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INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 4449

29 February 2024



DRAFT END-USER AND SUBSCRIBER SERVICE CHARTER AMENDMENT REGULATIONS, 2024

The Independent Communications Authority of South Africa ("the Authority") hereby declares its intention to amend the End-user and Subscriber Service Charter Regulations, 2016, as amended, in terms of section 4, read with section 69 (3), of the Electronic Communications Act, 2005 (Act No 36 of 2005), to the extent reflected in the Schedule.

A copy of the Draft End-user and Subscriber Service Charter Amendment Regulations 2024 ("Draft Regulations") will be made available on the Authority's website at <http://www.icasa.org.za>, or can be sent via email upon request by any individual, or can be collected from the Authority's library at Eco Point Office Park, 350 Witch-Hazel Avenue, Centurion between 09h00 and 16h00, Monday to Friday.

The Authority hereby invites interested persons to make written representations by no later than 16h00 on 15 April 2024 by email to eussc@icasa.org.za (in Microsoft Word or PDF), post or hand delivery, and marked specifically for the attention of:

Chairperson: End User Subscriber Service Committee
Block C
350 Witch- Hazel Avenue
Centurion
2146

Telephonic enquiries may be directed to Mr Lehumo Lebepe on 012-568-4065 between 08h30 – 16:30, from Monday to Friday.

Non-confidential versions of written representations received by the Authority pursuant to this Notice, will similarly be made available on the Authority's website, or for inspection by interested persons at the Authority's library.

When a person submits information to the Authority, such person may request that specific information be treated as confidential in terms of section 4D of the Independent Communications Authority of South Africa Act No 13 of 2000 ("ICASA Act"). The request for confidentiality must be accompanied by a written statement explaining why the specific information should be treated as confidential in terms of section 4D of the ICASA Act. Persons requesting confidentiality must acquaint themselves with the ICASA Guidelines for Confidentiality Request published in Government Gazette No 41839 of 17 August 2018.

The Authority may determine that such specific information or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where a request for confidentiality is refused, the person who made the request will be granted an opportunity to withdraw such information or portion(s) thereof.

Persons submitting written representations are further invited to indicate, as part of their submissions, whether they require an opportunity to make oral representations, should the Authority elect to hold public hearings.



YOLISA KEDAMA

ACTING CHAIRPERSON

DATE: 27 / 02 / **2024**

ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT NO 36 OF 2005) REGULATIONS

The Independent Communications Authority of South Africa has, under section 4, read with section 69 (3), of the Electronic Communications Act, 2005 (Act No 36 of 2005), intends to make the regulations in the Schedule.

SCHEDULE

1. DEFINITIONS

In these regulations, "the Regulations" means the Regulations published in Government Gazette No 39898 of 1 April 2016, as amended by Government Gazette Nos 41613 of 7 May 2018, 42225 of 12 February 2019, 42266 of 28 February 2019 and 48318 of 28 March 2023.

2. Amendment of regulation 1 of the Regulations

Regulation 1 of the Regulations is hereby amended –

- (a) by the insertion after the definition of "Act" of the following definition:

""**Activation**" means the time when the bundle is provisioned and/or made available for use to the end-user;"

- (b) by the substitution of the definition of "Data bundle" by the following definition:

"Bundle" means a set amount of data, voice minutes, SMSs, OTT services, or a combination thereof, valid for a specific period of time, sold for a single price for the set of services included in the bundle;"

- (c) by the insertion after the definition of "Complainant" of the following definition:

"Day" means a period of twenty-four (24) hours from the time of activation of a bundle;"

- (d) by the insertion after the definition of "Fixed Service" of the following definition:

"Hour" means a period of 60 minutes from the time of activation of a bundle;"

- (e) by the insertion after the definition of "Latency" of the following definition:

"Long-term bundle" means a bundle valid for more than thirty (30) days from activation;"

- (f) by the insertion after the definition of "Mean opinion score (MOS)" of the following definition:

