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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**NO. R. 128****12 FEBRUARY 2019****THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA****END-USER AND SUBSCRIBER SERVICE CHARTER AMENDMENT
REGULATIONS IN TERMS OF SECTION 4 READ WITH SECTION 69(3) OF
THE ELECTRONIC COMMUNICATIONS ACT NO. 36 OF 2005, AS AMENDED**

I, Rubben Mohlaloga, Chairperson of the Independent Communications Authority of South Africa ("the Authority"), hereby publish the amendments to the End-user and Subscriber Service Charter Amendment Regulations, 2018.

Rubben Mohlaloga
Chairperson

SCHEDULE

1. Definitions

In these Regulations “the Regulations” means the End-User and Subscriber Service Charter Regulations 2016 as published under Government Notice No. 39898 of 1 April 2016, as amended in Notice No. 233 of 2018 (Government Gazette No. 41613).

2. Substitution of regulation 3 of the Regulations

The following regulation is hereby substituted for regulation 3 of the Regulations:

“(1) These Regulations are applicable to:

- (a) class and individual ECNS licensees; and
- (b) class and individual ECS licensees.

(2) These Regulations do not apply to mobile virtual network operators, resellers and internet of things (or machine to machines).”

3. Amendment of regulation 8A of the Regulations

3.1 Regulation 8A of the Regulations is hereby amended by the substitution for sub-regulation (1) of the following sub-regulation:

“ A licence must send usage depletion notifications via SMS, push notification or any other applicable means when usage reaches 50%, 80% and 100% depletion of voice and/or SMS bundles. End-users must be provided with an option to opt-out of voice and SMS usage notifications.”

4. Amendment of regulation 8B of the Regulations

4.1 Regulation 8B of the Regulations is hereby amended by the substitution for paragraph (a) of sub-regulation (1) of the following paragraph:

“(a) sent data usage depletion notifications via SMS, push notification or any other applicable means when usage reaches 50%, 80% and 100% depletion of data bundles. End-users must be provided with an option to opt-out of data usage notifications.;”

4.2 Regulation 8B of the Regulations is hereby amended by the substitution for paragraph (c) of sub-regulation (1) of the following paragraph:

“(c) provided with an option via SMS, push notification, USSD or any other applicable means to opt-in or opt-out of out-of-bundle data usage.;

4.3 Regulation 8B(1)(d) of the Regulations is hereby repealed.

4.4 Regulation 8B(2) of the Regulations is hereby amended by substitution for the following sub-regulation:

“(2) Where an end-user does not opt-in to out-of-bundle data charge as per regulation 8B(1)(c) above, a Licensee must not permit any out-of-bundle data usage by an end-user until such time that an end-user purchases new data bundles or opt-in to out-of-bundle usage. In the event that an end-user does not make an election, whether to opt-in or opt-out of out of bundle usage, the Licensee may either immediately terminate data services or continue to provide data services, provided that the provision of the service shall be on the same terms and conditions applicable under in-bundle usage.

4.5 Regulation 8B of the Regulations is hereby amended by the substitution for sub-regulation (4) of the following sub-regulation:

“(4) A Licensee must provide an end-user with an option to transfer data to other end-users utilising services of the same Electronic Communications Service licensee. ”

5. Short Title and Commencement

These Regulations are called the End-User and Subscriber Service Charter Amendment Regulations 2019 and will come into force on 1 March 2019.

AMENDMENT OF THE REASONS DOCUMENT FOR THE END-USER AND SUBSCRIBER SERVICES CHARTER AMENDMENT REGULATIONS, 2018 (“AMENDMENT REGULATIONS”)

1. Introduction

1.1. During May 2018, the Independent Communications Authority of South Africa (“the Authority”) received letters from the following licensees:

- Cell C;
- Fworx;
- Internet Service Providers’ Association;
- Internet Solutions;
- Izwi Bridge Communications;
- MTN;
- Telkom; and
- Vodacom.

1.2. Licensees requested a postponement of the effective date of the amendment Regulations in order to afford licensees more time to make the necessary changes to their systems. In addition, the licensees raised certain questions of clarity on the implementation of certain provisions in the amendment Regulations.

1.3. On 9 May 2018, the Authority published the amendment Regulations with the effective date being 8 June 2018 (one (1) month after publication in the Government Gazette).

- 1.4. Cell C launched an urgent application on 7 June 2018 seeking *inter alia* the following orders:
 - 1.4.1. Interdicting the implementation of the amendment Regulations; and
 - 1.4.2. Directing the Authority to issue a notice in terms of which the amendment Regulations will be brought into force six (6) months after the date of publication of notice.¹
- 1.5. On 7 June 2018, the Authority suspended the effective date of the amendment Regulations pending the final determination of Part A of the urgent application launched by Cell C.²
- 1.6. On 16 November 2018, the Authority, Cell C, Telkom and MTN reached an out of court settlement in terms of which the amendment Regulations will be effective at midnight on 28 February 2019.³
- 1.7. On 4 December 2018, the Authority sent letters to Vodacom, MWEB, MTN, Telkom, ISPA and Cell C confirming the effective date of the amendment Regulations and that it would respond to licensees' questions of clarity in due course.
- 1.8. On 13 December 2018, the Authority sent letters to Vodacom, MWEB, MTN, Telkom, ISPA and Cell C with responses to the issues of clarity on the implementation of the amendment Regulations.
- 1.9. In addition, the Authority held one-on-one meetings with ISPA, Vodacom, Cell C and MTN on 16, 18, 21 and 22 January 2019 respectively.⁴ The purpose of the meetings was for licensees to

¹ MTN and Telkom joined the litigation and supported the relief sought by Cell C.

