



EC Act Licensees - The Cost of Compliance versus the Cost of Non-compliance

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The Independent Communications Authority of South Africa (ICASA) recently published Draft Compliance Procedure Manual Regulations (Draft Regulations), in terms of the Electronic Communications Act (EC Act), for a second round of public comments.

The Draft Regulations appeared in Government Gazette 33896 dated 20 December 2010, for public comment which was due at the end of January 2011. The purpose of the Draft Regulations, as stated in section 1, is to “assist licensees to demonstrate compliance with their obligations” and “assist the Authority to proactively monitor compliance”.

Regulatory Compliance Requirements

Most EC Act licensees are aware of their obligations to pay annual licence fees and to contribute annually to the Universal Service and Access Fund. The regulations setting out licence fees and contributions to the Universal Service and Access Fund also require licensees to submit financial reports to ICASA. ICASA recently issued revised regulations regarding the annual contribution to the Universal Service and Access Fund, changing the way the contribution is calculated and the date on which the payment is due.

Many licensees are not aware that they must submit interconnection agreements and tariffs to ICASA. Licensees are also obligated to submit numbering audit data on an annual basis (if they have number allocations), to develop a Code of Practice, and to file annual reports detailing progress made towards making services available and accessible to persons with disabilities.

Some licensees, as well as consumers, are not aware that ICASA has set out minimum standards with regard to service availability, installations and activations as well as the resolution of complaints, that licensees must comply with. Licensees are obliged by the standard setting regulations to maintain a record of all complaints received and to submit to ICASA biannual reports on complaints received and processed.

In addition to these obligations stemming from the EC Act, there are obligations placed on EC Act licensees and licence exempt service providers in the Regulation of Interception of Communications and Provision of Communication-Related Information Act and the Electronic Communications and Transactions Act.

Proposed New Regulatory Compliance Requirements

In addition to these existing regulatory compliance requirements, the Draft Compliance Procedure Manual Regulations, if enacted, will require the submission of licence and licensee details annually. This is in addition to the requirement that licensees submit written notice if the name, contact details, shareholding, or the addresses of the licensee changes, within seven days of the change.

The Draft Regulations also will require the submission of quarterly reports detailing compliance with ICASA's E-rate regulations. The E-rate regulations require all electronic communications network service and electronic communications service licensees to provide Internet services to schools at a fifty percent discount.

The E-rate regulations themselves require licensees to keep records and the following documents for a period of not less than three years.

- signed contracts
- internet service provider bills to schools
- details of services and locations at which they are provided
- the effective date of services provided
- the resumption date should the service be cancelled

The Draft Regulations also will require the annual filing of sectoral planning data, including the number of subscribers, retail revenue, the numbers of subscribers ported out and ported in, and the geographic and population network coverage for each different type of network deployed.

The Draft Regulations set out detail that biannual complaints reports must include. The reports must include statistics on resolved complaints and in respect of complaints that are pending or that have been escalated, the following details.

- details of complainant
- brief description of complaint
- date of receipt of complaint
- date of response to complaint
- brief description of response

The Cost of Compliance

If the Draft Compliance Procedure Manual Regulations are promulgated into law, licensees will have to file no less than eight separate reports with ICASA at least annually (some quarterly and biannually). If licensees also have spectrum licenses, number allocations and interconnects or lease facilities, they will have additional filing requirements.

In addition to these compliance issues stemming from the EC Act, the Regulation of Interception of Communications and Provision of Communication-Related Information Act requires all networks to be built in a manner so that communications can be intercepted, and requires all service providers to collect, retain and make available (in certain circumstances) information about customers. The Electronic Communications and Transaction Act requires licensees to comply with take down notice procedures and to join an industry association to avoid potential liability for third party content or activity.

In short, the cost of compliance with regulatory requirements for EC Act licensees as well as exempt service providers is not insignificant.

The Cost of Non-compliance

The cost of non-compliance, however, might even be higher.

The Independent Communications Authority of South Africa Act provides ICASA the authority to make a decision, on recommendation of the Complaints and Compliance Committee, directing a licensee to pay a fine in any amount prescribed, and, if the licensee has been found to be repeatedly in violation of the Act, regulations or licence conditions, ICASA may even revoke its licence.

The Draft Compliance Procedure Manual Regulations provide that “upon a determination of non-compliance with these Regulations by the Complaints and Compliance Committee in terms of the ICASA Act, a fine not exceeding Fifty Thousand Rand (R50 000.00) per contravention may be imposed”.

In addition, the regulations regarding annual licence fees provide for fines of up to one million rands for each failure to comply, upon an adverse determination by the Complaints and Compliance Committee, in addition to the automatic imposition of interest charges and penalties for the late payment of fees. Similar provisions are set out in the regulations regarding contributions to the Universal Service and Access Fund.

The interconnection regulations provide that upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, ICASA may impose a fine not exceeding five hundred thousand rands.

The E-rate regulations provide that a licensee who fails to comply with the regulations is guilty of an offence and is subject to the imposition of a fine of up to one hundred and fifty thousand rands.

The regulations setting out minimum standards with regard to service availability, installations and activations as well as the resolution of complaints, provide that a licensee who is held to be non compliant by the Complaints and Compliance Committee will be liable to a fine of up to R500 000 with an additional R50 000 for every repeated offence.

In addition to these potential penalties stemming from the EC Act, the interception legislation allows for fines up to five million rands and to imprisonment of up to 10 years, as well as licence revocation.

Conclusion

Although some of the compliance requirements placed on EC Act licensees have not been strictly enforced by ICASA in the past, indications are that ICASA will be more vigilant about prosecuting violations going forward. This is evidenced by the call last year for all licensees to provide updated licence and licensee information to ICASA, after which ICASA produced a list of non-compliant licensees. ICASA has also recently given licensees a last chance to notify it that operations have begun in terms of the requirements of licence conditions. In addition, ICASA's Complaints and Compliance Committee has begun to target licensees for failure to comply with, for example, the requirement to submit number audit data.

So, what should licensees and licence exempt entities do? First, licensees and licence exempt entities must understand what are their regulatory compliance requirements. Some are set out in legislation, some in regulations and some are set out in licence conditions. If you are interested in obtaining a complete summary of regulatory compliance requirements, you can email me.

Second, licensees and licence exempt entities must appoint a person who has the responsibility to ensure that the licensee or licence exempt entity is complying with its obligations. This might be an employee or a third party or a combination of the two.

Finally, licensees and licence exempt entities need to ensure that they remain up to date with the latest compliance requirements. The regulation of electronic communications is a fast moving target. In the year 2010, ICASA alone promulgated fifteen sets of regulations and now has more than 20 proposed regulations pending, including the Draft Compliance Procedure Manual Regulations. This year, ICASA has already promulgated revised regulations regarding contributions to the Universal Service and Access Fund. One way to stay up to date is subscribe to the free ICT Weekly Update. You can do this by going to <http://lists.internet.org.za/mailman/listinfo/weeklyupdate>.

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