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GENERAL NOTICE

NOTICE 2276 OF 2004

FINDINGS AND CONCLUSIONS IN TERMS OF SECTION 27 OF THE TELECOMMUNICATIONS ACT (NO. 103 OF 1996) ON THE ENQUIRY INTO THE DEVELOPMENT OF COMMERCIAL PUBLIC PAY-PHONE STRATEGY:

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1. Introduction

1.1. On the 10th of May 2004, the Independent Communications Authority of South Africa the Authority published a discussion document under Notice number 798 of 2004 in Government Gazette number 25594, requesting representations from interested parties on the provision of commercial public payphones.

1.2. The Authority received 10 written representations. Representations were made by Cell C, Vodacom, MTN, Telkom, Autopage, SmartCom, TOFO, Logitel, and COPASA and Psitek.

1.3. The Authority's Council appointed a special committee in terms of Section 17 of the ICASA Act number 13 of 2000 to conduct public hearings which were held on the 22nd of July 2004. Nine (9) respondents requested the opportunity to make oral representations. Oral representations were made by Cell C, Vodacom, MTN, Telkom, Autopage, SmartCom, TOFO, Psitek, and COPASA.

2 Legislative Framework

2.1 The Telecommunications Act, Act 103 of 1996 as Amended, ('the Act') empowers the Independent Communications Authority of South Africa (ICASA), hereinafter referred to as "the Authority", the power to conduct an enquiry into any matter relevant to *'the achievement of the objects mentioned in section 2*[1].

Section 2[2], lists amongst others, the following as the objects of the Act:

(a) promote the universal and affordable provision of telecommunication services;
(f) promote the development of telecommunication services which are responsive to the needs of users and consumers;
(j) ensure fair competition within the telecommunications industry
(k) promote the stability of the telecommunications industry;
(m) protect the interests of telecommunications users and consumers...

[1] Section 27(1) (a) of Telecommunications Act
[2] Section 2 of Telecommunications Act

The enquiry into 'Commercial Public Payphone' was instituted as a result of complaints by members of the public and the outcomes of the monitoring activities by the Authority of the business activities in the 'Commercial Public Payphone' industry.

The Authority was also inundated with complaints about the costs of telecommunication service offered by the operators of the said business and from the members of the public who had ventured into this line of business. With regard to the members of the public who had ventured into this business, the complaint focused mostly was about how they have been mistreated by the distributors of this service.

The said conduct and or complaint(s), have had the effect of bringing the matter within the ambit of the Authority's mandate read in conjunction with the provisions of section 2 of the Act.

2.2 The Act does not define the term 'Public Pay phone' or public pay-telephone services. However, this does not mean that there is a lacuna, for the definition of public pay telephone is provided for in the licence issued to Telkom SA Limited (Notice 768 of 1997) ('Telkom licence') where in a public pay telecommunication service is defined as:-

> *apparatus (including any kiosk, booth, acoustic hood, shelter or similar structure in which that apparatus may be installed) at which Public Pay telephone Services are made available to the public or segments of the public, and which contains a device to accept payment for those services.*

We make the observation that, the definition as encapsulated in the Telkom licence, is in terms of public switched telecommunication network (PSTN) and not applicable to mobile cellular telecommunication network (MCTN). Further, in terms of section 37(3) of the Act, *the MCTS is not required to hold a separate licence contemplated in section 39 of Telecommunications Act to enable it to provide the mobile cellular telecommunication service in question.*

Section 39(1)(a) provides that:

> *No persons other than Telkom shall be granted a licence to provide a local access telecommunication service until after 7 May 2002.*

The Authority has noted the need to have a common understanding of what a public pay phone is and without having any restriction on the technology used to provide the service.

The MCTS at the public hearing[3] argued that have not directly ventured into the provision public payphone services as contemplated in section 37(3) of the Act, and that the Community Service Telephones are not a form of public pay telephone.

3. The nature of the business practice:

"Commercial Public payphones" are modified GSM modules built into a handset adapted to the cellular Networks and configured in a preset tariff mode for use by members of the public. They are operated by entrepreneurs (herein referred to as Retail Operators), who are supplied with a public phone device and SIM card, for connectivity to the networks of licensed mobile operators, by parties who are referred to as Distributors. In most cases, the retail Operators are employed by Distributors.