² See Notice No. 582 Gazette No. 41696.

³ <https://www.icasa.org.za/news/2018/icasa-notes-cell-cs-urgent-application-to-review-the-eussc-regulations>

⁴ Other licensees did not request one-on-one meetings with the Authority.

obtain clarity on the Authority's responses contained in the letters of 13 December 2018.

- 1.10. The purpose of this document is to provide reasons for the latest amendments, following the recent engagements with various licensees, and to clarify any ambiguities from the previous Reasons Document.

2. Additional submission received and the Authority's response

2.1. Amendment to regulation 1

2.1.1. Additional submission received

- 2.1.1.1. No additional submission received.

2.1.2. The Authority's response

- 2.1.2.1. No response.

2.2. Amendment to regulation 4

2.2.1. Additional submission received

- 2.2.1.1. No additional submission received.

2.2.2. The Authority's response

- 2.2.2.1. No response.

2.3. Amendment to regulation 5 of the Regulations

2.3.1. Additional submission received

- 2.3.1.1. No additional submission received

2.3.2. The Authority's response

2.3.2.1. No response

2.4. **Amendment to regulation 8 of the Regulations**

2.4.1. Additional submission received

2.4.1.1. No additional submission received

2.4.2. The Authority's response

2.4.2.1. No response

2.5. **Insertion of regulation 8A**

2.5.1. Additional submission received

2.5.1.1. Cell C and MTN indicated that they have received complaints from some customers who did not want to receive usage notifications.

2.5.1.2. Cell C and MTN suggested that this provision be amended to provide end-users with an option to opt out of usage notifications.

2.5.2. The Authority's response

2.5.2.1. The Authority is still of the view that usage notifications are necessary to empower end-users to monitor, and be constantly aware of, their usage. The Authority however agrees that end-users should have the option to opt-out

of notifications and has amended the Regulations accordingly.

2.6. **Insertion of regulation 8B(1)(a)**

2.6.1. Additional submission received

- 2.6.1.1. Cell C and MTN indicated that they have received complaints from some customers who did not want to receive usage notifications.
- 2.6.1.2. Cell C and MTN suggested that this provision be amended to provide end-users with an option to opt out of usage notifications.
- 2.6.1.3. Vodacom indicated that the usage notifications were excessive and would irritate end-users who buy small and short-term data bundles.
- 2.6.1.4. Vodacom suggested that small and short-term data bundles be exempted from usage notifications provisions to avoid customer irritation.
- 2.6.1.5. Vodacom, Cell C and MTN suggested that the Authority exempt certain corporate services (e.g. corporate APNs) from usage notifications as it was not technically feasible to send accurate usage notifications as usage is not monitored and billed in real time.

2.6.2. The Authority's response

2.6.2.1. The Authority is still of the view that usage notifications are necessary to empower end-users to monitor, and be constantly aware of, their usage. The Authority however agrees that end-users should have the option to opt-out of notifications and has amended the Regulations accordingly.

2.6.2.2. The Authority agrees with the licensees that it is not technically feasible to implement usage notifications for certain applications such as Machine to Machine and Internet of Things.

2.6.2.3. In addition, it should be noted that IoT or M2M applications cannot be classified as end-users and therefore, licensees are not obliged to send usage notifications to these applications.⁵ Licensees are however encouraged to send the notifications where IoT or M2M applications are linked to natural end-users.

2.7. **Insertion of regulation 8B(1)(b)**

2.7.1. Additional submission received

2.7.1.1. No additional submission received.

2.7.2. The Authority's response

2.7.2.1. No response.

⁵ See the Authority's letter to licensees dated 13 December 2018

2.8. Insertion of regulation 8B(1)(c)

2.8.1. Additional submission received

- 2.8.1.1. Vodacom, Cell C and MTN indicated that this provision will result in job losses, loss of investor confidence, reduced tax and license fees, negative impact on customer experience and reduced investment in infrastructure.
- 2.8.1.2. Vodacom, Cell C and MTN proposed a phased approach to implementation of this provision to allow the licensees to adjust their business models to account for materially lower out-of-bundle usage that will ensue.
- 2.8.1.3. MTN proposed opt-out of out-of-bundle usage, as opposed to automatic out-of-bundle barring, to give end-users a choice and to minimise the immediate revenue impact.
- 2.8.1.4. Vodacom suggested that licensees be allowed to give end-users an option to opt-in to out of bundle blocking as opposed to automatic out-of-bundle blocking.
- 2.8.1.5. Cell C and MTN raised a concern that automatic blocking of post-paid users from out-of-bundle usage will change the nature of post-paid product which is *ultra vires* section 69 of the Electronic Communications Act 36 of 2005 ("ECA").
- 2.8.1.6. Vodacom, Cell C and MTN suggested that the Authority exempt corporates and IoT or M2M

applications from automatic out-of-bundle barring to ensure continuity or avoid disruption of services. Licensees indicated that if these services were automatically disconnected after depletion of data bundle, significant prejudice may occur.

