

26 August 2015

Independent Communications Authority of South Africa

Attention: Mr Godfree Maulana

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Dear Sir

WAPA RESPONSES TO THE INFORMAL QUESTIONNAIRE ON REALE AND RESELLERS

1. WAPA thanks the Authority for the opportunity to comment on issues related to resale and trusts that the below will be of assistance.
2. The RIA which the Authority intends to undertake requires in the first instance a clear, shared understanding of many of the service licensing framework created by Chapter 3 of the ECA. This is long overdue and the opportunity should be grasped. A discussion of what constitutes resale of licensed services must include a clear delineation of what licensed services are.
3. WAPA requests that the Authority notes that the responses below are intended to be of an informal nature and are not based on a full and proper consultation with WAPA's membership. As such WAPA reserves the right to make additional submissions during any ensuing process.
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.
6. The general interests of WAPA members lie in favour of a vibrant reseller market subject only to such light-touch regulation as is required to ensure consumer protection. WAPA's preference is for the Authority to continue to regulate resellers of ECS indirectly, i.e. through imposing obligations on licensees which must be observed in the resale of ECS.

OPENING REMARKS

7. We wish to raise the following at the outset:
 - 7.1. A question of capacity: it is important to recognise that a licensee under Chapter 3 does not always act in the capacity of licensee. In the same way as a licensee is not acting as such when it sells subscriber premises equipment, it is possible for a licensee to act in the capacity of a licence-exempt reseller (and when doing so it will not be providing licensed services).
 - 7.2. The definitions and the relationships at play are complex and correct use of terminology is critical but more often than not lacking.

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7.3. We find the definition of reseller itself to be thoroughly unhelpful in the absence of a clear understanding of the licensing framework. As it stands this definition is extremely wide and appears to cover a large range of activities.

7.4. ICASA's regulation does not exist in a vacuum and there are a number of other laws and regulations which apply to consumer protection in the provision of communications services. These should be taken into account during the proposed RIA.

A. UNDERSTANDING RESELLER PROVISION

1. *To your understanding could resellers operate without a licence? If the response is yes, kindly provide the provisions which are applicable either from the ECA, ICASA Act or prescribed regulations. If the response is No kindly provide the reason/s.*

- This is by no means a straightforward question.
- The starting point is the definition of "licence exemption" in the ECA which requires that a licence exemption be granted by the Authority:

"licence exemption" means an exemption granted by the Authority in terms of section 6 of this Act;

- Section 6 sets out the legislative position regarding licence exemptions:

6. Licence exemption

(1) Subject to subsection (2), the Authority may prescribe the -

- (a) type of electronic communications services that may be provided;*
- (b) type of electronic communications networks that may be operated;*
- (c) type of electronic communications network services that may be provided; and*
- (d) radio frequency spectrum that may be used, without a licence.*

(2) The electronic communications services, electronic communications networks, electronic communications network services and radio frequency spectrum contemplated in subsection (1) may include, but are not limited to -

- (a) electronic communications services provided on a not-for-profit basis;*
- (b) electronic communications services that are provided by resellers;*
- (c) private electronic communications networks used principally for or integrally related to the internal operations of the network owner. Except that where the private electronic communications networks' additional capacity is resold, the Authority may prescribe terms and conditions for such resale;*
- (d) small electronic communications networks such as local area networks;*
- (e) uses of the radio frequency spectrum that were permitted without a licence prior to the coming into force of this Act and uses of the radio frequency spectrum that the Authority finds would not cause harmful interference with radio frequency spectrum licensees such as low power uses; and*
- (f) such other services considered to be exempted, as may be prescribed by the Authority.*

(3) Any regulations prescribed by the Authority in terms of this section may contain terms and conditions applicable to the exempted electronic communications services, electronic communications networks, electronic communications network services and radio frequency spectrum use and declare contravention of the regulation an offence, subject to section 17H of the ICASA Act.

- Note that the instances provided in subsection 6(2) are not exhaustive and the Authority has the discretion to identify and regulate the exemption of other ECS¹, ECNs and ECNS to be exempted. Further, the Authority can under subsection 6(3) impose terms and conditions applicable to exempted ECS, ECNs and ECNS and make failure to comply therewith an offence under the ICASA Act.
- It follows that the Authority is directly empowered to regulate exempted services.
- The Authority has prescribed categories of ECNS, ECS and ECNs in the Licence Exemption Regulations 2010, specifically regulations 3 and 4 thereof.