The Distributors in turn enter into agreements with authorised Service Providers of the licensed mobile operators to provide them with telecommunications packages (airtime) and buy equipment from manufactures. They then re-package the airtime and sell it together with the phone device to Retail Operators referred to above.

It was established that these packages at the point of approval by the Authority have the following benefits:-

- A free phone;
- Free minutes or seconds depending on the package;
- Off-Peak rates as per approved plan.

In the case of whereby a Service Provider cannot give a public payphone terminal for use by the Retail Operator, they give cash equal to the cost of the free phone. However, it was established that Distributors do not pass these benefits to the Retail Operators. According to most advertisements of this service, it is indicated that one has to pay amounts varying between R2000 and R6000 for the hardware and free minutes. The free phone benefit that the Distributor received from the Service Provider is not passed on to the Retail Operator. Many Retail Operators who have lodged complaints with the Authority have indicated that the payphone devise is not theirs until after twenty four months.

[3] Hearing referred to in 1.3 of this document.

The Retail Operator also has to bear the following costs:-

- Monthly subscription fee paid to the distributor;
- Purchasing minimum amount of airtime from the distributor whether the allocation is used up or not;
- Whether the previous allocation is used or not;
- Entering into a 24-month contract with the distributor.

The Distributor on the other hand has to bear the following costs from the Service Provider:

- Entering into a 24-month contract with the Service Provider and bearing the risk of that contract – retail operator may renege on the contract but the distributor still has to pay Service Provider for the contract

- Paying consolidated bill for all individual retail operators in respect of airtime used in connection with any SIM card supplied by the Service Providers.

The Authority will concede that the situation is not always as simplistic as laid out above. There is little certainty as to the number of permutations of relationships that exist herein, this because some authorised Service Providers of MCTS operators also operate as Distributors at the same time, whereby they sell not only airtime, but sell public phone devises as well, directly to the Retail Operator. Furthermore, some Distributors do not buy the devise from outside companies but also manufacture their own equipment, in some instances.

4. The Agency Relationship:

The licence issued to MCTS operators, contain the condition that MCTS operators may appoint third parties (Service Providers/Agents/Contractors) to provide telecommunications service on their behalf. The licensees are required to enforce equivalent license requirements on their agents, and are held liable for any failure by such third parties to provide telecommunications service in accordance with their license conditions.

The Authority wanted to establish whether Commercial Public Payphone operators provide this service on behalf of the mobile operators. MTN[4] and

[4] Page 61 of the Transcript

Vodacom argued that they do not have any relationship with Commercial Public Payphone Distributors and Retail Operators beyond the standard retail customer relationship with Service Providers. The MCTS operators define the service as follows:-

Thus[4a], VODACOM does not have any obligation or responsibility to any other person or customer with whom it does not have a contract or retail customer relationship. We further confirm that no contract or customer relationship exist between VODACOM or its service providers and the commercial public payphone customers. VODACOM service, strongly submit that the commercial public payphone service is not being provided under the license of the mobile operator. Therefore, VODACOM is not responsible for any acts or omissions by the distributors or retail operators nor to ensure compliance with the Act or any regulations or guidelines which may be promulgated by ICASA in terms of enabling legislation with regard to the commercial public payphone services operated by such retail operators.

Licensees argued that they cannot discriminate in respect of service provision and the same goes for the Distributors. They say that they are selling airtime as they are licensed to do so and cannot monitor what the Distributors do with such airtime once it is in their hands. They therefore argued that Retail Operators and Distributors of Commercial Public Payphones are not Contractors or Franchisees or Service Providers or Operators of the service provided by licensed operators.

They also argued that the relationship between Distributors and Retail Operators falls within the domain of Commercial Contract Law, which the Authority has no jurisdiction in and therefore cannot regulate.

Cell C argued that while it is extremely onerous for licensees to validate that every client that purchase a corporate airtime package will use it expressly for the intended use, it does not condone this practice and will act to protect its license should this come to its attention. Its overall stance was that the relationship amongst parties in the value chain must be contractually determined.

Telkom[5] argued that while the relationship between and amongst involved parties is not very clear, it does not mean that the roles and responsibilities cannot be clearly assigned to each of them. They argued categorically that Distributors of Commercial Public Payphone service should be regarded as a category of Service Providers of mobile cellular telecommunications service, and their relationship should therefore be guided in the same manner as the relationship between Service Providers and MCTS license.

