
**VODACOM'S REPRESENTATIONS SUBMITTED IN RESPECT OF PROPOSED AMENDMENTS TO
THE
END-USER AND SUBSCRIBER SERVICE CHARTER REGULATIONS 2016 PUBLISHED 17
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INTRODUCTION

- 1 Vodacom welcomes the opportunity to comment on the proposed amendments to the *END-USER AND SUBSCRIBER SERVICE CHARTER REGULATIONS 2016* published by the Authority on 17 November 2017. Vodacom notes, from the Explanatory Note published with the proposed amendments, that the amendments have been proposed following concerns raised by stakeholders and specifically end-user groups and social media campaigns. Vodacom understands that these amendments have been introduced to address these end-user complaints and concerns.
- 2 Vodacom remains committed to reduce the cost to communicate and to extend access to communication to all. As detailed in Vodacom's submission dated 9 May 2017, Vodacom has made significant progress in reducing the cost to communicate, educating customers on data offers best suited to their needs and increasing customer awareness of data usage through Smart Notifications concerning bundle depletion. More recently Vodacom implemented the following measures to make data more affordable, to protect end-users from higher out-of-bundle ("OOB") charges and to prevent "bill shock":
 - 2.1 The reduction of OOB rates for pre-paid end-users to R0.99 and R0.89 for post-paid and hybrid end-users, effective from October 2017.
 - 2.2 The implementation of a Safety Bundle as a default for select prepaid users. Currently over 500,000 subscribers are subscribed to the service paying an effective 0.60c per MB. Further functionality to provide an opt-in service for all prepaid subscribers is being implemented.
 - 2.3 Data Auto Allocate for post-paid where customers can opt into automatically purchasing a bundle (selected from a predefined list of available data bundles) when they reach the end of their existing bundles.
 - 2.4 The implementation of OOB management control, with the ability to turn off OOB usage per subscriber with enhanced control enabling the subscriber to set usage locks per bearer and at account level.
 - 2.5 Threshold usage notifications for all bearers in and out of bundle.
 - 2.6 Usage notifications for prepaid subscribers in respect of OOB data usage.
- 3 Notwithstanding the significant progress made, Vodacom will continue to optimise its data portfolio and customer awareness measures.
- 4 Vodacom submits that many of the end-user complaints can be addressed without the need for the proposed regulations. Further, insofar as the issues relate to the rates that are charged, these issues can be addressed directly in the appropriate forum – the priority market review being a process in which the Authority is addressing these issues. This is particularly important when it comes to radical interventions in the product offering and associated pricing modelling, which cannot competently or rationally be done without a thorough market review.
- 5 As set out more fully below, there are a number of reasons why the proposed amendments ought not to be implemented. These reasons include that some of the requirements are *ultra vires* the empowering legislation and are irrational.
 - 5.1 While seeking to address certain end-user complaints on specific issues, it appears that the Authority has not taken into account the likely impact of the proposals on other end-users and the complaints that will arise from those end-users if the regulations are

enforced. The Authority has also not considered alternative measures that might achieve the intended purpose without having the negative impact for other end-users and the industry generally.

5.2 Vodacom submits, as set out below, that there are likely to be many negative consequences for end-users if these regulations are enforced. These consequences arise not only from limiting end-users' choice of products but also from forcing service providers to disconnect critical (and in some cases, emergency) services where the end-users do not wish them to do so.

6 We address each of the proposed amendments below.

AMENDMENT TO REGULATION 1

7 There are additional terms in the proposed amendment which are not defined and ought to be defined if the amendment is implemented. These terms include "out-of-bundle", "allocated data", "session" and "disconnection". It is critical to note that the concept "out-of-bundle" is not defined, and that the definition of "bundle" would encompass current "out-of-bundle" rates. This renders the whole structure of the proposed regulations incoherent and irrational, and contrary to the requirement of the rule of law that regulations must be clear and capable of compliance, as the proposed regulations depend on a distinction between "bundles" and "out-of-bundle" rates.

AMENDMENT TO REGULATIONS 4 AND 5

8 Vodacom has no comment.

AMENDMENT TO REGULATION 8 – INSERTION OF 8A(1) AND 8B(1)(a)

Proposed amendment

9 8A Voice and SMS Services – "(1) A Licensee must send usage notifications for voice and SMS to end-users, the intervals must show 50%, 75%, 90% and 100% service depletion. The notification must be through an SMS, push notification or any other applicable means."

10 8B Data Services – "(1) A Licensee must ensure that an end-user is: (a) sent data usage depletion notifications on regular intervals through SMS, push notification or any other applicable means, showing 50%, 75%, 90% and 100% depletion of data bundles."

Vodacom's interpretation

11 Vodacom understands that these provisions have been included in order to address end-user complaints around the depletion of voice and SMS services and/or data bundles and the transition from in-bundle to OOB status.

11.1 We understand the intention is to ensure the end-user is notified timeously of the number of voice, SMS and data units available "in bundle", to enable the end-user to take steps to avoid the consequences when the allocation/bundle is depleted.

11.2 In addition to requiring that notifications be sent, the Authority seeks to prescribe the content of each notification – recording the percentage depletion at pre-determined intervals.