2. LICENCE EXEMPTION IN GENERAL

ECS, ECN and ECNS that may be provided or operated in terms of a licence exemption are as set out in regulation 3 and 4 herein.

3. ELECTRONIC COMMUNICATIONS SERVICE

(1) A person who provides ECS on a non-profit basis is licence exempt and may include, but not limited to:

(a) a non profit organization registered in terms of the Non-Profit Organizations Act, 1997 (Act No.71 of 1997);

(b) a company registered in terms of section 21 of the Companies Act, 1973 (Act No.61 of 1973);

(c) a non-profit organization established in terms of any other Act of Parliament; or

(d) an entity that provides ECS to the public for free.

(2) A Reseller that provides ECS duly obtained from a licensee licensed in terms of Chapter 3 of the Act or a licence exempt entity is not required to hold an ECS licence.

(3) A person that provides an Ancillary service is licence exempt.

4. ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS NETWORK SERVICES

(1) A small electronic communications network is licence exempt.

(2) A small electronic communications network must use frequencies which are licence exempt in accordance with the radio frequency spectrum licence exemption regulations published by the

¹ “**electronic communications service**” means any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services;

Authority in terms of section 6 read with section 31(6) and technical parameters falling within the limits prescribed therein.

(3) A PECN in terms of section 6(2)(c) of the Act is licence exempt.

(4) Where a PECN resells, leases or otherwise makes available any spare capacity on its network to a third party, such resale, lease or other provisioning of spare capacity is subject to:

(a) using a cost recovery pricing model to be prescribed by the Authority; and

(b) The regulations 5 to 11 of these regulations.

- The Authority has elected to specify exemptions relating to ECS, ECNs and ECNS. While there are challenges with exemptions for ECNs and ECNS, the focus of the current exercise is on exemptions for resale.
- Resale of ECS
 - From a legal interpretation perspective there is a difficulty with the wording used in clause 3 of the Licence Exemption Regulations 2010, which creates doubt as to whether resale of ECS is licence exempt or whether it simply does not require a licence, i.e. it does not require the granting of a licence exemption. This flows from the difference in the wording of sub-clauses (1) and (3) – *A person who provides.....is licence exempt* – as against that used in sub-clause (2) with regard to resale of ECS – *A Reseller who provides.....is not required to hold an ECS licence.*
 - Where the Authority asks “*could resellers operate without a licence?*” the answer is unclear but there appears to be a strong argument that they can (a) operate without a licence in accordance with the explicitly wording of subclause 3(2) and (b) do not require a specific licence exemption. A consequence of resellers of ECS not being explicitly stated to be licence-exempt is that a further question is raised as to whether provisions in the ECA and the Regulations which relate specifically to licence-exempt persons apply to resellers of ECS.
- Resale of ECNS:
 - It does not appear that ECNS may be resold without the reseller holding at least a class ECS licence. This flows from the definition of ECNS in section 1 of the ECA (our emphasis):

*“**electronic communications network service**” means a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise -*

 - (a) for that person’s own use for the provision of an electronic communications service or broadcasting service;*
 - (b) to another person for that other person’s use in the provision of an electronic communications service or broadcasting service; or*
 - (c) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by this Act,*

*and “**network services**” is construed accordingly;*
 - The definition of ECNS explicitly contemplates resale of ECNS only to another licensee (noting that the language used – *or any other service contemplated by this Act* – is particularly vague and difficult to interpret).