[4a] Page 62 of the Transcript
[5] Page 282 of the Transcript

While all the Distributors of Commercial Public Payphone service argued that MCTSs do not have any involvement in this value chain, they see themselves as the most vulnerable link in the chain since they stand as guarantors to the Service Providers (and ultimately to the MCTS licensees) for honouring the airtime contracts that they sell to Retail Operators who have poor credit ratings and who can easily abscond from the agreement after committing themselves. They therefore argued that while the Authority does not have to license and monitor their operations, it must set an appropriate forum that will protect their rights and therefore the interests of the practice as a whole.

5. The role which the Regulator should take in the value chain:

This area of concern focused specifically on the question of whether the Authority should regulate this practice or not. The questions were raised in this context are as follows:-

a) Should the Authority have any role on the contractual agreements between Service Providers and Distributors:
b) Should the Authority have any role to play in the contractual relationships between Distributors and Retail Operators
c) Should the Retail Operators be registered with the Authority
d) Should the Authority play any role in the After-Sales Service Guarantees for the benefit of the Retail Operators and

e) Should the Authority should put any restrictions on the operational radius of the Retail Operators

We shall now address each issue separately.

a) The role of the Authority in the contracts between Service Providers and Distributors:

The role of the Authority regarding the contracts between network operators/licensees and their authorised Service Providers in the context of providing MCTS is beyond question. The contractual relationships that are of concern are those between Service Providers and Distributors, and those between Distributors and Retail Operators.

MTN and Vodacom[6] argued that the contractual relationship between the Service Providers and the Distributors is a straightforward general business agreement between the seller and the buyer of airtime. Their role is to sell airtime packages indiscriminately in terms of the licenses, and they are doing exactly that. They (Service Providers) therefore cannot be held accountable for what Distributors do with the airtime packages they purchase.

[6] Pages 168 and 62 of the Transcript respectively.

All the distributors argued that on-selling airtime is an entrepreneurial innovation and a harmless business practice. They have identified a market niche that could not be satisfied by the available telecommunications service packages and are simply exploring it. The Authority cannot therefore have any role in the contracts they sign between themselves and the Service Providers and those they have between themselves and the Retail Operators.

Cell C[7] argued that the fundamental position is that the business practice as it is; is illegal. They pointed out that while it has been noted that Retail Operators are being unfairly treated by the Distributors, and while ICASA must encourage entrepreneurship within the industry, it must do so within the parameters of the Act. That is, the Authority must first legalise the illegal practice before becoming involved in its operational issues.

Telkom[8] argued that the obvious exploitation of Retail Operators necessitates regulation of this value chain. They argue that the Distributors should be given the same status as the authorised Service Providers and have contracts with Service Providers (and/or network operators). The specimens of which shall be lodged with the Authority.

b) <u>The role of the Authority in the contracts between Distributors and Retail Operators:</u>

MTN[9] argued that it would be appreciable for the two parties to have formal contracts so that the Authority is not inundated with a large number of complaints from Retail Operators, but such a relationship falls outside ICASA's jurisdiction in the domain of Commercial Contract law. Secondly, mobile operators argue that they cannot be held responsible for monitoring such relationships since they operate independent of their license conditions. Thirdly, should ICASA have authority in this practice, it will not be able to monitor these contracts due to the large number of operators in the industry and the informal nature of the practice. The MCTS's argue that wanting to put onerous terms and conditions of contract might hinder development of SMMEs and recommend that the matter should be left to competition forces.

Telkom[10] suggested that the contractual relationship between the Distributors and the Retail Operators can best be addressed by a Code of Practice that should be enforced by the Licensees, by way of their respective agreements with the Distributors (who are in this context, elevated to level of Service Providers).

[7] Page 147 of the Transcript.
[8] Page 283 of the Transcript.
[9] Page 168 of the Transcript.
[10] Page 281 of the Transcript.

All the Distributors were of the view that an independent association of Distributors should be established and with the cooperation of the Authority, establish an industry Code of Practice that would guide the behaviour of signatories. This Code would be enforceable on all members of the association. Punitive measures would be met out against offenders.

c) The role of the Authority on whether the Retail Operators should be registered:

MTN and Vodacom[11] argued that since the Authority has no jurisdiction on this practice, registration would amount to some form of regulation and in anyway impossible to implement. They argued that firstly, the market is highly informal and mobile and the Authority would therefore not be able to regulate it. Secondly, registration would only be applicable to new entrants since it cannot be applied retrospectively to existing operators. Vodacom even suggested that this role is best left to the local municipalities who can issue hawkers license.