- 12 While Vodacom is technically capable of sending such notifications (save where network, platform or system failures are encountered), Vodacom submits that the content of the notification ought not to be prescribed and certainly, the "percentage depletion" notification ought not to be prescribed.
- 13 Vodacom's extensive experience with end-user usage patterns, needs and end-user education indicates clearly that end-users will not benefit from a "percentage depletion" notification and any such notification is liable to confuse rather than to assist end-users. There is likely to be far greater benefit to end-users in a notification which records the bundle units remaining (in the same unit of measure in which the bundle is purchased e.g. MB). This would enable end-users to manage and control their usage and to proactively plan for the purchase of additional bundles or units if they so require.
- 14 Notification of a percentage depletion is meaningless in the absence of clear knowledge of the original size of the monthly allocation or bundle. For example, where an end-user buys different size bundles on different occasions, for instance, 100MB on one day and then 10MB on another day, a notification that 75% is depleted could mean either 25MB remains or 2.5MB remains, depending on the bundle size bought on a given day. The end-user would then have to do the conversion into units rather than it being provided to the end-user in the first place. Further, confusion would be compounded where the end-user has purchased multiple different bundles (as top-ups before depletion). By way of example:
 - 14.1 End-user buys 20GB in October 2017 and carries over 5.5GB to November 2017.
 - 14.2 He/she then buys 2.5GB on 1 November, so that he/she has 8GB at the beginning of the month. When should the 75% bundle depletion notification be given?
 - 14.2.1 Is it when the remaining data hits 5GB (being 25% of the original 20GB)?
 - 14.2.2 Is it when it reaches 2GB being 25% of the data available after the previous purchase?
 - 14.2.3 Is it at 0,625GB, being 25% of the 2,5GB top-up?
 - 14.2.4 Is it at some other point?
- 15 While it may be possible for service providers to agree on a consistent approach or standard in these types of situations, end-users are unlikely to understand such agreement and, in any event, it is wholly unhelpful to the end-user as it necessarily requires that the end-user be able to do a similar calculation. In Vodacom's experience, it is advisable that flexibility be permitted to enable meaningful notifications to be given to end-users, depending on end-users' circumstances. It remains in the service provider's interests to improve end-user satisfaction levels and to address end-user concerns in an efficient and appropriate way. It is in Vodacom's interest that the notification given to the end-user be communicated in a manner which is most useful to its end-users and it intends to continue doing so. Vodacom submits that there is no benefit in the Authority prescribing that notifications be given as a percentage depletion.
- 16 Although Vodacom intends to continue with a programme of sending notifications, we point out that a number of devices that use voice, SMS and data services (specifically for M2M applications) do not have the facility to view such notifications.

Vodacom's proposal

- 17 While Vodacom does not object to a regulation requiring that notification be given to end-users, it does not consider that such regulation is necessary as it is in the service provider's interests to give such notification to its end-users and Vodacom currently does so.
- 18 If the regulation is to be promulgated, however, Vodacom submits that the method and frequency of notification should not be prescribed and operators should be allowed flexibility to select the most effective method of notification.
- 19 If the Authority insists on prescribing a minimum standard, Vodacom submits that it should go no further than prescribing that a minimum of two notifications be given to an end-user before 90% of the allocated voice, SMS or data units are depleted. This will allow the service provider to give adequate and appropriate notices having regard to the bundle units remaining, the rate of unit consumption, etc. It also permits flexibility as the market and technology develop.

AMENDMENT TO REGULATION 8 BY INSERTING 8A(2) AND 8A(3) FOR VOICE AND SMS SERVICES

Proposed amendment

"(2) A Licensee must provide end-users who are on post-paid plans with an option to buy additional voice services or SMS service upon depletion of such services."

"(3) Where an end-user who is on a post-paid / hybrid tariff plan does not buy additional voice services or SMS services, a licensee must provide end-users with an option to be disconnected from access to the relevant depleted services and allow such end-users to only use emergency services, customer care services and to receive incoming voice calls and SMSs and other free services"

Vodacom's interpretation

- 20 Vodacom notes the difference between the current draft and the prior draft of regulation 8A(3) so that it contemplates a licensee providing end-users "*with an option to be disconnected*" instead of obliging the licensee to "*disconnect the end-user*". Vodacom also notes that these provisions relate only to "post-paid plans" and "hybrid tariff plans", and not pre-paid plans.
- 21 Vodacom understands that the options contemplated in 8A(2) and 8A(3) do not apply to, and need not be considered in respect of, the following services-
- 21.1 The depletion of additional bundles bought and bolted on to contract plans;
 - 21.2 International voice and SMS services (dialling or roaming); or
 - 21.3 Premium rated voice and SMS services.
- 22 The regulation does not address the default position in the event that the end-user fails to exercise the options provided. Vodacom understands that, in this circumstance (unlike in the proposed regulation for data services under 8B), the licensee is obliged to continue providing the services and may apply OOB rates.
- 23 What is not clear is when the licensee may provide the end-user with the proposed "option" to buy additional voice services or SMS services or the "option to be disconnected" - whether these options can be offered to the end-user and/or exercised by the end-user only at the time of or after the depletion of the allocated services / bundles on his or her plan; or at any time.

- 24 If the Authority wishes to impose an obligation on licensees to provide end-users who are on post-paid plans or on hybrid tariff plans with the options contemplated in 8A(2) and 8A(3), it should be clear that the licensees can provide the option to the end-user and the end-user can exercise that option at any time prior to or after depletion of the allocation included in his or her contract tariff plan, including at the time that the contract is concluded. This would permit the end-user to exercise the freedom of choice of determining the services required in terms of its contract with the licensee and would prevent disruptions to end-users who require continuous service and/or wish to avoid OOB rates. The regulation should make it clear that the "option to buy" is not to be provided only "upon depletion of such services" but rather at any time, so that the additional voice services or SMS services continue to be available upon depletion of the monthly allocation.
- 25 Vodacom currently has such options available to end-users.

