

**INTENTION
TO
CONDUCT
AN INQUIRY
INTO
THE
NUMBER PORTABILITY
REGULATIONS, 2005
IN TERMS OF
GOVERNMENT GAZETTE
NO. 40232 OF 26 AUGUST
2016**

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Reg. No. 1993/003367/07

INTRODUCTION

- 1 Vodacom (Pty) Limited (“**Vodacom**”) welcomes the opportunity to submit our written representations in response to the Authority’s Notice of its intention to conduct an inquiry into the Number Portability Regulations as set-out in Government Gazette No. 40232 of 26 August 2016 (“**the Notice**”). Vodacom is particularly pleased that the Authority has elected to undertake a review of the Number Portability Regulations¹ (“**the Regulations**”) within the context of an inquiry (“**The Inquiry**”) to be undertaken in terms of section 4B of the Independent Communications Authority of South Africa Act, 2000 (“**the ICASA Act**”). Further, we are encouraged that the purpose of The Inquiry has been clearly articulated by the Authority while the backdrop provided by the Authority in respect of the motivation for undertaking the inquiry is also welcomed.

- 2 Vodacom wishes to also state that the review of the Regulations had been recommended by the Authority’s Complaint and Compliance Committee (“**CCC**”) in its order in *MTN (Pty) Limited v Cell C (Pty) Limited*.² In this regard, at paragraph 97.5 of the CCC’s decision, the following recommendation is made in terms of section 17D of the ICASA Act:

“The Authority should review the MNP Regulations (sic) and consider including fines or other punitive measures for transgressions.” (Own emphasis)

- 3 We shall make reference to *dicta* in the CCC’s decision which is supportive of a need to consider whether the Regulations operate optimally in respect of affording sufficient protection to subscribers while also requiring licensees to make more information available to subscribers throughout the course of the porting process. Notwithstanding, it is implicit in the CCC’s decision that the Regulations are outdated and relatively ineffective in regulating for undesirable conduct, certain commercial practices and other related matters that have become commonplace in the industry.

- 4 All in all, Vodacom is supportive of this review and trusts that our written representations shall be of some assistance to the Authority. Ultimately, we believe that the findings anticipated to be made in terms of section 4C of the ICASA Act at the culmination of the section 4B inquiry shall result in the Authority making determinations to the effect that the Regulations must be amended in accordance with the provisions of section 4 of the Electronic Communications Act, 2005 (“**the Act**”).

¹ Government Gazette No. 28091 of 30 September 2005. Paragraphs 1.3 and 1.4 of the Authority’s Notice erroneously refers to the Regulations as having been promulgated in 2006 while in fact same we promulgated and came into force and effect on 30 September 2005 in Government Gazette No. 28091 of 30 September 2005. This fact is confirmed at paragraph 14 of the Authority’s Complaints and Compliance Committee’s decision in *MTN (Pty) Limited v Cell C (Pty) Limited* (21 November 2014).

² Case Number unavailable and judgment rendered on 21 November 2014.

5 Our written representation is arranged as follows:

GENERAL COMMENTS

- Part A:** Inquiries contemplated in terms of section 4B of the ICASA Act;
- Part B:** Policy rationale for Number portability: Alleviation of switching costs and related transaction costs
- Part C:** Unlawful competition: fraudulent customer inducement and fraudulent misrepresentation;
- Part D:** MTN (Pty) Limited v Cell C (Pty) Limited;
- Part E:** Cell C (Pty) Limited v Vodacom (Pty) Limited, MTN (Pty) Limited, Telkom SA SOC Limited and ICASA; and
- Part F:** Porting of non-geographic numbers: 080, 086 and 087 number ranges.

SPECIFIC COMMENTS

- Part G:** Vodacom responses to the Authority's questions.

END

PART A: INQUIRIES CONTEMPLATED IN TERMS OF SECTION 4B OF THE ICASA ACT

6 In undertaking the review of the Regulations, Vodacom is particularly heartened that the Authority has elected to undertake an inquiry in accordance with the provisions of section 4B of the ICASA Act. Vodacom believes that the outcomes of The Inquiry ought to at least provide the context within which substantive amendments are to be made to the Regulations. This is premised on the sensibility of contextualising the section 4B inquiry as being undertaken in accordance with section 4B(b) of the ICASA Act which reads as follows:

“(1) The Authority may conduct an inquiry into any matter with regard to—

- (a) The achievement of the objects of the Act or the underlying statutes;*
- (b) Regulations and guidelines made in terms of this Act or the underlying statutes;*
- (c) Compliance by applicable persons with this Act and the underlying statutes;*
- (d) Compliance with the terms and conditions of any licence by the holder of such licence pursuant to the underlying statutes; and*
- (e) The exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes.” (Own emphasis)*

7 Vodacom also believes that since the promulgation of the Regulations in 2005, there have been significant market developments. In this regard, the Authority appropriately alludes to the exponential increase in the number of licensees entitled to have access to the National Numbering Plan, while practices adopted by licensees in respect of inducing and encouraging subscribers to port have developed beyond those initially envisaged to be regulated under the Regulations. Accordingly, a review of the Regulations has become necessary.