Telkom[12] maintained that once the practice is regulated, Retail Operators should remain the responsibility of network operators via Distributors and Service Providers.

COPASA[13] suggested that it would be a much more feasible approach to register with the Authority, the Distributor and not the Retail Operator. They suggested that Distributors should keep a register of their Retail Operators and issue them with identification cards/licenses, so as to link them to their respective Distributors, for coordination purposes.

d) The role of the Authority regarding After-Sales Service for the benefit of the Retail Operator:

MTN and Vodacom [14]argued that service levels associated on the provision of terminal equipment are a commercial matter that is best served by the principle of contractual freedom. While agreeing with this principle in broad terms, Telkom argued that this should not cause the Authority to abrogate its responsibility to ensure compliance of telecommunications equipment to applicable standards.

All the parties were in favour of the Authority playing an active role in ensuring compliance to applicable standards, in terms of powers vested on it by Section 54(1) of the Act.

[11] Pages 167 and 67of the Transcript respectively.
[12] Page 281 of the Transcript.
[13] Page 244 of the Transcript.
[14] Pages 169 and 60 of the Transcript respectively.

e) The role of the Authority regarding setting restrictions on the radius of operation by Retail Operators:

All the parties that sent written submissions and that made oral presentations were of the view that it is totally impracticable to put restrictions on the radius of operation for the Retail Operators and that it should be left to the market forces to determine how many phones can be profitably supported in a particular radius.

Telkom said that notwithstanding the above, the provision of Commercial Public Payphone service should have regard to published roll-out plans and obligations for the provision of the similar service by the licensed operators. Telkom is of the view that while we should not restrict the number of phones per radius, there is a need to regulate their geographical placement so that they do not operate in areas designated for obligatory public payphone provision by licensees such as Telkom, SNO and the USALs.

6. Consumer Protection Issues:

The following five issues of consumer concern were canvassed in both the oral and written submissions of the participants in the process. These are the following;

- Misleading Advertising
- Code of Practice
- SIM Locking
- Access to Emergency Services
- Mode of Payment:

a. Misleading Advertising:

It was noted in the discussion document that the Commercial Public Payphone Distributors and Retail Operators use the corporate logos of MCTS licensees to advertise their service. In response to this, MTN and Vodacom[15] submitted that laws regarding misleading advertising already exist, that the Advertising Standards Authority is there to deal with such issues and the Authority has no jurisdiction over this matter. They further argued that it is logical to expect the MCTS operator to take appropriate action against anyone tempering with their intellectual property rights.

[15] Page 71 of the Transcript.

It was also found that they advertise their tariff rates in a manner that has a potential to mislead the public into thinking that their rates are cheaper than those of licensed operators.

MTN and Vodacom [16] dismissed this issue by way of an example that since the roll-out of Cell C's CSTs in urban areas; most of the Commercial Public Payphone Retail Operators have gone under, because people have been able to notice the difference in rates. They argued that this shows that consumers have the ability to critically interpret tariff advertising, even when the call duration is written as units rather than in chronological terms.

All the Distributors of Commercial Public Payphones submitted that they are against this practice since they are illegal. They proposed that the Authority allow for the establishment of an industry association that will deal with these malpractices and punish offenders.

Telkom and Cell C [17]argued that while they support cooperation between the Authority and the Advertising Standards Authority in dealing with this problem, cognizance should be taken of the vulnerability of the target market of this practice and increased consumer protection should be established, once the sector is brought under regulation.

b. Code of Practice:

All Distributors of Commercial Public Payphones and Telkom[18] and Cell C argued in favour of an establishment of the Code of Practice by the role players in the sector that would be approved by the Authority and be implemented by respective Service Providers.