Technical feasibility

- 26 If the end-user is provided with an option and exercises that option to buy identified packages (e.g. bolt-on bundles) prior to the depletion of the original services, it is technically feasible for Vodacom (at the time of depletion of the original services) to automatically allocate the pre-selected additional services.
- 27 It is not possible to provide the end-user with the necessary option and to permit the exercise of that option in the event that core network elements required to rate voice and SMS consumption are offline (whether due to maintenance, upgrades or network / system failures). In the case of aforesaid failures Vodacom will still attempt to offer customers service in order to protect the customers' right to service. This is done via a degraded mode of service that allows for limited service in the case of failure in the rating and bundle management environment. In these instances, it will not be technically possible for Vodacom to monitor usage in real time in order to timeously notify and disconnect customers where this option was selected by customers.
- 28 Save where operations may be hampered in the event of network and system failures, it is technically possible to notify end-users of the available options when services are depleted. However, in respect of "OneNet", "Closed User Groups" and voice and SMS bundles supplied on a "corporate wide" basis, those services are not monitored in real time and are rated offline. Consequently, it is not technically possible to facilitate the option notification and the exercise of such option immediately at the time of depletion of such services.
- 29 While roaming voice and roaming SMS services are excluded from the scope of the proposed amendment, Vodacom notes that these services can similarly not be monitored in real time to enable an option to be provided (or disconnection to occur) immediately upon depletion of the services, as the services are rated offline. The authority is referred to Vodacom's submission dated 12 May 2017, section D17 for more detail. Similarly, premium rate and international dialling services are not applied to reduce the voice and SMS units allocated on a monthly subscription basis in terms of post-paid / hybrid contracts. These services are also not offered as separate bolt-on bundles. The premium rated and international services are charged individually as each service recovers its own unique direct cost. The use of these services is consequently not subject to this regulation.

Impact on end-users and impracticalities

- 30 The impact of this proposed amendment ought to be limited if the Authority permits the end-user to exercise the proposed options at an early stage, including at the time that the post-paid or hybrid contract is concluded. If however the Authority requires that the end-user can only

exercise those options during the contract period, this will negatively impact on a number of end-users and is likely to give rise to significant impracticalities, as detailed below:

- 30.1 First, currently Vodacom post-paid and hybrid end-users have the option to buy additional voice services or SMS services at any time both prior to and upon depletion of monthly allocated units. If the ability to exercise such option and Vodacom's flexibility to offer such options are restricted by the regulation, this will unreasonably and unjustifiably restrict the end-user's choice of product and services and how such services can be consumed.
 - 30.2 Second, current post-paid and hybrid end-users wanting to be disconnected when certain elected thresholds are reached (by service) can use service-specific account lock facilities to set these thresholds. These options are always available and can be activated via various channels. To the extent that the proposed amendment infringes on this arrangement, it would unjustifiably restrict the end-user's choice and ability to manage and control his/her own contractual arrangements.
 - 30.3 Third, current post-paid and hybrid end-users can pre-select rates that will apply in the case of no active bundle. This, similarly, should still be permitted so as not unjustifiably restrain end-user choice.
- 31 Some customers use voice and SMS services for Machine to Machine ("M2M") applications. This ordinarily involves remote wireless communication between two or more devices, and/or with a central server, in order to support a specific business process or service. In most cases, there is no direct engagement with an end-user but only with the machine.
- 32 The M2M end-users primarily use GPRS data service to connect their M2M devices to a central server, and SMS service is used in many applications as a fail-over should a data network not be available. Voice service is seldom required, although applications such as gate controllers and fleet management do require voice services.
- 32.1 Since these devices are typically not manned by end-users, most, if not all, of the notifications sent to these SIM cards with a call for action (demanding a response) will not receive a reply.
 - 32.2 M2M devices are programmed in many cases to ignore SMSs received from other MSISDNs apart from the end-user's SMS gateway. This is due to the large number of spam SMS messages that consume the limited memory on the SIM.
 - 32.3 Unless the end-user is able to exercise an option at the time of contracting, there is limited or no opportunity for the end-user to exercise the required option given the limited opportunity, if any for communicating via the SIM.

Vodacom's submission and proposal

- 33 It should be made clear that international and premium rate voice and SMS services are not subject to this regulation. It should also be made clear that this regulation would apply only to national standard voice and SMS services.
- 34 The regulation should permit the licensee to provide an option to the end-user to choose a default position when monthly allocated bundles are depleted and for the end-user to exercise that option at any time, including at the time that the contract is concluded.
- 35 If the Authority seeks to impose regulations which do not permit the above flexibility and the ability of the end-user and licensee to contract freely, Vodacom submits that the regulation will

be *ultra vires*, as it would amount to the prescription of the basic product and service offering and associated price modelling, by effectively excluding a particular product offering, which is beyond what section 69 of the ECA empowers.

- 36 Vodacom understands that this regulation has been introduced in order to provide a mechanism to end-users that would avoid or reduce bill shock – through the running up of charges on an OOB tariff. Vodacom notes, however, that unlike data services (addressed below), outgoing voice and outgoing SMS services are services that are ordinarily used intentionally by users and there is unlikely to be instances of bill shock in the same manner as may be experienced with data usage.