"Medium-term bundle" means a bundle valid between seven (7) to thirty (30) days from activation;"

- (g) by the insertion after the definition of "Service Installation" of the following definition:

"Short term bundle" means a bundle valid for less than seven (7) days from activation;"

- (h) by the insertion after the definition of "Post-paid plans" of the following definition:

“Promotional bundle” means any bundle offer made available to end-users for a period, and subject to terms and conditions as prescribed by the Licensee, including but not limited to –

- (a) discount vouchers,
- (b) free gifts, or
- (c) entry into a rewards scheme or loyalty programme.

3. Amendment of regulation 8A of the Regulations

The following regulation is hereby substituted for regulation 8A of the Regulations:

“8A Voice, SMS data and OTT services

- (1) A Licensee must send usage depletion notifications to end-users via SMS, push notification or any other applicable means, when usage reaches 50%, 80% and 100% depletion of each bundle.
- (2) At all times a Licensee must ensure that end-users are provided with the option to:
 - (a) opt out of usage depletion notifications;
 - (b) buy additional bundles via the USSD platform, push notification, or any other appropriate means; and
 - (c) opt in to or opt out of out-of-bundle usage charges.
- (3) In the event that a service bundle is depleted, and the end-user has not opted in to out-of-bundle charges as per regulation 8A (2)(c) above, a Licensee must not permit any out-of-bundle usage by, or out-of-bundle charges to, the end-user until such time that the end-user purchases a new bundle or opts into out-of-bundle usage and charges.
- (4) End-users on post-paid, pre-paid or hybrid plans must, at all times, be provided with the option to buy additional bundles.

- (5) A Licensee shall apply bundle usage sequentially against unused bundles with the earliest expiry, until such bundles are depleted, and thereafter against the next earliest expiry of any bundle.
- (6) A Licensee must, in the case of medium-term bundles, at the end of the validity period, roll-over 50% of any unused bundle for an equivalent validity period, provided that any unused portion of any bundle should be rolled over at least twice.
- (7) A Licensee must, in the case of long-term bundles, at the end of the validity period, roll-over 25% of any unused bundle for an equivalent validity period, provided that any unused portion of any bundle should be rolled over at least once.
- (8) The roll-over of bundles must occur without requiring any action and without incurring any cost to the end-user.
- (9) A Licensee must provide an end-user with an option to transfer bundles or portions thereof to any end-user utilising services of the same Licensee, and the same bundle conditions, including but not limited to those applicable to expiry, roll-over and transfer, must continue to apply to the transferred bundle or portions thereof.
- (10) The transfer of bundles in terms of sub-regulation (9) must not be limited to specific service types, with the exception of uncapped, free or promotional bundles, and applies to any SIM card or device on the same network, including SIM cards or devices owned by the same end-user, and exists without limit on the number of times that the end-user may transfer such bundles.
- (11) The validity period of a bundle must be extended when an end-user is unable to utilise the bundle due to a fault on the part of the Licensee.

4. Amendment of regulation 8B of the Regulations

Regulation 8B of the Regulations is hereby repealed.

5. Short title and Commencement

These Regulations are called the Fifth End-User and Subscriber Service Charter Amendment Regulations, 2024, and will come into force upon publication in the Government Gazette.



EXPLANATORY MEMORANDUM ON THE DRAFT END-USER AND SUBSCRIBER SERVICE CHARTER AMENDMENT REGULATIONS, 2024

1. INTRODUCTION

- 1.1. This Explanatory Memorandum is intended to provide clarity on the reasons for the proposed amendments to the End-user and Subscriber Service Charter Regulations ("Regulations"), 2016, as amended.
- 1.2. The proposed amendments are necessitated by general concerns raised by various stakeholders, including consumer groups and social media campaigns, with regards to data expiry rules, high out-of-bundle rates and rules, and out-of-bundle voice and Short Messaging Service ("SMS") rules currently applied by licensees.
- 1.3. The Authority has further considered the submissions it received from stakeholders - written submissions received on 17 June 2022,¹ and oral representations at the public hearings on 06 and 07 October 2022.
- 1.4. Further to that, the Authority was also concerned about the lack of prescribed minimum standards on how aspects such as voice, SMS and data are rolled over and transferred.

