
Submissions in respect of Intention to amend End-user and Subscriber Service Charter Regulations

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As invited in Government Gazette 41263 of 17 November 2017.

Principal Submissions:

That the proposed definition of “data bundle” is problematic and insufficient;

That the reliance on the “prepaid voucher” provisions of the Consumer Protection Act are misplaced;

The rationale of the Authority in the amendments are inconsistent with the existing regulations, including provisions unaffected;

The uncertainty of the regulation making process is more disadvantageous to the industry and interests of the consumer.

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INTRODUCTION

1. The submissions are being made on behalf of Crystal Web Mobile (an operations unit of Crystal Web (Pty) Ltd) and LEASP (Pty) Ltd.
2. LEASP would welcome an opportunity by the Authority to participate in public hearings as may be held in respect of this matter.
3. Submissions were not made in respect of the initial invitation.

REGULATIONS EXTEND FAR BEYOND THE “EVIL” THE REGULATOR SEEKS TO “CURE”

4. The EUSSC finds application on all original ECS and ECNS service offerings and while the reasoning advanced by the Authority makes it clear that the Authority is concerned with difficulties that have arisen in the context of mobile data the regulations will be applicable across all electronic communications network services. Quite specifically the EUSSC is effective on both individual and class licenses.
5. Subsequently should the proposed regulation 9B be given proper enforcement fixed line ISPs (or quite pertinently the relevant operator) will be obligated to:
 - a. inform customers by means of an SMS of their data usage – even though the provider incurs message transmission costs and the subscriber is effectively being spammed by their ISP if they do not wish to receive the messages;¹
 - b. operate a USSD interface²;
 - c. not operate “capped” product offerings in respect of “prepaid” customers (which for month to month DSL subscriptions represents the vast majority of customers).
6. The rendering of capped product offerings by ISPs will be particularly deleterious to the industry and I submit that such prohibition will be widely ignored. This in itself makes the proposed regulations unviable.
7. While the Authority may restrain the amendments to mobile data by explicit mention such an approach runs contrary to communications convergence and will undoubtedly find disfavor with the mobile network operators. Instead I submit that the underlying

¹ While the regulation provides for “other applicable means” it is not clear that email will be accepted.

² While “any other applicable means” may enable ISPs to operate other “top-up” mechanisms the specific mention of USSD platform points to a mechanism which can be broadly accessed at no charge to the consumer which is an entirely different exercise for a network operator who is not running a mobile network.

problem is that the Authority is looking at fairly blunt instruments to produce positive externalities for consumers.

RELIANCE ON CONSUMER PROTECTION ACT MISPLACED

8. The Authority appears to have moved from an early proposal to tie minimum expiry period to be tied to the size of the bundle to instead a fixed 36 month period based on the appearance of such a window in the Consumer Protection Act (CPA).
9. I submit that this approach is misplaced. The CPA provision relates to a prepaid voucher (so if a network operator were retailing unloaded vouchers that expire in shorter than 36 months from purchase there would be a contravention) or prepaid credit balance on an account. The provision states (own emphasis):
 - 1) *This section **applies only** to a transaction in which a supplier—*
 - a) *accepts consideration from a person **in exchange for a prepaid certificate, card, credit, voucher or similar device**; and*
 - b) *expressly or implicitly agrees to provide goods or services to any person who subsequently presents that certificate, card, credit, voucher or similar device, up to the value represented by it,*

but does not apply with respect to such a device, or the value represented by it, after all of the value of the device has been exchanged for goods, services or future access to services.
 - 2) *A prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) does not expire until the earlier of —*
 - a) *the date on which its full value has been redeemed in exchange for goods or services or **future access to services**; or*
 - b) *three years after the date on which it was issued, or at the end of a longer or extended period agreed by the supplier at any time.*
 - 3) *Any consideration paid by a consumer to a supplier in exchange for a prepaid certificate, card, credit, voucher or similar device contemplated in subsection (1) is the property of the bearer of that certificate, card, credit, voucher or similar device to the extent that the supplier has not redeemed it in exchange for goods or services, or future access to services.*
10. The 36 month expiry window itself is arbitrary and will provide little support to a customer where a network operator operates a last loaded first used approach to bundles with a running subscription.

