 There was a potential cross subsidization of the post-paid customers by other services;

1.2.10.6 There was limited choice for contract periods;

1.2.10.7 There was no justification to the position that licensees could not provide services in the absence of handset subsidies.

1.2.11 On the 15th June 2006 the Authority published draft regulations on handset subsidies.

1.2.12 On the 17th June 2008 the Authority published final regulations on handset subsidy under Government Gazette No. 31156.

1.2.13 The Hand Set Subsidy regulations were to be effective two months after the date upon which they were published; viz 1st of August 2008.

1.2.14 Owing to various issues raised by the operators on the implementation

process and the pending legal challenge by Vodacom, the Authority decided to withdraw the handset subsidy regulations published on the 17th June 2008.

2. DRAFT CODE OF CONDUCT

2.1 ICASA'S power to make regulations on the sale, lease, rental or subsidisation of subscriber equipments

2.1.1 Section 69 of the Act empowers the Authority to develop different codes of conduct and end user and subscriber service charters to which all licensees and licence exempts must comply.

2.1.2 In this regard section 69(2) of the Act provides that:

"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 prescribed".

2.1.3 Owing to the fact that the code of conduct on the sale, lease, rental or subsidisation of subscriber equipment does not relate to a particular type of service but rather to different types of services offered by all licensees and licence exempts it is fitting to prescribe the code of conduct in terms of section 69(2) of the Act.

2.2 Definitions (regulation 1)

This explanatory note does not explain all the terms that are defined in regulation 1 of the code of conduct but rather those that are necessary. In this regard the following terms are explained:

2.2.1 Subscriber Equipment

Subscriber Equipment do not only relate to mobile handset or equipment that is used for the purpose of receiving electronic communications but also include any terminal equipment such as a 3G data card, laptop, portable computers, fixed line telephones and wireless modems but exclude electronic payment equipment and two way radios.

2.3 Purpose of the code of conduct (regulation 2)

2.3.1 The code of conduct on the sale, lease, rental or subsidisation of subscriber equipment seek to:

2.3.1.1 Prescribe a code of conduct in relation to sale, lease, rental or subsidisation of subscriber equipment and set minimum standards in that regard for end-user and subscriber service charters;

2.3.1.2 Foster transparency with respect to the billing and charges on sale, lease, rental or subsidisation of subscriber equipment;

2.3.1.3 Give customers choice with regard to contract terms; and

2.3.1.4 Protect the rights of customers.

2.4 Application of the code of conduct (clause 3)

2.4.1 The code of conduct does not only relate to persons licenced in terms of chapter 3 of the Act but also relates to their agents and resellers who provide services to the public. This is necessitated by the fact that:

2.4.1.1 The code of conduct also imposes obligations on this category of persons to be adhered to similar to the obligations imposed on licensees.

2.4.1.2 These categories of persons also conclude contracts with customers with respect to subscriber equipment subsidy.

2.4.2 The provisions of the code of conduct should not be construed as providing a relief from the obligation to comply with other regulations prescribed by the Authority relating to consumer issues or related legislations such as the Consumer Protection Act, 68 of 2008.

2.5 Contractual issues (regulation 4)

- 2.5.1 The code of conduct requires that pre-paid and post-paid offerings to sufficiently unbundle all costs associated with the sale, lease, rental or subsidisation of subscriber equipments. This is intended to inform customers about the actual cost of the subscriber equipment, the interest that is charged in respect of the capital cost and the monetary value of the services offered.
- 2.5.2 The code of conduct reinforces the rights of customers for access to information in relation to any contract that they may conclude. This is achieved by requiring the licensee, its agents or reseller to provide customers with various information relating to, amongst other things, price, the term of the contract, billing information, capital cost of the subscriber equipment and the interest charged. This means that licensees, their agents and resellers must advertise and sell their services relating to subscriber equipment in such a way that they clearly explain what is offered and what they are purchasing.
- 2.5.3 The right of access to information also means that all contractual terms should be explained verbally and in writing to all potential customers. Further, small contractual terms and conditions should be in large prints, clear, conspicuous and should also include complete information about the applicable rates.
- 2.5.4 Where services are bundled together the licensee, its agents or reseller is required to provide the customer with the information relating to the price for each of the bundled products and services, the cost associated with those bundled products and services and the remaining installments for each bundled products and services.
- 2.5.5 The Authority is cognisant that regulation 4(3) might be interpreted to mean that licensees, their agents or resellers are only required to offer 2 contractual offerings. This is not the case. Regulation 4(3) should be interpreted to mean that end users would be given an opportunity to choose from various contractual periods.

2.6 Freedom to purchase subscriber equipment (regulation 5)

Under the code of conduct all contractual terms and conditions should not its agents or reseller with whom it did not conclude a contract with. This is intended to allow customers to use subscriber equipment separately from the contract entered into with the licensee, its agent or reseller.

2.7 Contraventions and penalties (regulation 7)

2.6.2 The penalties imposed will be relative to the offence committed and it is anticipated that in relation to the sale, lease, rental or subsidisation of subscriber equipment offences will in the main be for non-compliance by a licensee, its agent or reseller with the provisions of the code of conduct or an order of the Authority or that of the Complaints and Compliance Committee.

3 CONCLUSION

The Authority has published this explanatory note along with the draft code of conduct on the sale, lease, rental or subsidisation of subscriber equipments in the hope that it will provide interested parties with a context for the present drafts.