2. THE PROCESS

- 2.1. On 31 March 2022, the Authority published the Draft End-User and Subscriber Service Charter Amendment Regulations, 2022, for public comment.² The closing date for written submissions was extended to 17 June 2022³, and the Authority

¹ <https://www.icasa.org.za/legislation-and-regulations/regulations-underway/end-user-and-subscriber-service-charter-amendment-regulations>

² Government Gazette No 46153 of 31 March 2022.

³ Government Gazette No 2086 of 17 May 2022.

held public hearings on 6 and 7 October 2022.⁴

2.2. Thereafter, the final End-User and Subscriber Service Charter Amendment Regulations, 2023, were published and came into effect on 28 March 2023.⁵

2.3. Although, the 2022 draft regulations⁶ had sought, *inter alia*, to prescribe amendments to regulations 8A and 8B, the Authority elected to defer these provisions for further consultations, as it explained in its reasons documents⁷, and stated its intention to undertake further consultations regarding the inputs it had received from various stakeholders. Thus, the Authority now seeks to consult on regulations 8A and 8B.

2.4. The comments in the submissions made by stakeholders in relation to sub-regulations 8A and 8B assert, *inter alia*, that:⁸

2.3.1 The Authority, by its proposal to prescribe a validity period of six (6) months, is acting *ultra vires*, and this is tantamount to prescribing the terms and conditions of a contractual agreement. Furthermore, such explicit prescription is going beyond the scope provided for to the Authority under the ECA and such would have detrimental consequences of eliminating short term validity products from the market⁹.

2.3.2 Although section 69 of the ECA empowers the Authority to prescribe minimum standards for end-user and subscriber service charters, the Authority does not have the power to interfere in the contractual relationship between Licensees and their end-users and to prescribe the products that a Licensee should provide¹⁰.

2.3.3 Enforcing a 6-month validity period on all products will negatively impact product and service differentiation, stifle innovation and harm competition¹¹, and have a detrimental effect on consumers' choice.

⁴ Government Gazette No 46978 of 26 September 2022.

⁵ End-User and Subscriber Service Charter Fourth Amendment Regulations, 2023 (Government Gazette No 48318 of 28 March 2023).

⁶ Reasons Document For The End-User And Subscriber Services Charter Amendment Regulations, 2023 (Government Gazette No 48329 of 29 March 2023).

⁷ Reasons Document For The End-User And Subscriber Services Charter Amendment Regulations, 2023 (Government Gazette No 48329 of 29 March 2023).

⁸ <https://www.icasa.org.za/legislation-and-regulations/regulations-underway/end-user-and-subscriber-service-charter-amendment-regulations>.

⁹ Vodacom initial submission Para 4 Page 35.

¹⁰ MTN initial submission Para 4 Page 11.

¹¹ MTN submission Para 1 Page 10.