AMENDMENT OF REGULATION 8 BY INSERTING REGULATION 8B(1)(b)-(d) AND 8B(2) ON OUT-OF-BUNDLE DATA BILLING PRACTICES

Proposed amendment

“(1) A Licensee must ensure that an end-user is:

- (b) provided with an option to buy additional data bundles upon depletion of their allocated data through the USSD platform or any other applicable means;*
- (c) not defaulted to out-of-bundle data charges when their data bundle is depleted; and*
- (d) provided an option through SMS, push notification, USSD or any other applicable means to opt-in or opt-out of data bundle usage per session.*

(2) “Where an end-user opt-out of out of bundle data usage when their data bundle is depleted, a Licensee must disconnect an end-user from out of bundle data usage until such time that the end-user gives express consent or authorisation to be charged out-of-bundle rate.”

Vodacom’s interpretation

- 37 The option which the licensee is required to provide in 8B(1)(b) must be provided to the end-user “upon depletion” of their allocated data. This provision suggests that the licensee is precluded from offering such an option to the end-user before depletion of the allocated data. By implication, it suggests that no pre-selected rates (regardless of whether such rate is a unit-by-unit rate or a bundle rate) may be charged when a bundle is depleted.
- 38 As currently drafted, when a bundle is depleted, and because the end-user cannot be defaulted to an “out-of-bundle data charge”, the licensee is obliged to disconnect the end-user. The effect of this is that the data services will be disconnected when the data bundle is depleted and the end-user will then be obliged to exercise the prescribed option (being precluded from doing so at an earlier stage because of the prohibition on the licensee offering such an option at an earlier stage).
- 39 The end-user can re-establish services only once he/she has exercised the option to buy additional data bundles.
- 40 The regulation permits the end-user to opt for the continuation of services on “out-of-bundle charges” but, where that option is selected, that option will be exercised only for the current “session”. At the commencement of the next “session” and before the end-user can access data services, he/she must first elect whether to do so on “out-of-bundle data charges” or to purchase a new data bundle. The licensee may not permit access to data services (and charge therefore) unless the end-user has made that selection at the commencement of each “out-of-bundle session”. This requires a positive response from the end-user to the request for the exercise of an

option on every occasion (for every session), before data services can be provided in the absence of a new bundle.

41 Vodacom understands that this regulation will not apply to-

41.1 Roaming data services;

41.2 End-users who never buy data bundles but rather use the network on an ad hoc basis and pay agreed rates on that basis.

Technical feasibility

42 As was pointed out in section C.3 of Vodacom's submission dated 9 May 2017, it is not always technically feasible to present options and to obtain consent upon depletion of a data bundle.

42.1 For example, Vodacom is not able to track data consumption in real time in all of its offerings. For example, traffic to and from dedicated corporate Access Point Names (APN) is not rated in real time.

42.2 There are technical limitations applicable to APNs which render real time billing and the proposed options to be presented upon depletion of a bundle not feasible. Specifically, given the manner in which multiple concurrent quota reservations are managed, it is not possible to assess the point of depletion of a bundle in real time.

42.3 To elucidate on the quota system which applies in APNs, Vodacom sets out the following analogy-

A person (APN corporate end-user) has R170 and sends his children to the shop to buy goods where he is not sure of the price of each item. He sends his first child to the shop with R100 to buy milk and bread; the second child with R50 to buy a newspaper and the third child with R20 to buy sugar. No money is left to buy anything else while the children are away. When each child returns, at different times, each returns with different change. With the returned change, there is sufficient money to buy additional items, but until the change is returned, there is no money.

42.4 This is essentially how APN quota reservation works. For each session, each corporate SIM receives a reservation of data as it connects. If the APN is arranged in a manner which permits say 10 SIMs to connect at once and allocates data to each, the eleventh SIM will not be able to connect because the data reservation is depleted. However, once a SIM disconnects, data will then again become free from the quota and may be allocated to a new SIM. In these circumstances, it is not possible to determine the point of "depletion".

42.5 It is not possible to provide the end-user with the necessary option and to permit the exercise of that option in the event that core network elements required to rate data consumption are offline (whether due to maintenance, upgrades or network / system failures). In the case of aforesaid failures Vodacom will still attempt to offer customers service in order to protect the customers' right to service. This is done via a degraded mode of service that allows for limited service in the case of failure in the rating and bundle management environment. In these instances, it will not be technically possible for Vodacom to monitor usage in real time in order to timeously notify and disconnect customers where this option was selected by customers.

42.6 Furthermore, it is not technically feasible for Vodacom to present end-users with the required options on a “per bundle” basis. Vodacom can only provision this functionality at a customer level in terms of which Vodacom will provision “no OOB billing” for the customer. The customer will therefore not have the option to, for example opt-in to OOB billing for “general internet browsing” data bundles and opt-out of OOB billing for “YouTube” data bundles. The setting will apply to all data bundle categories used by end-users.