8 Given that section 4B(b) of the ICASA Act empowers the Authority to undertake inquiries into any matter concerning regulations made in terms of the ICASA Act or the underlying statutes, we believe that this provision reinforces the Authority’s competence in undertaking this inquiry. In other words, undertaking this inquiry is rationally connected to at least one of the empowering provisions in section 4B of the ICASA Act, in particular section 4B(1)(b) thereof. We further believe that a section 4B inquiry is desirable in the circumstances and on account of the following factors:

8.1 First, a section 4B inquiry affords the Authority with the necessary flexibility to thoroughly interrogate matters at hand, albeit within the parameters of a well-structured and robust inquisitorial framework. The very nature of a section 4B

inquiry is distinct from a regulation-making process and affords the Authority sufficient discretion in *inter alia* soliciting information in the form of representations, either oral or written throughout the course of The Inquiry. Further, and unlike regulation-making processes which are *rule-making* or *legislative-making* exercises and may often be reflective of adversarial engagements between the Authority and interested persons, section 4B inquiries are contemplated to be *inquisitorial*, fact-finding and evidence-gathering exercises. In the circumstances, an inquisitorial process is inherently disposed to soliciting credible information intended to shape the discourse regarding the review of the Regulations.

8.2 Second, an inquiry of this nature also affords interested parties the requisite degree of regulatory certainty regarding the operative scope of The Inquiry, and the timeframe within which the expected outcomes therefrom are to materialise.³ So, to the extent that a section 4B inquiry offers a measure of predictability as a regulatory consultative process, it ought to be the preferred consultative process which the Authority invokes when undertaking consultations of this nature pertaining to the reform of an existing regulatory dispensation.

Summary

9 We have set-out our views in respect of the utility in undertaking consultative processes within the scope of a section 4B inquiry. We have also noted that the Authority has previously recognised this utility and proceeded to undertake section 4B inquiries as a precursor for subsequent regulatory intervention. In the circumstances, we urge the Authority to be more willing to undertake section 4B inquiries when contemplating regulatory intervention that requires the consideration of complex matters.

³ Section 4C(6) of the ICASA Act imposes an obligation on the Authority to *gazette* the findings of the inquiry within 90 days of having undertaken same. This provision reads as follows:

"The Authority must, within 90 days from the date of conclusion of the inquiry—

(a) make a finding on the subject matter of the inquiry; and

(b) publish in the Gazette—

(i) a summary of its finding; and

(ii) the details of the place where and the time when the finding and the reasons for the finding can be obtained by the public."

Section 4C(2) of the ICASA Act provides that:

"The Authority may, subject to any law governing privilege, for the purpose of an inquiry –

(a) through the person presiding at such inquiry, by notice in writing in the prescribed form, require from any person such particulars and information as may be reasonably necessary;

(b) by notice in writing in the prescribed form under the hand of a councillor, addressed and delivered by an authorised person or a sheriff to any person, require such person to -

(i) appear before it at the date, time and place specified in such notice;

(ii) make a statement; and

(iii) submit to it all the documents or objects in the possession or custody or under the control of any such person which may be reasonably necessary; and

(c) through the person presiding at such inquiry and after explaining applicable rights under the Constitution and this section, question any person referred to in paragraph (b) in connection with any matter which may be reasonably necessary.

PART B: POLICY RATIONALE FOR NUMBER PORTABILITY: ALLEVIATION OF SWITCHING COSTS AND RELATED TRANSACTION COSTS

10 The policy rationale for the introduction of regulatory measures aimed at supporting number portability is the elimination or reduction of costs incurred by consumers in the choice of their preferred supplier of services. In reducing or eliminating such costs for consumers, regulatory authorities consequently enable consumers to responded more effectively to price and non-price competition amongst suppliers and determine their choice of supplier accordingly. Conversely, the higher the costs that are to be incurred by consumers so as to positively elect their preferred supplier, the less likely that consumers would be willing to incur these cost, even where the potential pay-off or benefits initially appear substantial. Consequently, the presence of relatively high switching costs operate to retard effective competition.

11 In this regard, Xavier and Ypsilanti describe switching costs as follows:

"Switching costs can be defined as the real or perceived costs that are incurred when changing supplier but which are not incurred by remaining with the current supplier. Barriers to switching can be present due to high switching costs. Switching costs reduce consumer flexibility and lower the pressure exerted by the prospect of a consumer migrating to a competitor."⁴

12 Further, the European Commission has described the ultimate objective of number portability and its importance for the promotion of competition in a liberalised electronic communications market as follows:

"Number portability is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment such that end-users who so request should be able to retain their number(s) on the public telephone network independently of the organisation providing service."⁵

13 In addition, the United States Federal Communications Commission ("**FCC**") has also described the cumulative objectives of number portability as follows:

"As the Commission has found previously, it is critical that customers be able to port their telephone numbers in an efficient manner in order for LNP [local number portability] to fulfil its promise of giving 'customers flexibility in the quality, price, and variety of telecommunications services.' Through the LNP process, consumers have the ability to retain their phone number when switching telecommunications service providers, enabling them to choose a provider that best suits their needs and enhancing competition."⁶

⁴ Xavier, Patrick and Ypsilanti, Dimitri, Switching costs and consumer behaviour: implications for telecommunications regulation Info 2008 10 (4), 13-29, at 14.

⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications (Universal Service Directive), at para 40. Number portability under the Universal Service Directive is regulated under Article 30.

⁶ Telephone Number Portability, CC Docket No. 95-116, Report and Order and Further Notice of Proposed Rulemaking, FCC 09-41, at para 6.

- 14 So, it is clear that the ability of consumers to make positive choices regarding their preferred electronic communications service (“ECS”) provider greatly depends on the ability of number portability to reduce or eliminate switching costs. Further, the inability of consumers to migrate from their existing service provider with relative ease manifests as both switching costs and transaction costs. In particular, while regulatory intervention that promotes number portability generally operates to alleviate switching costs faced by consumers, the design and operation of the intervention may still present non-price related costs in the form of transaction costs. In this regard, while switching costs amount to real or perceived costs, transaction costs amount to non-price related costs which are not readily observable but have a similarly deleterious effects on consumer switching. More so, the presence of transaction costs in instances wherein regulatory intervention has substantially reduced switching costs may in effect operate *as if* switching costs persist. Accordingly, the FCC has alluded to the manifestation of transaction costs and their impact on consumer switching behaviour as follows:

“Delays in porting cost consumers time and money and limit consumer choice and competition because when consumers get frustrated with slow porting, they often abandon efforts to switch providers. We find this to be a significant concern due to the Commission’s efforts generally to ensure “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another,” as well as due to the important role intermodal providers play in telecommunications competition.”

- 15 CEPT has also described the interrelation between the existence of both switching costs and transaction costs within the context of mobile number portability as follows:

“From a user’s perspective, mobile number portability creates an ability to switch mobile network without the possible cost and inconvenience of a change of their telephone number. This is because, in the absence of number portability, a change of number when switching networks requires most users to notify people who contact them of the new number. In the case of business users, especially those who rely on a mobile phone as a primary method of communication, the effort and cost involved in notifying contacts of a new number may be quite substantial.”⁸

- 16 Accordingly, it is important for the Authority to be acutely mindful that the operation and overall effectiveness of number portability rests with its ability to regulate for both switching costs and transaction costs. Further, while the former may be regulated with reference to actual costs incurred by consumers, the latter must necessarily be regulated in the form of enforcing rules aimed at disciplining licensees to facilitate porting efficiently and timeously. Here, *behavioural prescriptions* in respect of the conduct of licensees as donor operators and recipient operators is absolutely crucial.

- 17 Over and above the need for clearly articulated behavioural prescriptions intended to discipline licensees’ conduct in respect of artificially increasing barriers to switching, regulatory intervention must also ensure that the appropriate signals to induce consumer switching adequately reflect consumers’ preference for switching. In other words,

⁷ At para 6.

⁸ European Conference of Postal and Telecommunications Administrations (CEPT), *Implementation of mobile number portability in CEPT countries* (March 2003 [updated October 2005]), ECC Report 31.

consumers' desire to switch and the reasons for doing so must be aligned with the materialisation of the incentive or benefit presented by licensees to induce switching. Here, regulatory intervention must also have related measures in place which ensure that there is no misalignment between consumers' expectations regarding the benefits for switching and the costs incurred for switching, particularly where the switching costs outweigh the perceived benefits of switching.

- 18 In instances where switching is induced and the benefits thereof (as perceived by consumers) do not materialise in accordance with their expectations, *over-switching* may characterise switching patterns and incorrect conclusions may be inferred regarding the relative competitiveness of a market. This is in instances wherein an inference may be made with regarding the relationship between a highly competitive market with persistence price movements, and the volume of consumers switching, presumably on account of a positive response to the persistence in (lower) price movements. In other words, a market may be deemed to be competitive on the basis of relatively high volumes of consumer switching without these volumes being further explained by the existence of over-switching on account of the misalignment of consumer expectations. Here, tariff transparency and the terms and conditions for services is an important related regulatory measure which operates to support a number portability regulatory dispensation.⁹
- 19 Regulatory intervention ought to also be equally concerned with conduct which induces switching while setting-out clear behavioural prescriptions in respect of permissible and impermissible conduct in relation to engagements with consumers while inducing switching. To be clear: customer inducement to switch is an important function of effective and robust competition. However, the manner in which customer inducement occurs is equally important. Clearly, customer inducement premised on dishonesty, fraud and material misrepresentation is by its very nature undesirable and is likely to materially contribute to *over-switching*.
- 20 In this regard, Vodacom has observed the recent and alarming emergence of discrete patterns of fraudulent inducement for customer switching and material misrepresentation in respect of the incentive presented by recipient operators. We have equally observed correspondingly high volumes of port reversals on account of consumers having been fraudulently induced to switch due to material misrepresentations. Although the Regulations prescribe certain behavioural expectations in respect of engagements between donor operators and consumers once a legitimate port request has been initiated, these prescriptions are ambiguous and confusing. Further, they are set-out in three (3) separate regulatory instruments dealing with number portability, namely the Regulations, the Mobile Number Portability Ordering System Specification ("**MNPOSS**") and the Inter Operator Code of Practice ("**Code**") and this has rendered the interpretation of the scope of these prescriptions particularly difficult. Accordingly, Vodacom strongly believes that the entire regulatory dispensation on number portability ought to be set-out in a single statutory instrument which set-out clear behavioural prescriptions.