- 2.3.4 None of the tariff plans currently offered by mobile operators has a validity period of at least 6 months, and operators will effectively be prohibited from offering the majority of their existing tariff plans.¹²
- 2.3.5 The new tariff plans that operators will offer, with a minimum validity period of 6 months, would be of higher effective rates for consumers than existing tariffs¹³. This will be a result of the high cost of maintaining customer's data, voice and SMS balances over a longer period.
- 2.3.6 The proposed changes are expected to make it more difficult for operators to offer lower prices to end-users who are not able to nor willing to pay more for mobile services.
- 2.3.7 The longer validity period will prevent Licensees from offering end-users different validity periods at different price points, and this will consequently disadvantage end-users who use different packages to meet their lifestyle and economic needs, as well as disadvantage Licensees who will not be able to differentiate themselves through offering differing data validity periods and preferential pricing in respect of shorter data validity periods.¹⁴
- 2.3.8 The provision of unlimited data transfers will effectively result in the creation of a secondary market where electronic communications services are resold between end-users without the Licensee's involvement, oversight, or control.¹⁵
- 2.3.9 Unlimited and unrestricted data transfer will open licensees up to arbitrage: allowing subscribers to transfer data an unlimited number of times could open a secondary market, where data can be resold by the subscriber. Unlimited data transfer provides an opportunity for subscribers to transfer highly discounted bundles for commercial gain. The same would apply to data purchased at a promotional or regional discount, as well as URL-based

¹² Expert Report prepared by Frontier Economics Ltd. Para 3.1.1 Page 17.

¹³ Expert Report prepared by Frontier Economics Ltd. Para 5.1.1 Page 34.

¹⁴ MTN initial submission Para 3.5.2 Page 9-10.

¹⁵ MTN initial submission Para 4.37 Page 24.

services such as WhatsApp bundles, which are sold at a discounted rate.¹⁶

2.3.10 The Authority should reconsider the first-in-first-out principle in favour of the earliest-expiry-first-out principle. Whilst the first-in-first-out principle makes sense, it does not consider the varying validity of bundles. For example, if a subscriber buys a weekly bundle on 15 May which expires at 23:59 am on 22 May and a daily bundle on 16 May which expires at 23:59 am on 16 May, the daily bundle has the soonest expiry and must be depleted first, before the weekly bundle.¹⁷

2.3.11 MTN indicated that "A minimum expiry period of six months will therefore result in a substantial impact on the services experienced by subscribers, as well as substantially increased liability on MTN's balance sheet. This is because MTN will, to ensure that the quality of its network is not impacted by the longer expiry periods, be required to ensure that there is sufficient capacity on its network even though such capacity may not be utilised immediately".¹⁸

2.3.12 Furthermore another licensee stated that "ICASA's proposals to impose a minimum validity period of six (6) months and require operators to allow, almost without restriction, the transfer of data allowances between SIMs, do not reflect regulatory best practice as seen in other countries, therefore conclude that ICASA's proposals to impose a minimum validity period of six (6) months are significantly out-of-line with international best practice, and cannot be justified on this basis".¹⁹

2.3.13 The proposed regulations will have a negative impact on numbering resources, which is a scarce resource, which must be managed efficiently. Cell C indicated that "the requirement for extending the duration of unused data, voice and SMS over six (6) months will require that more MSISDN'S will be locked in for a longer duration of time resulting in the numbering resource being used negatively".²⁰

¹⁶ MTN initial submission Para 4.37 Page 24.

¹⁷ MTN initial submission Para 5.2.2 page 32.

¹⁸ MTN initial Submission Para 4.15 page 17.

¹⁹ Expert Report prepared by Frontier Economics Ltd. Para 3.3 Page 23.

²⁰ Cell C initial submission paragraph 6 Section 3.1.7.

3. THE AUTHORITY'S POSITION

- 3.1 As indicated above, after consideration of the submissions made by various stakeholders, the Authority decided to defer the amendment of sub-regulations 8A and 8B, in order to undertake further consultation regarding inputs received from various stakeholders.
- 3.2 The Authority has decided to merge sub-regulations 8A and 8B due to the fact that their provisions are largely identical.
- 3.3 This has further necessitated the inclusion of new definitions in the schedule in order to guide and clarify certain provisions for licensees.
- 3.4 The Authority concedes that applying a 6-month validity period across all services will undermine market dynamics, and limit end-user choice, and that this may lead to an increase in prices for consumers who are currently benefitting from low unit prices on short-validity bundles.²¹
- 3.5 Nevertheless, in order to cater for ongoing consumer demand for bundles that do not expire prematurely, the Authority further intends to differentiate between short-term, medium-term and long-term bundles, and the provisions applicable in each case. The Authority is of the view that there remains strong consumer resistance to the 'loss' of unused data etc when it comes to bundles of longer duration, hence the roll-over (and transfer) provisions detailed under sub-regulation 8A below.
- 3.6 The proposed differentiation between medium-term and long-term bundles further intends to cater for consumers who desire to benefit from bundles with longer expiry dates and to stimulate offerings to consumers in that segment of the market.
- 3.7 The Authority further intends to specify what is meant by 'hours' and 'days' in order to address the regulatory lacuna exposed by the 2022 ruling of the Advertising Regulatory Board²², and thereby to ensure consumers derive full value from bundles purchased.

