



Submission

**Notice of Intention to Amend the Regulations in Relation to the
End-User and Subscriber Service Charter, Government Gazette
No 46153 Dated 31 March 2022 (Notice 1958 of 2022)**

17 June 2022

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1. Introduction

1.1 On 31 March 2022, the Independent Communications Authority of South Africa (the "**Authority**") published draft regulations (the "**Draft Regulations**"), which are intended to amend the End-User and Subscriber Service Charter Regulations, 2016 (as amended and published in Government Gazette No 39898 on 1 April 2016) (the "**Charter**"), together with a notice inviting interested persons to submit written comments on the Draft Regulations.

1.2 Mobile Telephone Networks Proprietary Limited ("**MTN**") welcomes the opportunity to make submissions to the Authority on the Draft Regulations. The purpose of these submissions is to set out MTN's concerns in respect of the Draft Regulations. These concerns include legal, economic, and practical submissions, including MTN's concern as to whether the Authority is authorised in terms of the applicable provisions in the Electronic Communications Act, 2005 ("**ECA**"), to regulate certain aspects of the Draft Regulations.

1.3 MTN has structured its submission as follows:

1.3.1 Part A: Background to the Charter;

1.3.2 Part B: A summary of MTN's concerns;

1.3.3 Part C: MTN's specific submissions on the concerns set out in Part B; and

1.3.4 Part D: MTN's specific comments on the other provisions in the Draft Regulations.

2. Part A: Background to the Charter

2.1 In terms of the ECA (read together with the Independent Communications Authority of South Africa Act, 13 of 2000 (the "**ICASA Act**")), the Authority is obliged (among other things) to make regulations on matters consistent with the objects of the ECA and to seek to achieve these objects in its regulation of the electronic communications

industry. The objects of the ECA are set out in section 2 of the ECA. The objects in the ECA include:

- 2.1.1 to encourage investment, including strategic infrastructure investment, and innovation in the communications sector (subsection (d));
 - 2.1.2 to promote competition within the Information Technology and Communications ("ICT") sector (subsection (f));
 - 2.1.3 to ensure the provision of a variety of quality electronic communications services at reasonable prices (subsection (m));
 - 2.1.4 to promote the interests of consumers regarding the price, quality and the variety of electronic communications services (subsection (n)); and
 - 2.1.5 to refrain from undue interference in the commercial activities of licensees while considering the electronic communication needs of the public (subsection (z)).
- 2.2 Section 69(4) of the ECA empowers the Authority to prescribe regulations setting out "*the minimum standards for and (sic) end-user and subscriber service charters*" for different types of services. The matters which may be addressed in an end-user and subscriber service charter are prescribed in section 69(5), which states that these matters "*include, but are not limited to -*

- (a) *"the provision of information to end-users and subscribers regarding services, rates, and performance procedures;*
- (b) *provisioning and fault repair services;*
- (c) *the protection of private end-user and subscriber information;*
- (d) *end-user and subscriber charging, billing, collection and credit practices;*
- (e) *complaint procedures and the remedies that are available to address the matters at issue; and*
- (f) *any other matter of concern to end-users and subscribers."*

2.3 The Charter, which was enacted pursuant to the provisions of section 69 of the ECA, came into effect on 1 April 2016 (and was subsequently amended, with the latest amendments becoming effective on 1 March 2019). Regulation 2 of the Charter states that the purpose of the Charter "is to:

- (a) *prescribe minimum standards for electronic communications services to an end-user by:*
 - i. *an individual or class ECNS licensee, and*
 - ii. *an individual or class ECS licensee;*
- (b) *ensure that the quality of service offered to an end-user is in accordance with prescribed service parameters; and*
- (c) *protect the rights of end-users in the electronic communications sector by:*
 - i. *providing an end-user with sufficient information to enable informed decisions;*
 - ii. *ensuring the efficient and effective resolution of complaints; and*
 - iii. *facilitating redress to an end-user where appropriate."*

- 2.4 The Charter requires an individual or class electronic communications service licensee (collectively, "**Licensees**") (including MTN) to, *inter alia*:
- 2.4.1 provide certain specified information to end-users at the point of sale or prior to contracting with the end-user, and to provide certain billing information to end-users upon request from the end-users;
 - 2.4.2 lodge certain documentation with the Authority in relation to any promotional tariffs or promotions which may be launched by the Licensee;
 - 2.4.3 provide certain specified information to end-users roaming internationally; and
 - 2.4.4 ensure that end-users are aware of the Charter and its terms.
- 2.5 The Charter also prescribes certain minimum standards which relate to service and network availability, network fault clearances, network monitoring, and service interruptions. As MTN understands it, these are aimed at ensuring a certain standard of service quality to end-users.
- 2.6 The Draft Regulations seek to amend the Charter by imposing several additional obligations on Licensees. Without repeating the entirety of the Draft Regulations in this submission, MTN notes that the Draft Regulations require Licensees to, amongst other things:
- 2.6.1 ensure that unused voice services and Short Messaging Services ("**SMS**") obtained through either prepaid or post-paid channels do not expire before the expiry of a period of 6 months;
 - 2.6.2 implement mechanisms where voice and SMS usage is, in the first instance, deducted against the oldest of any unused voice and SMS services, until such voice and SMS services are depleted, and thereafter against the newly allocated voice and SMS services;