11. I submit that if the Authority promulgates regulations on the basis of the section the mobile network operators will be well placed to judicially challenge the regulations which would be deleterious.

REGULATORY APPROACH PROPOSED CREATES CUSTOMER RETENTION RELATED PROBLEMS

12. Network operators incur costs to preserve a customer identity³ on their network. These costs are quite considerable if the operator is not seeing much use on the network. The problem of a “line access deficit” on mobile SIM cards can be expected if SIM cards not used to make or receive calls with un-expiring data dominate the prepaid market.
13. Ultimately if network operators have a disincentive to acquire a new customer identity the availability of viable products on the market are reduced. Almost invariably this will be to the detriment of less empowered consumers.

RESTRICTIONS BUILT INTO DATA BUNDLE PRODUCTS PIVOTAL TO COST REDUCTIONS

14. There are many things which the mobile network operators do incorrectly but before the Authority makes it impossible for them to sell data products with an effective price of less than 6c per megabyte in low price highly time restricted offerings (such as power bundle) the Authority needs to spend time on minibus taxis with commuters who have mastered a savvy art of getting the most of their very limited disposable income⁴.

³ A single customer with multiple prepaid SIM cards generates costs for each SIM card, the absorption of these costs can become a significant factor in certain circumstances. If the cost to an efficient network operator to maintain an identity is R2 per month the costs to the network operator which a user who purchases a single bundle every 36 months is R72 which must be absorbed into the cost of bundle, this makes it untenable to anticipate data bundles which price mobile data at a price of less than R150 per gigabyte appearing in the market.

⁴ Several years ago, Vodacom’s “Power Bundle” product range attracted a fair amount of criticism and ridicule on MyBroadband with particular criticism being directed at the perceived complexity and lack of a usage case. At this time, I had an experience of using a minibus taxi to travel from Port Elizabeth to Jeffrey’s Bay. While waiting for the vehicle to fill up and on the ninety minute journey I was struck by the number of commuters who purchased a five rand voucher from a hawker at the rank and proceeded to make full use of their smartphones (the Nokia C3 being surprisingly popular at the time) with short life bundles being the main purchase. As things have evolved both Telkom and CellC have sought to gain market share through making social networking zero rated on their products and at the last instance I checked with taxi commuters in Humansdorp the FreeMe product offering from Telkom had gained traction. While anecdotal (and for various reasons my experiences are minibus taxis always carry a “tourist” sheer) the lesson to be drawn is that the fact that a product is

15. Most of the costs associated with delivery of network services have considerable complexity which requires a network operator to ensure various balances on the network. It is possible to sell data which expires in a short period for cheaper because of the predictability of that product being used, similarly a network operator that is forced to sell data that is consumed in a single sitting at an unpredictable point in time has serious challenges to ensure that the quality of the network is preserved during a peak demand time.
16. Subsequently operators need to find ways to ensure that they derive the maximum revenue from their investments in network assets – which is not the same thing as charging as much money per megabyte as the market will carry. There are various ways to do this (bundle expiry periods, time of use rules etc ...) which needs to be balanced against fairness to the buying consumer.

REGULATORY UNCERTAINTY IS SERVING AS AN OBSTACLE TO PRICE REDUCTIONS

17. The most significant effect of the Authority's approach towards seeking to regulate the mobile data product offerings of operators is to create an uncertainty trap. This is not to the benefit of consumers and undermines efforts to ensure retail competition in the market.
18. Crystal Web Mobile is at present unable to viably launch a consumer orientated mobile data offering (as a result of a wholesale agreement with an incumbent operator) wherein subscribers receive data bundles which are non-expiring (so long as the customer remains a customer of Crystal Web Mobile) at a cost of less than R80 per gigabyte of data. The obstacle to launch is uncertainty in the regulatory space.
19. Undoubtedly other retail focused service provider businesses (both who operate in the resale space and who operate networks) are similarly constrained and so a lack of competition and innovation is currently being experienced.