²¹ Vodacom initial submission paragraph 5 page 21.

²² <https://mybroadband.co.za/news/wp-content/uploads/2022/09/MTN-Boshoff.pdf>.

4. SUMMARY OF THE PROPOSED AMENDMENTS

4.1 Amendment of sub-regulation 1 of the Regulations

Sub-regulation 1 is amended to introduce definitions for new terms by amendments proposed in the Draft Regulations as outlined below. These include:

- 4.1.1 A definition for "Activation" to clarify any uncertainty regarding when a bundle becomes available to end-users.
- 4.1.2 A definition for "Bundle" to clarify the meaning and to replace the current definition of "bundle data". This definition covers any combination of voice, SMS, data and over-the-top services in order to reflect current market practices.
- 4.1.3 Definitions for "Day" and "Hour" to provide certainty for consumers in respect of the validity period of bundles purchased as set out above.
- 4.1.4 Definitions for "Long-term bundle", "Medium-term bundle", and "Short-term bundle" in order to segment the differing ranges of bundles in order to prescribe how unused bundle services must be rolled over.
- 4.1.5 A definition for "Promotional bundle" to distinguish between standard bundles and promotional bundles in order to clarify the applicability of bundle roll-over and transfer.

4.2 Amendment of sub-regulation 8A of the Regulations

- 4.2.1 When sub-regulation 8A was promulgated in 2018, it was intended to empower end-users to monitor usage and to limit spending, as well as to avoid or minimise bill shock as a result of out-of-bundle charges. It further sought to provide post-paid users with an option to buy additional voice or SMS services, and to protect post-paid / hybrid users against the practice of defaulting them into out-of-bundle charges upon depletion of their monthly allocated bundled services.

- 4.2.2 However, sub-regulation 8A of the Regulations is silent on how licensees must implement the possible roll-over of unused voice and SMS services, and it only prescribes parameters for the roll-over of unused data. This has created a regulatory gap regarding the roll-over of unused voice and SMS services.
- 4.2.3 Further, sub-regulation 8B (3) of the Regulations requires that a licensee shall in the first instance apply data usage against the rolled-over data until that data is fully depleted, and thereafter against the newly allocated data. The “first-in-first-out” approach does not provide for the optimal roll-over of unused voice, SMS and data services.
- 4.2.4 The lack of regulatory parameters or prescribed minimum standards for roll-over of unused voice and SMS services prejudices consumers by leaving them vulnerable to losing their old voice and SMS services as licensees deplete newly allocated voice and SMS balances instead of older voice and SMS balances remaining on the allocated bundled services of the end-user.
- 4.2.5 Therefore, the Authority proposes the substitution of sub-regulations 8A and 8B with the amended sub-regulation 8A which will prescribe uniform minimum standards and guidelines on how the issues of roll-over, transfer, depletion notifications, out-of-bundle charges and sequence usage of bundles must be implemented.
- 4.2.6 The provisions in respect of usage depletion notifications, end-user options and out-of-bundle charges combine and retain the provisions of the current sub-regulations, currently applicable to all service categories, and seek to prevent consumers from being charged exorbitant rates without their explicit consent when bundled services have been depleted.
- 4.2.7 The proposed amendment on the sequence of bundle depletion will provide for the earliest-expiry-first-out rule on service bundles, as recommended in one stakeholder submission²³, and is aimed at ensuring greater protection against premature loss of bundle services.
- 4.2.8 When sub-regulation 8B was promulgated in 2018, it was intended to provide for the roll-over and transfer of data, for the benefit of end-users, by minimising the risk of premature expiry of data bundles.