Impracticalities and impact on end-users

- 43 We refer to section C.3 of Vodacom’s submission dated 9 May 2017 and section 2.1d of Vodacom’s submission dated 18 September 2017. The points made in those submissions remain valid and should be taken into account by the Authority.
- 44 The impracticalities and negative impact on end-users are influenced significantly by the requirement that the option must be provided to the end-user “upon depletion”. If the end-user could exercise an option at an earlier stage, so that the services used could be automatically allocated to an end-user as per his or her pre-selected alternative arrangement, many of these impracticalities and negative end-user impacts could be addressed.
- 45 On Vodacom’s current interpretation of these provisions, the Authority seeks to prevent the end-user and licensee from agreeing on the default position in the event that the primary bundle is depleted. This significantly reduces end-user choice (which is dealt with more fully below) but also will have significant negative impact in at least the following areas:
- 45.1 M2M services – assuming it is technically feasible (which is not the case in respect of M2M services provided on APNs), a meaningful option cannot be presented to M2M end-users upon completion of data bundles, for at least the following reasons-
- 45.1.1 M2M SIMS, by nature, are inserted into equipment that is un-manned and which cannot respond to a notification requiring an option to be exercised;
- 45.1.2 M2M devices are typically programmed to ignore SMSs received from any MSISDN apart from the end-user’s SMS gateway, to mitigate against spam SMSs that occupy limited memory available on SIMs.
- 45.1.3 Vodacom is not always aware of which SIMs are used for M2M applications and consequently it is not always possible to distinguish M2M end-users from other end-users.
- 45.2 Even in cases where Vodacom is aware that the SIM is allocated to M2M devices and the end-user has an administrator, it is not practical to expect the end-user’s administrator to deal with such option requirements. In many cases, an end-user may have hundreds, thousands or hundreds of thousands of SIMs connected to devices within its administration. In the future, administrators are likely to have millions of SIMs subject to administration. If an administrator were required to deal individually with, and exercise an option in respect of, each SIM under administration, this would likely result in end-users incurring large additional costs impacting on the viability of their businesses and these applications within their businesses.
- 46 End-users use SIM cards in a number of devices which cannot ordinarily display usage notifications, such as dongles, routers and tablets. On these devices, it is impractical to present options to the end-user and to expect them to exercise those options in respect of that device. Consequently, similar problems are expected as with M2M devices.

- 47 Narrowband-IoT (NB-IoT) - is a Low Power Wide Area Network (LPWA) service on the cellular network for devices with low bandwidth and long battery life requirements. Often with the launch of new technologies, such as NB-IoT, there are lags with integration capabilities. These services typically function initially in off-line mode which makes it difficult to maintain up-to-date “real time” monitoring of data usage. If end users in South Africa are able to benefit from the latest technologies only once all integration issues are resolved and real-time monitoring is possible, many economic opportunities will be delayed, if not lost.
- 48 M2M service disconnection – in the event that an option is not exercised, the proposed regulation requires in effect the disconnection of the end-user from data services – to avoid OOB data usage. This would cause significant prejudice and disruption to many M2M end-users and in some cases could be catastrophic.
- 48.1 M2M services are often mission-critical or life-critical services and include emergency services, tracking devices, point of sale devices, meters, industrial controllers, security systems, weather stations, elevator controllers, generators etc. If these services are automatically disconnected, significant prejudice including injury and loss of life may occur. It is Vodacom’s understanding that all of the end-users who use these services require continuous data services to be available and would object to the disconnection of those services on the expiry of a bundle.
- 48.2 As mentioned above, the M2M devices are unmanned and even in cases where an administrator is employed, the full service will at times be unmanned (eg where the administrator is not at work). In situations where the service provided is a weather station service (which provides early warning signals) or an emergency service providing vehicle tracking or emergency service despatching, the end-users cannot allow these services to be disconnected and if they are disconnected, the absence of these services will have significant effects on the community at large.
- 49 Another element of M2M data usage is that generally, these devices have very low data consumption, average monthly consumption being as little as 2.5MB per SIM per month. The most common M2M applications across the Vodacom end-user base are vehicle tracking, point of sale, energy and water metering and security. In the tracking industry, a tracking device will send a location periodically as defined by the tracking end-user (typically every minute when the vehicle is moving). Each packet size is ordinarily less than 1Kb and hence thousands of packets must be sent in order for a MB usage to be significant. While fleet management, point of sale devices and security services have slightly higher data usage (between 5MB to 10MB on average per month), water and energy meters have very low data usage – between 100Kb to 500Kb per month.
- 50 Given this low usage, these end-users often do not buy bundles but prefer M2M tariffs which charge OOB unit rates by default. If the regulation is promulgated in the current form, it appears that licensees may be prevented from providing data services on OOB unit rates, unless the M2M device opts to continue with the data usage for every session using the OOB rate – i.e. every time a message is sent. It would force the end-user to purchase bundles which may be too big, or risk depletion and disconnection during the period. This is unworkable and will cause significant prejudice and disruption to numerous users.
- 51 Even if it were possible to install software updates on M2M devices in order to interpret and process notifications from Vodacom, such upgrades would need to be undertaken by end-users and would require manual intervention and the incurring of additional cost, which would

otherwise be unnecessary and uneconomical. Further, if the Authority insisted that end-users exercise an option before services are provided, the costs of doing so for each end-user would unnecessarily increase their cost of doing business.