CONCLUSION: ALTERNATIVE APPROACH PROPOSAL

inconvenient and unsuited to white middle class South Africans doesn't mean that it doesn't genuinely improve the lives of thousands of South Africans. The Authority, regardless of its racial makeup, is fundamentally divorced from a full understanding of the needs and wants of the full gamut of consumers in South Africa. The proposed regulations will make it impossible for individuals who have daily or weekly disposable income as opposed to monthly disposable income to purchase low cost luxury data access as the current barrier to entry on the 500 megabyte FreeMe product offering which offers considerable value is R69 per 31 days (R2,34 per day). Encouraging operators to introduce products wherein a consumer purchases a bundle for R5 every two days that provides low data utilization services for the full period and a time bound full data service window.

20. I therefore propose that the Authority rather craft the proposed amended regulations to provide a requirement that operators distinguish between:

- a. An “allocation” approach wherein a “cap” for data on a time period (or minutes in respect of voice) applies. Subscription services operating with an allocation must indicate the applicable rollover rules of the product and may include options wherein a VAS may be purchased to enable roll over. (This maps to the provisions of regulation 4(1) and entails an envisaged fair use policy and carryover rules as the allocation will also determine the out of bundle rates and tariffs)
- b. A data, voice or SMS bundle product which has:
 - i. a price;
 - ii. a quantity of data (expressed in mebibytes or gibibytes), voice (expressed in minutes) and SMSes (expressed in SMS tally);
 - iii. the utilization window from activation (expiry period);
 - iv. any time of use restrictions (such as evening utilization);
 - v. single or multiple subscription identities rights⁵;
 - vi. single or multiple transferability rights⁶;
 - vii. outline of the depletion messaging points and means with the 50%, 75% and 95% thresholds as the default.

21. Requiring a network operator to pro-rata refund a customer any unexpired bundles where the operator terminates the relationship between the subscriber and the operator.

22. Requiring the operator to file particulars of every bundle product with the Authority at least 30 days prior to the launch and empowering the Authority to determine that a product is of a predatory character⁷.

⁵ That is whether the bundle may be shared amongst different access points – such as SIM cards

⁶ A single transferability right would entail the subscriber to transfer the unutilized unexpired portion of a bundle to a different subscriber or subscriber identity (a different subscriber identity) on the same network whilst multiple transferability would allow the subscriber to transfer portions of the bundle.

⁷ The real concern which the Authority should hold is the prospects of predatory products which by design mislead consumers.

23. Requiring an operator to enable a subscriber to opt-in to being billed for data, voice and SMS offerings outside of any active bundle or allocation available to the subscriber.⁸
24. Following such a distinction the Authority can oblige (either by regulation or by agreement) operators to offer a regulated set of data bundle products with a utilization window of three years and it is expected that such product offering will be a field wherein competition between operators will result in mobile data being available to consumers at a price below R150 per gigabyte⁹.
25. Such an approach maximizes consumer choice and enables operators to imaginatively monetize their product offerings in a competitive fashion. The alternative approach will simply see mobile data products being sold with the costs of the extended window of 36 months featuring in the price of all data bundles.
26. Further such an approach will be implementable without negative disruption across the industry.

⁸ This would require an operator to disconnect a subscriber who has not opted in for being billed for post allocation usage. I anticipate that Telkom and CellC will have no difficulty with this approach whilst Vodacom and MTN may have technical difficulties with implementation which may result in some incurring costs through implementation.

⁹ The chief obstacle to low pricing will be the risk carried by the operator of a significant number of consumers who purchase the smallest bundle and inflict a large identity management cost (a SIM card that uses 1 gigabyte of data over 3 years) it is quite possible that the effects of competition between operators will lower the price to under R100 which will be a net win against current gigabyte data products with a 30 days expiry period and will drive price reductions on products with shorter expiry windows.