²³ MTN initial submission Para 5.2.2 page 32.

Sub-regulation 8B, however, does not specify for a minimum standard or prescribed guideline on how licensees must implement the roll-over of unused data. All it does is to prescribe that there exists an "option" to roll over data and that the roll-over must be done before the expiry date.

4.2.9 Licensees have, therefore, developed their additional terms and conditions in ensuring compliance with sub-regulation 8B (3) of the Regulations, such as requiring a consumer to purchase additional data in order to secure the roll-over, or requiring a consumer to purchase what is called a 'data extender'. Some licensees also require that end-users roll over data at given times, such as two (2) days before the data expires. These practices unfairly disadvantage consumers through forced additional purchases or other roll-over restrictions.

4.2.10 The proposed amendments on the roll-over of bundle services seek to ensure that end-users are not unduly disadvantaged by the total loss of their purchased bundles and further benefit them by minimising the risk of premature expiry of bundles.

4.2.11 The Authority recognises that there is an active and dynamic market in respect of small denomination, short-term service bundles, and proposes to exercise regulatory forbearance in respect of any roll-over requirements for such bundles.

4.2.12 The Authority, however, proposes to specify the roll-over requirements for longer-term bundles by providing for the automatic roll-over of a specified proportion of unused bundle services, while at the same time limiting the number of times such automatic roll-over may take place. This is intended to protect consumers from the unexpected loss of unused services, whilst ensuring that roll-over specifications are not open-ended and thus likely to have a negative impact on numbering resources.

4.2.13 Further, sub-regulation 8B (4) of the Regulation is silent on how licensees must implement the transfer of data, save to prescribe that there exists an "option" to transfer data and that the transfer must relate to another end-user on the same network. The Regulations do not provide for a minimum standard, nor do they prescribe guidelines on how the transfer of data obligation must be met by licensees. This allows licensees to develop their

own additional terms and conditions in ensuring compliance with sub-regulation 8B (4) of the Regulations.

4.2.14 The proposed amendment on the bundle transfer provision intends to provide certainty to the transfer of bundles to any SIM card or device, whether owned by the same end-user or not, and further provides clarity with respect to subscribers with multiple SIM cards, since the current Regulations are not clear in this regard.

4.2.15 The proposed amendment further seeks to ensure that no restriction is placed on the number of times that end-users are allowed to transfer bundles, as some licensees currently limit the number of times that end-users are allowed to transfer data, and further gives clarity and guidance on how the data transfer obligation must be met by Licensees.

4.2.16 The Authority has noted the suggestions from some stakeholders that unlimited transfer of service bundles may create the possibility of arbitrage and a secondary market, but is of the view that such a secondary market can only exist where there is a significant differentiation in the unit price of bundle services between larger and smaller denomination bundles. Further, such differentiation is per se disadvantageous to consumers, according to the Competition Commission²⁴.

4.2.17 Finally, the provision for compensation to end-users who are unable to utilise bundle services due to the fault of the Licensee has been retained in order to ensure that end-users are able to enjoy the full value of bundles purchased.

4.3 Amendment of regulation 8B of the Regulations

The Authority proposes to repeal sub-regulation 8B in its entirety, as its provisions will be encapsulated in the revised sub-regulation 8A.

²⁴ Competition Commission (2019) 'Data Services Market Inquiry Final Report', <http://www.compcom.co.za/wp-content/uploads/2017/09/DSMI-Non-Confidential-Report.pdf>, Chapter 5 & p 789.