- 52 Corporate APN – notwithstanding the fact that it is not feasible to implement the current regulation with corporate APN arrangements (as set out above) any attempt to implement this system with corporate APN end-users would give rise to significant confusion and misinformation. Given the manner in which the quota allocations are done within APN configurations, there is a significant risk that these corporate end-users would be informed of depletions in data bundles when, in reality, data remained available. This could give rise to APN end-users purchasing larger data bundles than are actually required, incurring additional end-user costs in the process and also incurring additional costs associated with manual intervention. None of these additional costs are warranted and all could be avoided if a pre-selection option was available.
- 53 In addition to the above impacts, for end-users who access data through devices which are incapable of displaying and responding to usage notifications (such as dongles, routers and tablets) those end-users will suddenly experience the termination of their data services without their prior knowledge or consent.
- 54 In respect of end-users in general, significant end-user complaints are likely to be received in the event that an automatic disconnection was applied upon depletion, as contemplated by the proposed regulation. The imposition of such a requirement, without permitting early pre-selection of an alternative, significantly infringes on the end-user's freedom of choice and the ability of end-users to have an uninterrupted seamless data experience.
- 55 In addition, particularly where there is a requirement for repeated notifications of data depletion, the introduction of additional notifications requiring end-users to exercise options is likely to increase the annoyance factor for many end-users who are able to regulate their affairs and wish to pre-select the default position.
- 56 If the regulation is applied in its current formulation, end-users who deplete their data bundle mid-session will experience the following:
- 56.1 Downloads will stop (both background and end-user initiated downloads). Depending on the device and the nature of the file or application being downloaded, the interruption of the download may have the effect that the partially downloaded content is discarded and the end-user is required to re-download the same content from the start.
 - 56.2 Streaming will stop – any content being streamed will terminate and may need to be streamed and paid for from the start of session.
 - 56.3 By implication, on depletion mid-session, end-users will be redirected to a zero-rated URL, to either buy an additional bundle or "opt in" to OOB data use charges. This will interrupt data sessions as it would likely not be achieved in one seamless journey. The process will necessarily interrupt any existing data session.
 - 56.4 Background data services will be disabled. When the application view or screen is closed, a smartphone ordinarily performs actions such as synching, receiving notifications, monitoring the server for new things, receiving new messages etc. When background data services are disabled, end-users do not receive any notifications (including WhatsApp messages, email notifications etc). The photographs and documents will not

automatically backup to the Cloud and the device will not be able to respond to VOIP calls.

The proposed regulation is unlawful – ultra vires and irrational

- 57 As set out in previous submissions, Vodacom remains of the view that the powers of the Authority to prescribe regulations and set out a code of conduct in terms of section 69 of the Electronic Communications Act do not extend to permit the Authority to regulate the products and services (and indirectly, the prices for such products or services) that may be offered by licensees. The proposed amendments go far beyond setting “minimum standards” and also extends beyond the stated objects of the regulations. Such an intervention is legally competent only after a market review undertaken in terms of Chapter 10 of the ECA.
- 58 The amendments proposed in regulation 8A and 8B go beyond the scope contemplated by section 69 in that they purport to limit and regulate the products and services that may be offered by a licensee and the manner in which such products and services may be contracted for between licensees and end-users. While the amendment has been proposed in order to address complaints raised by a specific group of end-users, no consideration has been given to the broader set of end-users of services and the manner in which those services are applied. If the amendments are promulgated, Vodacom will have to limit or exclude many of the product options currently chosen by end-users and the imposition of the regulations are likely to create additional costs and inconveniences for many of the end-users. None of these impacts are considered or analysed in the Explanatory Note.
- 59 A fundamental incoherence inheres in the attempt to distinguish “*bundles*” from “*out-of-bundle*” charging, without defining “*out-of-bundle*” in a way that rationally and meaningfully makes it something different from that which is covered by the definition of “*bundle*”. The fact that the definition of “*bundle*” would in fact encompass out-of-bundle renders the whole regulation fatally incoherent, vague and contrary to the rule of law. Simply put, despite the critical importance attached to “*out-of-bundle*” charging, no definition of this phenomenon is provided that makes it clear how precisely it differs from a bespoke “*bundle*”, at the very least making the regulation susceptible to abuse and circumvention in the creation of “*bundles*” that can be defined as “*out-of-bundle*” rates.
- 60 Failing to take into account the consequences of the proposed amendment and focusing only on the limited scope of the complaints received, would be irrational. Vodacom submits that the Authority should not impose any amendment to the regulations unless it has properly considered the implications of such amendments for all users. If the Authority were to promulgate the regulations in the face of evidence of the negative implications for other end-users, without addressing those implications, such conduct would, in our submission, be irrational and therefore unlawful. Vodacom submits that the following contentions need to be addressed comprehensively and satisfactorily before the regulation is promulgated:
- 60.1 The restriction on the licensee’s ability to contract freely with its end-users based on the end-user’s needs and determined by the extent to which the end-users choose to use selected products or services.
- 60.2 The ability of every affected end-user to exercise the options proposed to be made available – having regard to the manner in which such option can be communicated and addressed by the end-user. Where it is clear that an end-user cannot meaningfully receive and address a proposed option, the requirement that such option be provided is meaningless and therefore irrational.

- 60.3 Where end-users employ data usage services for M2M applications different from other end-users, it is irrational and unreasonable that concerns raised by the latter should be allowed to prejudice the data usage by the former – including enforced, unwanted disconnection.
- 60.4 The proposed amendment excludes end-user choice to remain connected (and pay different rates) when a far less invasive mechanism can be employed to protect the end-users that the Authority is concerned with, i.e. the pre-selection of the default option.
- 60.5 There are multiple existing applications and, in time, there are likely to be multiple new applications for M2M services and other technological developments in which data services would be employed. The manner in which these services are used and charged for cannot be regulated inflexibly, as if all applications were the same. Where different applications have different requirements and priorities, the Authority should not impose unnecessary restrictions on the agreements which are concluded for the provision and consumption of those services.