MTN and Vodacom[19] argued that ICASA has no jurisdiction over this market; that it is an unregulated market and that market forces should therefore prevail. They were of the view that a Code of Practice would amount to some form of regulation.

c. SIM Locking:

While Vodacom declined to comment, MTN, Vodacom and all the Distributors were in consensus that SIM locking is an acceptable business practice that ensures suppliers of service recoup the subsidies that they used to provide such service. They argue that service providers (and

[16] Pages 175 and 71 of the Transcript respectively.
[17] Pages 280 and 147 of the Transcript respectively.
[18] Page 282 of the Transcript.
[19] Pages 167 and 67 of the Transcript respectively.

Distributors) give subsidies on terminal equipment to reduce barriers to market entry by people who do not have upfront cash to buy such equipment.

Telkom proposed that it wants the conditions under which SIM locking is practiced to be clearly stated in the contract. Be that as it may, Telkom further stated that they do not see the need for SIM Locking since this practice negates the need for transparency.

Telkom raised an argument that that if Retail Operators are allowed free movement across different Distributors i.e. SIM Locking is not mandatory, the latter will have to compete for client base by openly revealing their trade conditions (which have been found to be problem) as a way of self promotion. Telkom argued that Distributors who make SIM locking mandatory do not have to compete for client base using favourable contractual terms and conditions as a self-promotion tool, since it (SIM Locking) guarantees them their clients for the next twenty four months.

d. Access to Emergency Services:

Vodacom opted not to comment, however all the interested parties who made representation agree that provision of emergency service at no cost should not be obligatory in the case of Commercial Public Payphones.

e. Mode of Payment:

The Discussion Document had indicated that some Retail Operators give sweets and chewing gum where they have to give change after service. All the parties that made representations agreed that applicable principles of commercial transaction should apply and proper change in monetary terms should be given where it is due.

7. Tariffs Issues:

Holders of a MCTS licence are required to file and lodge their tariffs with the Authority as stipulated in Section 45 of the Act and in their respective licences. This lodgement and filing relates to any new services that the operator may wish to introduce in the market or an amendment to existing tariff packages.

The empowering provision, for the Authority is section 45 of the Act, however, for the purposes of this discussion, we will concentrate on the provisions of the MCTS licences.

The relevant provisions in the respective licences are as detailed below.

Clause 13.1 of the Vodacom and MTN license and clause 12.1 of Cell C license read:

> *the Licensee shall not charge any tariffs or fees for the Service and any other services whatsoever until such tariffs and fees have been lodged in writing with the Authority*

Further clause 13.3 of MTN and Vodacom licences (12.3 for Cell C) reads:

> *If the charges in a tariff plan vary, in their nature, in their amounts or both, the notice must set out why and how charges vary*

Even further clause 13.5 of MTN and Vodacom licences reads:

> *The Licensee shall not, without the approval of the Authority, increase any existing tariff plan by an amount which is greater than the percentage year on year increase in the Consumer Price Index for all goods unless such a change constitutes a special promotion for marketing or advertising purposes. If the Authority disallows or delays the proposed tariff increase, it must provide written reasons to the Licensee for its decision...*

Given the preceding context, the holders of the MCTS license lodge their tariffs with the Authority as required by their respective licenses. These tariffs are assessed as per the guidelines of the MCTS licenses and are amended or (dis)approved following an analysis of the tariffs by the Authority. This is a fundamental role that the Authority has to play and cannot be delegated to any other entity but a Regulator, which has a consumer protection imperative.

Once approved, MCTS operators proceed to sell airtime or bulk airtime, as the case maybe, to Service Providers. It is common cause that some of the airtime that is sold is at an agreed discounts. The Service Providers in turn sell this airtime in form of 24-month contracts to the end-user as per approved tariff plan.

In the case of the Commercial Public Payphones, the Service Provider sells the airtime to the distributor; The distributor then enters into a further relationship with a retail operator whose mandate it is to sell minutes to the consumer.

For the sake of the discussion, we will analyse this tariff that is charged to the consumer from the beginning of the process of tariff approval and see how the tariff is eventually reformulated. It was established from the representations made by interested parties that the popular packages bought by Distributors are Vodacom's Talk 500 S and MTN's 705 tariff plan.