2.8.2. The Authority's response

2.8.2.1. The Authority would like to reiterate its view that defaulting end-users to out-of-bundle usage without express consent exposes end-users to the risk of bill shock as a result of high out-of-bundle charges.

2.8.2.2. The Authority is of the view that end-users should have the option to opt-in or opt-out of the out of bundle usage and has amended the Regulations accordingly.

2.9. **Insertion of regulation 8B(2)**

2.9.1. Additional submission received

2.9.1.1. Vodacom indicated that regulation 8B(2) does not distinguish between post-paid and other end-users whereas the Reasons Document (Gazette No. 41613) stated that regulation 8B(2) does not apply to post-paid users.

2.9.1.2. Vodacom proposed amendment of the regulations (by explicitly excluding post-paid users from the provisions of regulation 8B(2)) to be in line with the reasons document.

2.9.1.3. Cell C raised a concern about the proposed amendment of the reasons document to include post-paid users as highlighted in the Authority's letter of 13 December 2018.

2.9.1.4. Cell C also raised a concern that this provision will change the nature of post-paid as it will effectively become top-up and or prepaid.

2.9.1.5. Cell C indicated that the inclusion of post-paid users may delay the implementation of this provision due to time constraints.

2.9.2. The Authority's response

2.9.2.1. As indicated in the Authority's letter dated 13 December 2018, it is clear that this provision applies to all end-users (including post-paid users) as it does not distinguish between post-paid, pre-paid users and hybrid users. To the extent that paragraph 3.11.2 of the reasons document creates a different impression, the contents of that paragraph are erroneous.

2.9.2.2. In addition, for purposes of implementation and enforcement of the amendment regulations, ICASA can in law only rely on the letter of the amendment regulations (and not the reasons document as highlighted by Cell C) since the reasons document is not a regulatory instrument.

2.9.2.3. The Authority can therefore confirm that this provision applies to all end-users including post-paid users.

2.9.2.4. There may be cases where the end-user makes no election at all, whether to opt-in or opt -out of out of bundle usage. In those cases, the Licensee may terminate data services or continue to provide data services on the same terms and conditions applicable under in-bundle usage.

2.10. **Insertion of regulation 8B(3)**

2.10.1. Additional submission received

2.10.1.1. Vodacom raised a concern that this provision will affect the nature of data bundles with short validity period (i.e. hourly and daily bundles).

2.10.1.2. Vodacom proposed exemption of corporate services such APN where data bundle is shared by subscribers connected to the APN.

2.10.1.3. Cell C raised a concern about the implementation of this provision by Mobile Virtual Networks and resellers who are not licensees in terms of the ECA.

2.10.2. The Authority's response

2.10.2.1. With regard to data bundles with short validity period, the Authority would like to refer stakeholders to paragraphs 3.12.2.3. to 3.12.2.5. of the reasons document published in Notice No. 233 of Gazette No. 41613.

2.10.2.2. The Authority can confirm that MVNO and resellers, who are not licensees in terms of chapter 3 of the ECA, are not required to implement the amendment Regulations.

2.11. **Insertion of regulation 8B(4)**

2.11.1. Additional submission received

2.11.1.1. ISPA raised a concern about technical feasibility with regard to the implementation of transfer of data in the fixed line environment where end-users are using the same licensee who is using different network providers.

2.11.1.2. ISPA also raised a concern about the negative financial impact of transfer of data between end-users who are on data packages with different speeds and terms and conditions.

2.11.1.3. ISPA raised a concern with regard to the use of the word "network".

2.11.1.4. Cell C raised a concern about the implementation of this provision by Mobile Virtual Networks and resellers who are not licensees in terms of the ECA.

2.11.2. The Authority's response

2.11.2.1. With regard to issues raised by ISPA, the Authority would like to refer stakeholders to paragraph 3.13.2. of the reasons document published in Notice No. 233 of Gazette No. 41613.

2.11.2.2. The Authority agreed with ISPA that the use of the word "network" was incorrect. The Authority amended regulation 8B(4) to include transfer of data *"...to other end-users utilising services of the same Electronic Communications Service licensee."*

2.11.2.3. The Authority can confirm that MVNO and resellers, who are not licensees in terms of chapter 3 of the ECA, are not required to implement the amendment Regulations.

2.12. **Insertion of regulation 8B(5)**

2.12.1. Additional submission received

2.12.1.1. Vodacom, MTN and Cell C raised a concern about technical feasibility of implementing regulation 8B with regard to IoTs or machine to machine.

2.12.2. The Authority's response

2.12.2.1. The Authority is of the view that IoT or M2M cannot in any event be classified as end-users. Therefore, the provision does not apply with respect to IoTs or M2M.

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