Vodacom's submission and proposal

- 61 In Vodacom's view, the regulation cannot be implemented in its current form. If the intention of the Authority is to provide end-users with choice as to what should occur when their ordinary data bundle is depleted, the regulation should permit end-users to pre-select (at any time, including at the time of contracting) what should happen as a default position. End-users should be disconnected only in the event that they pre-select disconnection alternatively if they do not pre-select an alternative.
- 62 End-users should be given a choice at an early stage to elect tariffs so that, in the case of bundle depletion, top-up bundles or OOB charging that have been pre-selected are automatically applied. Rates (regardless of whether they are charged on a unit-by-unit basis or on a bundled basis) can be pre-selected so that the seamless supply of the service can be maintained. End-users should be permitted to make this choice at the time of contracting.
- 63 The options available to the end-user ought not to be prescribed by regulation, given the many options currently available to end-users and the development of technology, which would introduce new options. End-users should retain the choice of inter alia-
 - 63.1 Disconnecting immediately in the event of depletion of existing bundles;
 - 63.2 Implementing a "soft lock" which will limit the extent of "out-of-bundle" usage.
 - 63.3 Choice of an alternative data bundle or OOB charging which would be automatically allocated on depletion, as a pre-selected option.
- 64 Each of the options listed above could be chosen at any time. The current channel for this service at Vodacom is Customer Care and with development, this can be extended to various other channels. These developments will, in each case, permit the end-user freedom of choice to determine how she wishes to proceed and to provide her with an option to maintain seamless data usage when her initial bundle is depleted.

AMENDMENT OF REGULATION 8 BY INSERTING 8B(3) ON EXPIRY OF DATA PRACTICES

Proposed amendment

(3) "A licensee must provide prepaid data bundles with minimum expiry period of three (3) years, save where such prepaid bundles have been exhausted prior to the expiry of three (3) years, in line with section 63 of the Consumer Protection Act, 2008 (Act No. 68 of 2008)."

Vodacom's interpretation

- 65 In this sub-regulation, it appears that the Authority is seeking to impose mandatory contractual provisions which necessarily limit the scope of the products that may be offered by a licensee. Moreover, the Authority appears to be imposing on licensees (and end-users) its interpretation of legislation other than the ECA – being section 63 of the Consumer Protection Act 2008 ("CPA").

Impracticalities and impact on end-user

- 66 We refer to section 2.2d and Annexure A of Vodacom's submission dated 18 September 2017. The points made in this submission remain valid and should be taken into account by the Authority. End-user choice will be adversely impacted, because the proposed amendment will remove the choices customers currently have in the market, and the benefit of buying data bundles of different sizes, rates, and validity periods. For example, an end user can currently either buy a 1 Gig bundle at different price points with different validity periods (R149/30days or R79/7days or a R29 URL/1day with in bundle rates of 14,9cents, 7,9cents and 3cents respectively), or various sizes of bundles at different price points with different expiry periods depending on their needs.
- 67 The end-user's ability to purchase a product that suits his or her specific needs will be drastically curtailed. It will lead to a decrease in the variation in bundle offers, and the repricing of data bundles. Data bundle sizes aimed at end-users in the 'lower end of the pyramid', i.e. the end-users currently buying hourly, daily, and weekly bundles would be negatively impacted. These bundles will be repriced, which will increase the cost of data. Using the 1Gig data bundle as example, the R149, R79 and R29 price points will have to be removed and be replaced by a higher price point applicable to a bundle valid for 3-years. The uptake of micro bundle sales i.e. hourly, daily, weekly, and fortnightly bundles over the past year has been substantial, as was indicated in Annexure A. Currently, 18.3 million Vodacom customers buy daily, weekly or monthly data bundles. The proposed Amendments would impact negatively on end-users optimising their requirements/needs which may vary over time.
- 68 We refer to section 2.2e of Vodacom's submission dated 18 September 2017. The points made in this submission on the potential economic implications for industry remain valid and should be taken into account by the Authority. As highlighted, licensees will have to review their respective current offers, and only have data bundle sizes with 3-year validity periods. The increase in the validity periods (and the impact of roll over of data bundles) will lead to an increase in data bundle tariffs with a consequent decrease in data bundle sales and revenue. Vodacom, and other licensees, will no longer be able to predict and plan data service demand, and subsequently the capacity requirement to meet demand. It will hamper efficient network utilisation and investment, leading to the networks at times being either underutilised or over utilised/constrained.