For illustrative purposes. We will analyse the Vodacom Talk 500 S and MTN's 705 packages. The following table shows the prices that have been lodged and approved by the Authority for the Vodacom Talk 500 Plus S:

Vodacom: Talk 500 Plus S

[20]

Fixed monthly call charge (500 minutes free)		Rand/month	775.00
Standard Calls	Peak	Rand/min	1.35
	Off-Peak	Rand/min	0.90
Long distance Calls	Peak	Rand/min	1.35
	Off-Peak	Rand/min	0.90
Vodacom to Vodacom	Peak	Rand/min	1.50
	Off-Peak	Rand/min	0.90
Vodacom to MTN and Cell C	Peak	Rand/min	1.74
	Off-Peak	Rand/min	0.99

The above table illustrates in the Talk 500 package, a call made from Talk 500S contract to another Vodacom subscriber costs R1.50 peak and R0.90 off peak and the price to a subscriber on another network costs R1.74 peak and R0.99 off peak. A call made to a Telkom subscriber costs R1.35 peak and R0.90 off-peak. Comparatively, the public pay phone operators charge a flat rate of R2.50 per minute (R0.50 per 12 seconds) regardless of what time the call is made. This new rate is not filed with the Authority. Additionally, the Public payphone price structure does not differentiate between Peak and Off-Peak rates whilst the package was originally filed with the Authority does ***(CA/G175/03)***.

[20] Source: ICASA

MTN: Value 705

[21]

Fixed monthly call charge (500 minutes free)		Rand/month	749.99
MTN to Telkom National	Peak	Rand/min	1.54
	Off-Peak	Rand/min	0.97
MTN to Telkom National	Peak	Rand/min	1.54
	Off-Peak	Rand/min	0.97
MTN to MTN	Peak	Rand/min	1.48
	Off-Peak	Rand/min	0.97
MTN t0 Other Operator	Peak	Rand/min	2.30
	Off-Peak	Rand/min	1.20

The above table shows that a subscriber on the MTN value 705 package pays R1.54 and R0.97 for a Telkom call for peak and off-peak respectively; R1.48 and R0.97 to an MTN subscriber and R2.30 and R1.20 for a call to another network for peak and off-peak respectively. Similar to the Vodacom 500 Pus S, these rates are below the rate R2.50 charged by the public payphone operators.

8. Technical Aspects: Equipment features of Public Payphones

The basic equipment used is the dual/ triple band Global System for Mobile communications (GSM) module that sometimes has General Packet Radio System (GPRS) capabilities. The equipment normally is delivered to the would-be retail operator already programmed with relevant tariffs.

From ICASA's database[22], Psitek and Siemens are chief suppliers to this market. The latter was also granted an opportunity to make an oral submission. From the oral submissions it became clear that upgrades are normally done after 24 months. Psitek has the capability of remotely fixing any problematic product of their own. In view of their diverse local clientele, the language unfriendliness of the equipment is a serious concern especially when it became clear in their oral submission that there are gadgets produced in this country that are programmed in Kishahili & French destined for their East African & Francophone countries respectively.

[21] Source: ICASA
[22] ICASA Type Approval and Licensing Unit.

Both licensed MCTS operators and service providers are supplied directly and under warranty by equipment vendors. SIM locking which normally extend for 24 months is used as a tool to recoup subsidies of the equipment.

9. Conclusion:

The Authority has come to the conclusion that the services that form the subject of this inquiry are different from those that a defined and provided for in terms of Telkoms PSTS licence, hence the reference to 'commercial public pay phone' which has a value chain that is not conventional for fixed line public pay phones.

However the fundamental issue then becomes is this commercial public pay – phone of the kind that is under discussion is it to be subject to regulation or licensing. Does the Authority have jurisdiction or authority over this sector so as to in effect either license or impose regulations on this class of telecommunications service.

The Authority has come to the conclusion that it has both the legal and policy justification for actually exercising jurisdiction over this kind of activity. The rationale for this conclusion is based on two pillars:

(i). the entities that are identified as Service Providers in the value chain are directly answerable to the Authority and fall squarely into its regulatory jurisdiction. This is because they have a direct nexus with the MCTS licencees and are therefore regulated by the Authority as specified in MCTS licences read with section 39 of the Act; and

(ii) Secondly the Minister of Communication in her policy announcement of 02 September 2004 states the following with respect to public pay phone:-

Provision of Public Pay Phones

Public pay phone services are services whereby providers, be they individuals or entities, purchase pay phones from manufactures, lease lines or purchase airtime to resell to the public on their own. Allowing this to happen in the ICT sector will help promote SMMEs in the sector and promote job creation as well as address the challenges of the second economy. I have now provided that:

As of 1 February 2005 persons may apply for a licence to provide public pay phone services in any area of the Republic.