Summary

- 21 In the following discussion, we refer to instances wherein the absence of clarity regarding the operative scope of these prescriptions have led to vastly different interpretations amongst licensees requiring adjudicative intervention from the Complaints and

⁹ Although *under-switching* is an important consideration in the design of a number portability dispensation, the problems associated with the prevalence of over-switching are more acute and require greater regulatory scrutiny.

Compliance Committee (“CCC”) and the High Court. However, prior to briefly discussing these litigation matters (Part D and Part E), we set-out our views regarding the legal and policy basis upon which clearer behavioural prescripts regarding the impermissible conduct of licensees ought to be premised.

- 22 All in all, we believe that the law of unlawful competition adequately and appropriately renders such guidance to the Authority in its consideration of the appropriate behavioural prescripts intended to protect consumers. As such, we proceed to broadly set-out the law on unlawful competition and the salient aspects thereof which we believe ought to be transposed into prohibited and impermissible conduct set-out in the Regulations.

PART C: UNLAWFUL COMPETITION: FRAUDULENT CUSTOMER INDUCEMENT AND FRAUDULENT MISREPRESENTATION

Introduction

- 23 The Regulations, the MNPOSS and the Code have set-out certain expectations in respect of interactions between donor operators and recipient operators, donor operators and subscribers and recipient operators and subscribers. Broadly, engagements with subscribers by either donor or recipient operators are intended to facilitate the efficient porting of MSISDN within the time periods set-out in the Regulations and MNPOSS. However, Vodacom has observed the emergence of commercial practices engaged by recipient operators and premised on fraudulent misrepresentations intended to induce subscribers to switch from donor operators. These practices clearly constitute unlawful competition. We turn to set-out a brief exposition of the law on unlawful competition.

Foundations of unlawful competition

- 24 Unlawful competition refers to those rules, primarily of a common law origin, that govern the competitive process between traders. Liability on the basis of unlawful competition is delictual in nature and that protection is based on the *lex Aquilia*. At stake is a trader’s right to goodwill. In delineating the right to goodwill, our courts have relied on the principles of *fairness* and *honesty*. Another norm, the *boni mores*, also underlines the delictual nature of the remedy obtainable in cases of unlawful competition.
- 25 The right to protection from unlawful competition was set out in ***Schultz v Butt*** where the court held that:

“In order to succeed in an action based on unfair competition, the plaintiff must establish all the requisites of Aquilian liability, including proof that the defendant has committed a wrongful act. In such a case, the unlawfulness which is a requisite of Aquilian liability may fall into a category of clearly recognized illegality, as in the illustrations given by Corbett J in Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) at 216F - H, namely trading in contravention of an express statutory prohibition; the making of fraudulent misrepresentations by the rival trader as to his own business; the passing off by a rival trader of his goods or business as being that of his competitor; the

publication by the rival trader of injurious falsehoods concerning his competitor's business; and the employment of physical assaults and intimidation designed to prevent a competitor from pursuing his trade. But it is not limited to unlawfulness of that kind".¹⁰(Own emphasis)

- 26 The freedom to pursue a livelihood, operate a business and compete in the marketplace is essential to any free enterprise system. Competition creates incentives for businesses to earn customer loyalty by offering quality goods at reasonable prices. At the same time, competition can also inflict harm. For instance, the freedom to compete gives businesses the right to lure customers away from each other. When one business entices enough customers away from competitors, those rival businesses may be forced to shut down or move.
- 27 The law of unlawful competition will not penalize a business merely for being successful in the marketplace. Nor will the law impose liability simply because a business is aggressively marketing its product. The law assumes, however, that for every rand earned by one business, a rand will be lost by a competitor. Accordingly, the law prohibits a business from *unfairly* profiting at a competitor's expense. The law of unlawful competition seeks to ensure that competition in business remains within fair and reasonable bounds and that no trader benefits at the expense of his/her rivals through the use of improper business methods.
- 28 Prior to conduct constituting unlawful competition, there are four requirements of *Aquilian* liability that must be present:
- 28.1 A wrongful act or omission;
 - 28.2 Fault, in the form either of intention or negligence;
 - 28.3 A causal link between the wrongdoer's behaviour and the loss sustained; and
 - 28.4 Patrimonial loss suffered by the victim.
- 29 The general test for wrongfulness was laid down in ***Schultz v Butt*** where Nicholas AJA stated that in determining whether competition is unlawful and in determining the fairness and honesty of conduct, regard should be given to the concept of *boni mores* and to the general sense of justice of the community, the legal beliefs of society in this regard being those of the legal policy-makers of the community, such as legislator and judge.¹¹ In an earlier judgment in ***Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Others*** Van Dijkhorst J stated that:

"What is needed is a legal standard firm enough to permit the influence of an inherent sense of fairplay. In have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the boni mores, manifested in public opinion. In determining and

¹⁰ 1986 (3) SA 667 (A) at 678H – 679E.

¹¹ At 679 C – E (Corbett, Hoexter and Boshoff JJA and Nesadt AJA concurring).

applying this norm in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal. As this norm cannot exist in vacuo, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination. Public policy as criterion for unlawfulness in delict is well known in our law; it has stamp of approval of our highest court".¹²(Own emphasis)

30 Further, in ***Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd*** the court held as follows:

"Fairness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition, they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade".¹³

31 In addition, in ***Elida Gibbs (Pty) Ltd v Colgate-Palmolive (Pty) Ltd*** the court was called upon to decide whether in order to satisfy the requirement of wrongfulness in a claim based on unlawful competition, it sufficed to allege that conduct is *contra bonos mores*, or whether the claimant must go further and allege *dolus* or dishonesty on the part of his trade rival.¹⁴ The court held that the underlying principle is that the dissemination of a wilful falsehood that causes damage to another is *contra bonos mores*. However, it does not follow that in all instances of unlawful competition a statement must be deliberately false before it can give rise to legal liability. The test remains whether or not the conduct complained of is *contra bonos mores*, and it is perfectly possible for an untrue statement that is not dishonestly made nevertheless to be *contra bonos mores* and thus constitute unlawful competition.

Summary

32 In Part D and Part E of our written representation, we set-out the importance of premising the prohibited conduct in respect of engagements with subscribers by donor operators and recipient operators on the general operation of unlawful competition as set-out above. In this regard, Vodacom is of the view that the Regulations require urgent review in respect of the permissible and impermissible subscriber engagements in circumstances wherein port requests have been initiated and the donor operator is required to authenticate the actual identity of the person initiating the port request. This subscriber authentication is crucial in ensuring that persons initiating port requests are in fact the legitimate and lawful owners of the relevant MSISDN, and that the port request has been initiated legitimately and not on the basis of some material misrepresentation in respect of the identity of the subscriber.

¹² 1981 (2) SA at 188H – 189A

¹³ 1968 (1) SA 209 (C) at 218

¹⁴ 1988 (2) SA 350 (W)

- 33 As shall be clear, the current provisions in the Regulations governing permissible subscriber contact by donor operators are rather ambiguous and unclear, and this has led to two instances wherein both the donor operator and recipient operator have interpreted the operative scope of same substantially differently. In the circumstances, a review of these provisions ought to at least render the necessary clarity so as to avoid unnecessary litigation.
- 34 Lastly, in reviewing these provisions, Vodacom is of the view that the interpretative contours of the principles of fairness, honesty and the absolute prohibition of fraudulent misrepresentations by recipient networks ought to inform the reformulation of the Regulations.
- 35 We turn to briefly describe the deleterious effect that the current ambiguous formulation of these provisions have on subscribers.

PART D: MTN (PTY) LIMITED v CELL C (PTY) LIMITED

- 36 Vodacom has noted the CCC's decision regarding a complaint lodged by MTN (Pty) Limited ("MTN") against conduct allegedly perpetrated by Cell C (Pty) Limited ("Cell C") in respect of an alleged contravention of Regulation 7(1) of the Regulations. Regulation 7(1) of the Regulations reads as follows:

"A recipient operator shall not order number portability for any subscriber unless it has received a request from that subscriber and shall ensure that the recipient service provider does not order number portability for any subscriber unless it has received a request from that subscriber."

- 37 The complaint lodged by MTN had been characterised by the CCC as constituting *unlawful porting* and described instances wherein MTN subscribers had allegedly been ported to Cell C without their explicit consent or knowledge. Having emphasised the seriousness of violations of the Regulations and the substantial inconvenience caused to consumers to address unauthorised ports, the CCC made the following observations:

"Porting is a sophisticated and complex process, and can therefore be quite confusing to consumers. The regulations related thereto are also not easily understood by people who are not au fait with the telecommunications industry, which may be most consumers."¹⁵ (Own emphasis)

- 38 The CCC also referred to the substantial number of *unwanted ports* and described the prevalence of unsuccessful ports as industry-wide and fairly common problem.¹⁶ Accordingly, in addressing the prevalence of unwanted, unsuccessful and unlawful porting, the CCC made the following recommendation:

¹⁵ At para 93

¹⁶ At para 95

“The Authority should direct all mobile network operators to carry-out campaigns directed at their agents and consumers to make them aware of the porting rules and regulations, and also to make consumers aware of their rights in the case of erroneous or illegal porting.”¹⁷

39 All in all, the CCC’s decision reflects significant deficiencies in the Regulations’ treatment of impermissible conduct that has the effect of inducing subscribers to initiate port requests on the basis of incomplete information and/or material misrepresentations. Accordingly, Vodacom is of the view that substantial reformulations of the Regulations are required so as to protect subscribers against unscrupulous conduct attributed to licensees, their authorised 3rd parties, distributors and agents. At the very least, Vodacom considers that the law on unlawful competition provides the basis for which the Regulations may be reformulated.

PART E: CELL C (PTY) LIMITED v VODACOM (PTY) LIMITED, MTN (PTY) LIMITED, TELKOM SA SOC LIMITED AND ICASA

40 On 14 June 2016 Cell C launched an urgent High Court application against Vodacom, MTN, Telkom SA SOC Limited (“**Telkom**”) and the Authority in respect of SMS messaging process for ports adopted by Vodacom and MTN.¹⁸

41 In its Founding Affidavit, Cell C alleged that Vodacom and MTN had begun to perceive Cell C as a legitimate threat to their market position and this had led them to dissuade customers from switching to Cell C by making it difficult for subscribers to take their cellular telephone numbers with them when they switch operators. Further, alleged Cell C, Vodacom and MTN did not have the same degree of incentive to attract subscribers of smaller operators since they made their profits from their existing subscriber bases and their main incentive was to retain existing subscribers. As a result, Cell C alleged, hindering the porting process served as the most effective way to do this because customers who experience the problem with porting their numbers to another network are unlikely to try and switch again.¹⁹

42 Cell C also made reference to the meeting held on 18 March 2014 between the Authority, Vodacom, MTN and Cell C where both Vodacom and MTN requested permission to send specific messages to subscribers initiating port requests. This was intended to combat banking fraud. Cell C also alleged that MTN and Vodacom were given permission to implement their proposed validation systems and report back on the success of the systems. However, Cell C alleged that both MTN and Vodacom had failed to adhere to the undertaking made at the meeting with the Authority and instead have constantly changed the SMS port message in order to frustrate subscribers intending to port to Cell C.

¹⁷ At para 97.4

¹⁸ MTN had been the only respondent to oppose Cell C’s application.

¹⁹ At para 21

- 43 In support of its averments, Cell C made reference to the following examples:
- 43.1 Vodacom elected to use a message that notified subscribers that it had received a request to port the subscriber's number and notified the subscriber that he or she should contact Vodacom Customer Care if he or she had not made the request. On the other hand, MTN elected to use a message which notified subscribers to reply to an SMS by pressing 1 where they have not send a port request;²⁰
- 43.2 On 19 June 2015 Vodacom changed its message to read as follows: "*Vodacom has received a request to port your number – 082xxxxxx. If this is incorrect please call Vodacom Customer Care on 082 111 urgently*". According to Cell C Vodacom used this message until 18 April 2016;
- 43.3 During the second half of 2015 and the first two months of 2016 Cell C experienced increasing numbers of instances of delay in the porting process and incorrect rejections of porting requests. The incidence of these problems in relation to ports from Vodacom increased markedly during March 2016 and resulted in Cell C's technical staff raising the problem directly with Vodacom. The cause of these problem's was Vodacom's failure to deactivate the number on their network with the result that its systems did not recognise that the number was on the Cell C network and that calls to the number from a Vodacom number had to be routed to the Cell C network rather than dealt with as an "on net" call on Vodacom's network. Despite undertakings made by Vodacom in several correspondences Vodacom has still not remedied the technical challenges that were highlighted by Cell C and Cell C continues to experience delays and incorrect rejections;²¹
- 43.4 On 18 April 2016 Vodacom fundamentally changed its SMS messaging process where subscribers were advised to contact Vodacom where every subscriber who wishes to port out is required to confirm that request with Vodacom, failing which the port request will be rejected. The SMS also included a reference to possible loss of airtime and data bundles as a result of porting;²² and
- 43.5 On 26 April 2016 MTN also changed its SMS message process alerting subscribers that it has received a port request and that the subscriber will lose airtime/SMS bundles SMS. Subscribers were urged to reply to the SMS within 30 minutes if they have not requested the port.²³
- 44 Although an interim interdict had been granted in favour of Cell C pending the adjudication of a complaint that Cell C were to lodge with the CCC within fifteen (15) days from the date of launching the application, the High Court did not deliberate on the lawfulness or otherwise of the conduct complained of by Cell C. Notwithstanding, as the recipient

²⁰ At para 47

²¹ At para 59 – 64

²² At para 66

²³ At para 69

operator, Cell C held a different view to MTN in respect of the permissibility of engagements that a donor operator is entitled to have with subscribers that had initiated a legitimate port request. The sharp differences in interpretation clearly demonstrate the urgent need for the review of the current Regulations.