- Note that sub-paragraph (b) refers to provision of ECNS directly to a subscriber, i.e. a retail service. An example would be Telkom leasing a telephone or ADSL line to a subscriber (as opposed to the ECS provided over that line such as voice and Internet services).
- The type of transaction contemplated by resale of ECNS needs to be understood:
 - The provision of ECNS is the provision of connectivity services (which can also loosely be referred to as “layer 2 services”): the ECNS licensee is authorised by its licence to activate an electronic communications network so that it is able to carry communications/information from one point to another on that network.
 - The ECNS licensee may then use the ECNS it provides to carry its own ECS or it may provide the ECNS to another ECS licensee for the carriage of its ECS. This is not resale of ECNS: it is the provision of ECNS to an ECS licensee (i.e. the act of the making a network available to yourself or to a third party is the licensable act).
 - Resale of ECNS occurs where the ECNS licensee contracts with a third party licensee for the resale of the ECNS to other ECS licensees, i.e. the reseller is providing the same class of service as the ECNS licensee whose ECNS it is reselling.
 - Note: where an entity provides “layer 1 services” comprising passive electronic communications facilities such as dark fibre or communications towers, and makes these available for the provision of ECNS, the party activating the passive facilities will require an ECNS licence. This is not resale.

2. *Is there any provision in the ECA, ICASA Act or regulations which entities that want to operate as a reseller must/could follow in order to be recognised as a reseller?*

- Form M to the Class Licensing Process and Procedure Regulations sets out the application form to be used in applying for a licence exemption.
- The discussion above indicates that the position regarding who is required to apply for an exemption in respect of what activities is confusing: there are no doubt a number of entities which may fall within the definition of “resale” which are unaware of the existence of ICASA or any requirement to apply for a licence exemption.

3. *Are there any restrictions as to what services can be provided by resellers in the market [Market refers to the electronic communications services and electronic communications network service.]? Or kindly provide what services can be provided by resellers in the market as per your understanding?*

- As noted above, there appears to be a restriction on the resale of ECNS without a service licence (although see below with regard to the different position presented by the definition of “wholesale”).

4. *Is there a limitation as to whom can be a reseller in the market? Kindly provide reasons.*

- Limitations are imposed through the requirements of certain licensees that parties wishing to enter into wholesale relationships with them must have at least an ECS licence.
- We understand that this position is itself a function of uncertainties in the interpretation of the licensing and licence-exempt framework, i.e. licensees choose to adopt such a position on the

basis either of restricting access to their wholesale offerings or because they have adopted a conservative interpretation of the law given the confusion surrounding it.

B. RESALE MARKET

1. *In your view how many resellers are in the South African market?*

- Given the difficulties of defining what falls within the term “reseller” it is impossible to provide a useful estimate.
- Note that the reseller market does not include those acting under a licence exemption in respect of the provision of “Ancillary services”, defined as:

“Ancillary service” means a retail service or bundle of retail services which do not amount to an Electronic Communications Service and includes necessary but incidental elements of ECS, where such ECS elements do not constitute the major purpose, utility or value of the service, including but not limited to, tracking, alarm and similar services;

2. *At which level of the market should there be resellers? Should it only be at the retail level i.e. directly to customers or should it be at all levels of the market?*

- This should be determined by the market, i.e. if there is a market for resale then it will establish itself. It is difficult to imagine any sound reasons for limiting existing resale of ECNS on a wholesale basis.
- This question requires an analysis of the terms “wholesale”, “retail”, “end-user” and “subscriber” as defined in section 1:
 - The term “**subscriber**”² refers to a person using or receiving a retail service of a licensee for a fee or the retail services of a licence-exempt provider. This term corresponds most closely with the term “consumer”.
 - An “**end-user**” refers to “subscribers” as well as someone who uses “the services of a licensed service” or uses “a service pursuant to a licence exemption, referred to in Chapter 3”³. This term therefore appears to include licensees obtaining a wholesale service as well as “subscribers” obtaining a retail service.
 - A “**wholesale**”⁴ service involves a licensee making available ECNS or ECS to another licensee or a licence-exempt person. Our understanding is that a wholesale relationship is one in which the customer is a “subscriber” and further that there may be multiple wholesale relationships in the service delivery chain.

² “**subscriber**” means a person who lawfully accesses, uses or receives a retail service of a licensee referred to in Chapter 3 for a fee or the retail services of a person providing a service pursuant to a licence exemption;

³ “**end-user**” means a subscriber and persons who use the services of a licensed service, or use a service pursuant to a licence exemption, referred to in Chapter 3;

⁴ “**wholesale**” means the sale, lease or otherwise making available an electronic communications network service or an electronic communications service by an electronic communications network service licensee or an electronic communications service licensee, to another licensee or person providing a service pursuant to a licence exemption.