The Department is considering the removal of licensing requirements to provide these services.

The announcement by the Minister had a direct bearing on the enquiry in the following sense:-

(i) it provided clarity as to what a public pay phone in relation to GSM Technology can be viewed to include;
(ii) it brought the service under discussion into the ambit of section 39 of the Act; and
(iii) it provided for the method of liberalisation in the market.

The above issues including the provisions of section 2 of the Telecommunications Act clearly put the service under discussion in the jurisdiction of the Authority.

The next issue then becomes now that it is clear that the activity falls within the jurisdiction of the Authority because it relates to its licensees, how far down the value chain can the power of the Authority extend. Does the Authority only have jurisdiction as between the MCTS licensee and the Service Provider or does this jurisdiction extend right down to the retail operator. On this issue the Authority has explored the rules agency to ascertain whether the players in the value chain right to the last player that interfaces with the end-user or public. The Authority is of the opinion that the laws of agency can extend right to the end of the value chain, such that all the players in the value chain can be categorised as agents of the licensed entity in this case the MCTS. The rationale for this approach is that the players in the value chain right up to the retail operator can be viewed as ***unempowered agent***[23]. They are therefore agents whose service contributes to bringing about an opportunity for the principal (in this case an MCTS or Service provider of an MCTS) to enter into vary or terminate a contract or contractual obligation but who does not himself/herself do so on the principals behalf. The most practical manner to give life to this kind of relationship is as proposed by Telkom that is to recognise these players as form of service provider and to regulate the relationship between the players by way of contract. This would have the double benefit of ensuring compliance and predictability on that applicable terms and conditions as laid out in the MCTS licence conditions. Secondly it would assist the Authority in its consumer protection so as to be able to easily identify offenders and the manner of dealing with contraventions as the terms and conditions under which they contract will be clear for public and consumers.

[23] A. J. Kerr,3rd edition-The Law of Agency, pages 13-16 [Butterworth publication September 1991]

Therefore the players in the value chain in this practise are unempowered agents of the MCTS.

The next issue on the aspect of jurisdiction becomes that even though it is clear that a form of agency relationship can be attributed to players in the value chain and they can be regulated under the auspices of section 39 of the Act as per the Ministerial determination the two further questions become the following:-

(i) which one of the players in the value chain should be regulated
(ii) and what method of regulation should be adopted to effectively ensure consumer protection on the one hand and ensure against stagnating entrepreneurship and growth of SMMEs on the other.

The authority in addressing this issue has concluded that based on the hearings it is clear that there are many permutations of relationships that exist in the value chain of the practise under consideration. However we are unaware of the many different forms that these relationships can take. This is more so as at times Service Providers are distributors in their own right. Therefore this possesses a difficulty of entity would be the correct one to exercise regulatory control over so as to efficiently monitor and control the sector. The Authority therefore is of the view that it is premature to state the exact nature of the regulatory control that will be exercised and the nature of the entities that are to be subject to the regulatory control .However in order to address this issue the Authority envisages a registration process that will preceded the formal licensing process (as per the Ministerial Determination). This initial registration process will be undertaken as an initial step so as to better understand the permutations of relationships that exist and then properly identify which entity in the value chain requires licensing.

Therefore preceeding from the above the Authority believes that any body, who has already ventured into this business i.e. those who are already players and those who intend to take part in the business practice, may register with ICASA irrespective of his or her level in the distribution chain. This will better inform the Regulator on the nature of rights and interests that require protection. However how this will be adopted if at all will be in terms of a regulation making or licensing process. The Authority wish to state that this process will be subject to public participation and in – put to the extent necessary. The process that is envisaged is one that is a simplified General authorisation/Class licensing process.

The one aspect that also requires conclusion on is the issue nature of regulation that the Authority envisages in this context. The Ministerial Determination is clear that the process of regulation will be by way licensing these players. Therefore on the issue of establishing a Code of Practise for players in the sector, the Authority is of the view that based on the Ministerial Determination this is no longer an option as it has connotations of self – regulation. Therefore in view of the above licensing and not self regulation will be the approach adopted herein.