The proposed regulation is unlawful – ultra vires and irrational

- 69 First, Vodacom denies that the Authority is empowered to impose interventions in ECA regulations based on the Authority's interpretation of the CPA. If there are any CPA contraventions, the Authority is not the party that would take steps to enforce compliance. Vodacom has given careful consideration to section 63 of the CPA and believes that all of its prepaid data bundle offers comply with section 63. If the National Consumer Commission ("NCC") takes issue with Vodacom relating to compliance with the CPA, Vodacom will address any such assertions in the appropriate forum. Vodacom denies that there is any basis for the Authority to seek to impose or enforce provisions of the CPA.
- 70 In any event, Vodacom disagrees with the Authority's interpretation of section 63 of the CPA and denies that its prepaid data bundles are subject to the three-year requirement addressed in that section. Vodacom is of the view that regarding the purchase of access to a network, such as in the bundled product offerings offered by Vodacom, as the equivalent of a "voucher" for future use, such as is regulated by section 63 of the CPA, entails a fundamental mischaracterisation of the basic nature of the service offered and purchased.
- 71 In addition, Vodacom submits that the Authority is not empowered by the legislation to prescribe validity periods for data expiry. The effect of this provision would be to change, fundamentally, the product offerings that are made available by licensees – being access to the licensee's network. This directly affects and regulates the price modelling associated with the product offering, making this regulation a form of price regulation too. The prescription of products that may be offered by a licensee (or the time period over which access to the licensee's network must be allowed) does not fall within the concept of "minimum standards" contemplated in section 69 of the ECA and violates section 2(f) and (y) of the ECA.
- 72 As explained under paragraph 66, in many cases, an offer of a product permitting access to the network for a shorter period of time will attract a lower price from a product which permits access over a longer period of time. Many end-users who manage the use of data closely are able to maximise efficiency and minimise cost by selecting the data bundle package most suitable to them – to enable use of selected MB in an identified period. By insisting that all products have the same minimum expiry period, the Authority will not only radically eliminate competition in product offerings; it will also be reducing end-user choice and negatively affecting those end-users who are able to manage their data usage and benefit from the cost advantages of doing so.
- 73 The selection of a single product offering such as proposed to be prescribed is also wholly arbitrary when it is not the product of a thorough market inquiry such as envisaged in Chapter 10 – as such intervention in the market without a review of the market dynamics, especially the effect this will have on competition, choice, and pricing of this uniform product offering, can only be arbitrary and accordingly unlawful for this reason as well.
- 74 In the event that the Authority considers that any of the products offered by Vodacom are not in line with section 63 of the CPA, the appropriate approach would be to refer the matter to the NCC who could then decide whether to refer the matter to the National Consumer Tribunal. A determination in that forum (and any proceedings consequential thereto) would determine the application of section 63 of the CPA. Vodacom denies that the Authority can competently impose its interpretation through the proposed amendment to the End-User and Subscriber Service Charter Regulations.

AMENDMENT TO REGULATION 8 BY INSERTING 8B(4) ON ROLL-OVER OF UNUSED AND TRANSFER OF DATA

Proposed amendment

(4) "A Licensee must provide an option to post-paid users to roll over unused data of the monthly data allocation to the next billing period or to transfer the monthly data allocation or a portion thereof to other end-users on the same network."

Vodacom's interpretation

- 75 Vodacom understands that this provision relates only to post-paid users and does not apply to prepaid users or to hybrid users.
- 76 Vodacom also understands that this provision applies to unused monthly allocated data units which are allocated in terms of a post-paid contract and does not apply to unused data units of additional bundles which may be bought and bolted on to post-paid contract plans.
- 77 In this proposed amendment, the Authority requires licensees to provide both options to end-users – i.e. either to roll over and retain unused data units or to transfer the unused data units to other end-users. In either case, the unused data units must remain valid for one month – being the month after the month in which they were allocated.
- 78 Vodacom repeats what is stated above in relation to the inability of the Authority to regulate a licensee's product offering. The proposed regulation entails a radical intervention in the basic product offering in that the period for which data is available will determine the product offering and the price at which products are offered. For end-users who manage their data consumption closely and are able to take advantage of pricing benefits on data which is available for a short period, the proposed regulation would significantly restrict their right of choice.
- 79 Again, this regulation, in restricting the licensee's ability to offer different products, is *ultra vires* the powers conferred in section 69 of the ECA. The proposal also does not further the expressly stated purposes of the regulations set out in regulation 2.
- 80 The Authority's motivation for implementing this amendment (p 26 of 29) does not justify the imposition of this regulation. The premise of the Authority's motivation is that the expiry of data in post-paid situations is "unexpected", but this is not the case. Each post-paid end-user contracts for an agreed data package with his or her selected product option. The amount of data that is available each month and the fact that it expires at the end of the month or at the end of an alternative agreed period, is provided for in the agreement and is consequently completely expected by the end-user.
- 81 Licensees should be entitled to develop different products which allow for data bundles to expire within short periods or within longer periods. These packages may differ in price and provide end-users with a choice. An end-user who wishes to retain data and "roll over" data is likely to pay a higher price for that data than an end-user who is prepared to limit the time during which the data and access are available. The current proposed amendment, which imposes a blanket regulation and ignores the requirements of different end-users, is irrational.
- 82 This is particularly so where this intervention occurs without the benefit of a market review, where the market dynamics, especially the competitive dynamics, and the likely effect in pricing and competition of such radical interventions, can be properly and fully assessed and modelled.

AMENDMENT OF REGULATION 8 BY INSERTING 8C ON END-USER EDUCATION AND AWARENESS

83 Vodacom has no comments on this regulation.

AMENDMENT OF REGULATION 13

84 Vodacom has no comments on this regulation.

SHORT TITLE AND COMMENCEMENT

85 In the event that the Authority wishes to promulgate the proposed amendments, licensees should be given sufficient time (at least 6 months) to develop systems in order to be able to comply with the regulations from the date of publication. Vodacom would not be in a position to comply immediately with the requirements of the proposed amendments from the date of publication.