PART F: PORTING OF NON-GEOGRAPHIC NUMBERS: 080, 086 and 087 NUMBER RANGES

- 45 Section 68(1)(a) of the Act imposes an obligation on the Authority to prescribe regulations for the inception of a national numbering plan while section 68(1)(b) of the Act mandates the Authority to prescribe regulations concerning the implementation of number portability. Further, section 68(7)(d) of the Act requires the contemplated regulations to give treatment to *inter alia* the protection of consumers and disclosure of consumer rights relating to number portability, and a schedule. In addition, section 67(7)(e) of the Act requires number portability regulations to be inclusive of a schedule for transforming the numbering plan to a non-geographic numbering system, and this include enabling inter-operation between telephone numbers and the Internet domain name system. All in all, section 68 of the Act is *forward-looking* in envisaging a dynamic regulatory dispensation that accommodates multiple users of the national numbering plan and enabling these users to switch between electronic communications service licensees through the regulations contemplated in section 68(1) of the Act.
- 46 Importantly, section 68(7)(e) of the Act specifically contemplates the accommodation of voice over internet protocol (“VoIP”) number ranges within the Regulations, while other number ranges such as the 080 and 086 ranges may be adequately accommodated on the same basis and for the same policy and regulatory rationale as geographic and mobile number ranges. That is, the elimination of switching costs for subscribers in response to price and non-price competition ought to be facilitated through the operation of the Regulations, and there is no rational or reasonable basis in law for the Regulations to operate to exclude certain number ranges from switching between electronic communications service licensees. In this regard, in reviewing the operative scope of the Regulations, Vodacom strongly urges the Authority to explicitly include subscribers of other non-geographic number ranges.
- 47 In setting-out the scope of the ***Local Number Portability Porting Interval and Validation Requirements Order***, the FCC specifically included toll-free, or *800 and 800-Like Service Subscribers* within the operation of the rules set-out in the Order.²⁴ The FCC’s policy rationale for number portability had been stated as follows:

“...it is critical that customers be able to port their telephone numbers in an efficient manner in order for LNP to fulfil its promise of giving “customers flexibility in the quality, price, and variety of telecommunications services.” Through the LNP process, consumers have the ability to retain their phone number when switching telecommunications service providers, enabling them to choose a provider that best suits their needs and enhancing competition.”²⁵

²⁴ *Telephone Number Portability*, CC Docket No. 95-116, Report and Order and Further Notice of Proposed Rulemaking, FCC 09-41.

²⁵ At para 7

- 48 In the circumstances, Vodacom believes that over and above section 68(7)(e) of the Act specifically empowering the Authority to have regard to other similar non-geographic numbering plans adopted in other jurisdictions in the implementation of the Regulations, the extension of the Regulations to include other non-geographic numbers is strongly encouraged.

SPECIFIC COMMENTS

PART G: VODACOM RESPONSES TO THE AUTHORITY'S QUESTIONS

Question 1

Describe your company or personal involvement in number portability

Vodacom is a licenced Individual Electronic Communications Service (Licence No. 0049/IECS/JAN/09) and Individual Electronic Communications Network Service Provider (Licence No. 0049/IECNS/JAN/09). Further, in terms of the Regulations licensees rendering ECS are obliged to offer mobile number portability.

Question 2

Describe your company's positioning in the fixed line and/or mobile markets

Kindly refer to our response to Question 1.

Question 3

What would you consider to be the advantages and/or disadvantages with the current number portability framework and the administration thereof?

Vodacom notes that there are several challenges that emanate from the current number portability framework. Notwithstanding, we also believe that there are certain areas that should be revised in order to strengthen the number portability regime.

ADVANTAGES

- The centralised system of porting coupled by the need to have a dedicated team to deal with number portability allows for efficient management and quick resolution of number portability queries
- The relationship between the Port Support Teams amongst licensees renders it efficient in addressing queries and complaints at the first instance while avoiding invoking dispute resolution mechanism set out in the Code.

DISADVANTAGES

- One of the major challenges with the current number portability framework is that there is no active subscriber authentication other than a CLI verification undertaken at a technical level. We have already alluded to the challenges associated with fraudulent porting at Part C, D and E above.
- The inability to port non-geographic telephone numbers constraints effective competition amongst licensees and further operates to restrict corporate subscribers from electing their preferred host licensee on the basis of, amongst others, price, quality etc. we have further set out our views regarding the desirability for the scope of the Regulations to be expanded so as to include porting of non-geographic numbers in Part F above.
- The limitation that ports should take place or be processed only during Network Synchronisation Time ("**NST**") is likely to cause frustration for subscribers and may lead to the abandonment of port requests already initiated.

Question 4

Would you consider the fees structure associated with participating in Number Portability such as cost recovery, subscription to number portability administration and charging of ports to be effective?