- A “**retail**”⁵ service involves making available services offered by licensees to “subscribers”. Our understanding is that a retail service is the final service to a consumer and further that this service cannot be resold. Notwithstanding this there is no explicit reference in this definition to resale so it is unclear whether this includes licence-exempt retail services (it should).
- Within this understanding, resale can be seen as the relationship between a subscriber and an intermediary which is not acting in the capacity of licensee.
- Note that there appears to be a conflict between the definition of ECNS and the definition of wholesale:
 - The definition of “wholesale” contemplates resale of ECNS to a licensee and a person providing a service pursuant to a licence exemption.
 - The definition of ECNS restricts resale of ECNS to resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by the Act.

3. What types of entities are currently in the South African reseller market?

Note that the list below is not an exhaustive list, but merely an indication of the wide ambit of resellers;

- IPC ADSL resellers such as Internet Solutions, MWEB, Cybersmart etc
- Non-IPC ADSL resellers such as Web Africa and most WISPs etc
- Resellers of terrestrial wireless services
- Resellers of broadband and enterprise VSAT services
- Resellers of mobile contracts such as which include a long list of retailers and other service providers that utilise the mobile data connection as an alternative local access circuit
- Mobile virtual network operators
- ECS licensees that procure bandwidth through wholesale agreements with other ECS licensees
- ECS licensees that procure and resell local access circuits installed at their subscribers' premises
- Wi-Fi hotspots

4. What type of reseller services [Services refers to electronic communications services and electronic communications network service] are currently being sold in this market?

Note that the list below is not an exhaustive list, but merely an indication of the wide ambit of resellers;

- Resale of ECNS
 - local access circuits
- Resale of ECS
 - ADSL through Telkom
 - Mobile data services (through, e.g. Afrihost, Axxess and MWEB)
 - MVNOs reselling minutes of use (voice) and megabytes (data)
 - VOIP minutes

⁵ “**retail**” means the sale, lease or otherwise making available of services offered by licensees to subscribers;



- Internet access
- Virtual Private Network Services

5. *What type of services must/should in your opinion, should be part of the reseller market?*

- Any service which does not fall within the definition of a licensed service, and which relies upon a licensed service: which of course raises the requirement to clearly define what services are to be regarded as ECNS, ECS and BS.

6. *Should services in the reseller market be distinguished from those not in the reseller market and how? In answering this question kindly refer to section 1, “reseller” definition of the ECA.*

- The Authority should avoid over-regulation. The model of imposing obligations on licensees and requiring such licensees to devolve such obligations to its resellers (where applicable) works. As such the distinction between the provision of licensed services and the resale of licensed services should be retained without further regulation being imposed on the latter.
- This “pass-through” principle has already been recognised in the Consumer Protection Act where all the parties involved in the value chain are jointly and severally liable to the consumer for defective goods

C. REGULATORY INTERVENTIONS

1. *If the Authority were to intervene in the reseller market what and where should the intervention be?*

- It does not appear that there is a need to intervene in the reseller market other than to create a shared and clear understanding of the service licensing framework and the licence exemption framework.
- Creating clarity on the fundamental legal concepts at play will also assist the Authority in its efforts to calculate and invoice for annual licence fees and contributions to the Universal Service and Access Fund (USAF).

2. *What are the current challenges that resellers commonly have within the reseller market?*

- Due to the confusion around the service licensing and licence-exemption frameworks it appears that some of the incumbent operators are not willing to recognise a licence-exemption for resale as a valid basis for entering into a wholesale relationship with the holder of such exemption.
- There can be issues of disclosure of things like contention ratios and Fair Use Policies from upstream providers. There is no common standard around minimum service provisioning and disclosure to resellers and downstream buyers

3. *Given that resellers will be competing in the same space as licence holders should they (resellers) be exempted from paying general licence fees and making contributions to USAF?*

- The creation of a reseller network by a licensee represents a decision by that licensee to deepen its competitive efforts in a market by creating more points of access to a licensed service and to target niche markets which it currently does not serve. This should be seen as an extension of the competition which takes place between licensees – i.e. they extend their competition in licensed services through reseller programmes.
- We do not therefore believe that it is accurate or helpful to state that resellers compete with licensees: where they do so this is entirely at the choice and the discretion of a licensee.
- Furthermore the manner in which the calculation of annual licence fees is currently undertaken in accordance with the General Licence Fees Regulations 2013 – based on a straight application of a prescribed percentage against revenue from licensed services – means that any extension to licence-exempt resellers would result in even further double taxation (an issue which has been repeatedly raised with the Authority).