Further it can be argued that the Code of practise is in appropriate for the following reasons:

- is it would amount to abdication by the Authority of its(the Authority's) responsibilities as mandated by section 2(m) of the Act which mandates the Authority to protect the interests of telecommunications users and consumers.

- Over and above this, the Minister's announcements of 2nd September 2004 provide a definition of a public payphone that is broad enough to embrace the type of public payphones under consideration and thereby bringing them under regulatory framework.

- Allowing the sector to develop its own Code of Practice and self regulate will be therefore be tantamount to abrogation of responsibility by the Authority and as such can not be entertained under the current regulatory climate.

The issue of after sales service and the regulation thereof was also canvassed at the hearing and the Authority's conclusion on the matter is that the Regulator shall play a role in the after-sales service in the interests of the Retail Operators.

As a consequence of the hearings it is clear that the service under discussion is highly mobile in its nature. Therefore it is clear that there should not be any restrictions to the radius of operation of the service.

On the issue of misleading advertising the Authority concluded that while it accepts that it should cooperate with the Advertising Standards Authority, it has the consumer protection mandate and shall therefore have to play an active role in dealing with this issue.

On the question of SIM locking the Authority concluded that it should be prohibited. MTN and all the Distributors were of the view that SIM locking is an acceptable industry practice to ensure that subsidies included in the sale of the telecommunications devise are recouped. Be that as it may, none of the Distributors could commit that they do provide terminal equipment on a term payment basis. On the contrary, evidence from complaints received by the Authority from the Retail Operators indicate that they pre-pay for public payphone devise before they can start to operate but still the phones are SIM locked. Based on the fact that Distributors requires up front payment for the terminal equipment, such equipment is not subsidised hence no need to SIM lock the terminal equipment. The Authority has also published a Regulation which

prohibits SIM Locking for Number Portability to allow freedom of Porting which should be applicable to Public Payphone operators. Thus these three arguments are mutually distinctive, therefore the Authority concludes in the interests of entrepreneurship, SMME growth and competition that SIM locking should be prohibited *(CA/G175/03, CA/KZN181/03, CA/KZN054/04).*

Free emergency services are in the opinion of the Authority a legislative imperative and as such all public payphones should provide the public with access free call to emergency services. Therefore the Emergency Service in the arena of public pay phones will be addressed in terms of the provisions of Chapter X of the Act at no charge.

From the information gathered on the tariffs structure it appears that the business risk that the distributor assumes by entering into a twenty four-month contract with the Service Provider is factored into the price that is eventually passed to the consumer. However, as the Authority has declared, this is the year of the consumer and one of the Objectives of the Act's to protect the interests of telecommunications users and consumers. Thus the business risk that the distributor incurs and pass on to the consumer is in conflict with the objectives of the Act. The provisions in the MCTS's licenses clearly stipulate that any amendment to an existing tariff package or any introduction of a tariff package, are to be lodged with the Authority. The provisions show that the role of the Authority is not that of a spectator but that of a participant in the approval of tariff or fees for services. This active participation and as stated above, arises out of the need to protect consumers from arbitrary tariff and charges for the communication services. The Authority therefore concludes that tariffs of these public payphones should be regulated.

The Authority concluded that the unorthodox business practise of providing change to the public in other terms other than monetary terms must be discouraged. Therefore the Retail Operators should operate according to standard commercial practice and give change in monetary terms where it is due.

In relation to the issue of the equipment used for public pay phone the Authority has noted minimal participation by equipment vendors during this consultation process. Save to say the Authority mandates and obliges the members of the public to use public payphones that bears the ICASA stickers. That reflects that the equipment has been type- approved. The Authority concluded that it should be encouraged into the future that Commercial Public Payphones are programmed in various indigenous languages for ease of operation by both retail operators and public alike. This is more so in compliance with the objectives laid out in section 2 of the Act.

Therefore in conclusion the Authority agreed that these phones shall be defined as Public Pay Phones, in line with the Minister's definition of a Public Payphone in the announcements made on 2nd September 2004. This is in light of the

announcement of the 02 September 2004 by the Minister on Public Payphone activities.

The Authority intends to embark on a simplified General authorisation/Class licensing process in accordance with the Ministerial determination, as is the case in Lesotho, all the retailing of the Telecommunications Services by individuals and entities who do not own the Network but facilitate public access to the Services, by purchasing services from Network Operators.