Vodacom is of the view that the charges for Geographic number porting are disproportionately high relative to mobile number porting charges. Unlike GSM customers who port in a full number range which varies in size, geographic numbers port at approximately R40 per Direct Dial In (“DDI”)/Direct Dial Overseas (“DDO”). As such, the Authority should consider revising the current fee structure to make provision for the DDI/DDO number range as ports for companies with large number of extensions can be more costly.

Question 5

Would you say that there is a need to review the block sizes for Number porting? Please elaborate.

The current Regulations prescribe that numbers should be ported in blocks of 1000 to 10,000 range of numbers. Vodacom is of the view that this limitation is exclusionary in nature as it excludes the porting of numbers which fall below the prescribed minimum of a 1000 (mostly carried out by Small and Medium enterprises and Small Office Home Office establishments) and/or those who want to port numbers above the current threshold of 10 000 at once. As such, Vodacom propose that the limitation placed on porting of block numbers should be reviewed to cater for the needs of different operators.

Question 6

What is the mean porting timeframe, in hours, have your subscribers experienced? Do you consider it to be reasonable? If not, please indicate what challenges have you experienced and what measures could be taken to reduce the porting timeframe.

As our answer to question 3 in respect of the disadvantages of the current number portability framework and administration thereof, we referred to the limitation of processing port requests exclusively during NST. As such, we believe that the administration of the Regulations and more efficient and timely processing of port requests ought not to be restricted to the NST period. Accordingly, we believe that the removal of the restriction to process port requests during NST would have a profound effect on reducing porting time frame in its entirety.

Question 7

Do you think the current geographic porting at the local area code exchange promotes effective number portability? If not, please elaborate and propose alternatives if any - Geographic numbers ported make a up a fairly high proportion of all geographic numbers.

No comment.

Question 8

What other non-geographic numbers do you think should be subjected to number portability besides mobile numbers? Please elaborate

Kindly refer to Part F.

Question 9

Do you think the port back waiting period of two (2) months in the current number portability regulations promotes effective number portability? If not, please elaborate and propose alternatives if any

Vodacom believes that the port back waiting period of 2 months is adequate since it affords the recipient operator enough time to offer targeted products and services aimed at meeting subscriber needs. Importantly, it allows customers to make an informed decision whether to remain with the recipient operator or port its number to another operator.

Question 10

Which provisions of the Number Portability regulations including the functional specifications do you think should be reviewed to improve the efficiency and effectiveness of porting?

We have made substantial comments in respect of the significant deficiencies of the Regulations at Part B, C, D, E and F and have proposed to the Authority that the Regulations must be amended accordingly. To this end, we believe that our recommendations set out as our general comments would materially contribute in improving the efficiency and effectiveness of the number portability regulatory dispensation.

Question 11

Do you think the number of days it takes to port should be increased or decreased? Please elaborate and provide alternatives if any

Kindly refer to our response to Question 6 above.

Question 12

Do you think the current recipient led porting process is effective? Please elaborate and provide alternatives if any.

Vodacom is of the view that the recipient led porting is effective and allows for protection against impediments from the donor network. Notwithstanding, we believe that it exposes subscribers to fraudulent ports which are initiated without their knowledge or consent. As such, we believe that the current recipient led porting process should be strengthened in order to protect subscribers from fraudulent ports. Accordingly, we have made several recommendations as part of our general comments regarding the strengthening of the current recipient led porting process.

Question 13

Do you think there should be a standard/uniform call routing mechanism? Please elaborate

Vodacom believes that the current 27 Dxyz routing number format suffices.

Question 14

Do you think the process and procedures for resolving subscriber complaints and providing subscribers remedies are efficient? Please elaborate

While we believe that the current self-regulatory mechanism for dispute resolution as set out in the Code suffices in promoting the resolution of disputes amongst licensees, we have already set out the instances wherein the inadequacies of this process have led to litigation. As such, we believe that a dispute resolution mechanism similar to that set out in the Interconnection Regulations and the Facilities Leasing Regulations which empower the Authority to make determination in the resolution of disputes ought to be included in the amended Regulations.

Question 15

Do you think that customers are adequately protected by the Number Portability regulations? If not, please elaborate and provide alternatives.

Vodacom is of the view that customers are not adequately protected by the Regulations as they are susceptible to fraudulent practices by other parties. For example a customer that has a port initiated without their consent or knowledge is unable to counteract or stop this port without contacting the recipient network. This engagement requires a working SIM and in some cases credit/airtime, both of which might not be readily available if the fraudulent port has already been processed leaving the customer with no recourse to retrieve their MSISDN. Accordingly, Vodacom is of the view that subscribers should be given the option to manually trigger port cancellations and reversals within a prescribed timeframe in order to remedy fraudulent or erroneous ports easily and without the need to contact the call centre.

Question 16

Please submit any other information that you believe the Authority should consider.

Kindly refer to our comments in the General section.

END