4. *Given that resellers do not own a network or a product directly, if a customer has a complaint about a specific product made available by the reseller who should be held accountable? Is it the licence holder or reseller and why?*

- The reseller has a direct retail relationship with the customer and the agreement entered into between the reseller and the customer governs the relationship between them, including insofar as it relates to complaints about a product made available by the reseller.
- The licensee has a direct relationship with the Authority as the entity which issued the licence: the licensee is required under its licence and in terms of the ECA to comply with all applicable regulation, including that relating to complaints made by customers about licensed services provided by the licensee.
- There are two potential scenarios:
 - The reseller provides retail services as the agent of the licensee and has disclosed that the licensee is its principal: under this scenario the customer will have a direct contractual agreement with the licensee and can enforce it directly against the licensee, irrespective that it has entered into a contract with the reseller (acting as agent for the licensee).
 - The reseller provides retail services in accordance with the definition of the term “reseller” but as an independent entity and not as an agent of the licensee: under this scenario the customer has a contractual relationship only with the reseller and can only enforce rights against the reseller.
- In the second scenario the Authority should bear in mind that:
 - The licensee grants an authority to the reseller to resell the licensee’s products. This authority will generally be captured in a commercial agreement which will set out the terms and conditions applicable to the resale of the licensee’s products. These terms and conditions will include the delegation of obligations imposed on the licensee by the Authority’s regulation. For example: obligations imposed on an ECS licensee under the

Code of Conduct Regulations to have display their Code of Conduct must be passed on to the licensee's reseller to ensure that this obligation is complied with.

- The reseller will generally – but not always - sell its products on a back-to-back basis, so where a customer complains about a product the reseller will have rights in terms of the commercial agreement entered into with the upstream licensee to have that complaint resolved. However this may not be done due to a lack of capacity or expertise on the part of the reseller.
- We also wish to refer to the recently promulgated Consumer Goods and Services Code under the Consumer Protection Act⁶, with particular reference to section 4 thereof (our emphasis):

4 APPLICATION, SCOPE AND TYPE OF PARTICIPANT

4.1 The Code applies to all Participants, unless they are regulated elsewhere by other public regulation, a Code prescribed by the Minister in terms of section 82 of the CPA and/or where a complaint falls within the jurisdiction of an Ombud with Jurisdiction, or an Industry Ombud accredited in terms of section 82 (6) of the CPA.

4.2 It is mandatory for all Participants above to comply with the provisions of this Code, to register with the CGSO in accordance with the procedures provided on the CGS() website from time-to-time, and contribute towards the funding of the CGS() in accordance with the funding model as set out in clause 6.2 below.

4.3 This Code shall not be construed as to diminish a Consumers rights under the CPA or any other law but it shall enhance the Consumers rights to be equivalent to or better than the provisions of the CPA.

4.4 This Code excludes: transactions that are not covered by the CPA and/or that are governed by other public regulation; the automotive industry, Electronic Communication Service as defined in section 1 of the Electronic Communications Act, 2005 (Act No. 36 of 2005) and transactions with organs of state or financial institutions.

- It is noteworthy that sub-clause 4.4. does not explicitly exclude ECNS – although such transactions will generally not fall under the CPA - nor does it explicitly exclude resale of ECS.
- It is therefore open to argument whether a degree of consumer protection is imported through this Code onto resellers of ECS.
- Chapter VI of the Electronic Communications and Transaction Act 25 of 2002 set out consumer protection applicable to the provision of services where the service agreement is entered into online.
- The Memorandum of Understanding (MoU) recently entered into between the Authority and the National Consumer Commission should also be borne in mind once the responsibilities of the parties under that MoU are fully defined.

⁶ <http://www.cgso.org.za/wp-content/uploads/2015/05/CODE-2015.pdf>, Regulation 271, G 38637, 30 March 2015



We trust that the above will prove to be of assistance. 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.

Regards

WAPA Regulatory Advisors