- 2.6.3 compensate end-users who are unable to utilise specific promotional voice/SMS products due to a fault attributable to the Licensee;
 - 2.6.4 send consumer-alerts to consumers on specific issues which the Authority may deem relevant and necessary for the protection of end-users;
 - 2.6.5 send notifications to end-users to notify them of any planned service interruptions and any major network outages; and
 - 2.6.6 conduct education awareness campaigns aimed at educating end-users on cybersecurity and on the protection of personal information.
- 2.7 The Charter also prescribes certain minimum standards which relate to service and network availability, network monitoring and service interruptions. As MTN understands it, these are aimed at ensuring a certain standard of service quality to end-users.

3. Part B: MTN's Concerns

- 3.1 MTN is aware and supportive of the need for all persons who are contracted and subscribed to receive electronic communications services from mobile network operators (referred to below as "**end-users**") to be provided with a standard of electronic communications services which are affordable and of an acceptable quality.
- 3.2 MTN is supportive of some of the proposed amendments in the Draft Regulations, however, MTN also has several concerns regarding the formulation of certain provisions within the Draft Regulations. These concerns centre on whether the Draft Regulations proposed by the Authority, are commensurate with the powers of the Authority as provided for in the ECA.
- 3.3 For reasons set out below, MTN submits that certain of the proposed amendments in the Draft Regulations are problematic in several

respects and fall outside the ambit of what may be regulated by the Authority in the Charter. MTN is concerned about the proposed amendments that would require Licensees to, among other things:

- 3.3.1 ensure that unused voice and SMS services obtained through either prepaid or post-paid channels will not expire before expiry of a period of 6 months, except for promotional packages (subsection 8A (4));
- 3.3.2 compensate end-users appropriately (such as by giving a rebate or by extending the validity period of the product concerned) who are unable to utilise specific promotional voice/SMS products due to a fault on the part of the Licensees such as network outages or service breakdowns (subsection 8A (6));
- 3.3.3 ensure that unused data and data services obtained through either prepaid or post-paid channels do not expire before expiry of a period of six months, except for promotional packages (subsection 8B (3));
- 3.3.4 ensure that the transfer of data in terms of regulation 8B (4) of the Charter, (i) is not limited to specific products and/or payment types (with the exception of uncapped or free promotional bundled products); (ii) applies to any SIM card or device on the same network, including SIM cards or devices owned by the same end-user; and (ii) exists without a limit on the number of times that the end-user may transfer such data (subsection 8B (5)); and
- 3.3.5 compensate end-users appropriately who are unable to utilise specific promotional data packages or bundles due to a fault attributable to the Licensee

such as network outages or service breakdowns (subsection 8B (7)).

3.4 MTN submits that the end-user's choices and MTNs freedom to contract are legally and constitutionally recognised and protected principles. These choices include how the end-user contracts with mobile network operators in terms of the specific data, voice and SMS bundles they may purchase. Furthermore, these contractual choices are directly linked to a mobile network operators' freedom to contract in the manner deemed appropriate for itself as a commercial entity which has a responsibility to act in the best interest of its shareholders whilst balancing the interests of its customers. MTN believes that the Draft Regulations are overly prescriptive, and therefore infringe on the mobile network operators (Licensees) commercial practices.

3.5 MTN's submission with respect to subsections 8A (4), subsection 8A (5), subsection 8A (6), subsection 8B (3), subsection 8B (3A) subsection 8B (5) and subsection 8B (7) (collectively, "**Contested Provisions**") of the Draft Regulations may be summarised as follows:

3.5.1 The inclusion of the Contested Provisions in the Draft Regulations goes beyond the scope and purview of what is contemplated in section 69 of the ECA, and in particular, what may be regulated by the Charter, or the Authority.

3.5.2 The Authority, in prescribing the validity periods to be applied in respect of voice, SMS and data bundles and/or services (as well as the manner in which these periods are to be calculated), is in the first instance, prescribing contractual terms to be applied in respect of the sale of voice, SMS and data, and in the second instance, removing the ability of Licensees to compete with one another insofar as this aspect is concerned. Licensees will be prevented from offering different validity periods to

end-users (at different price points). This will consequently disadvantage end-users who use the different packages to meet their lifestyle and economic needs, as well as disadvantaging the Licensees who will not be able to differentiate themselves through data validity periods and the preferential pricing offered in respect of shorter data validity periods. This, in MTN's view, unduly interferes with the commercial activities of Licensees, as it will result in Licensees being required to offer the same packages, on similar terms, with minimal difference between their offerings (resulting in reduced variety of choices available to end-users, a reduction of competition between Licensees, and Licensees being unable to offer end-users packages that are tailored for their specific interests). This amendment will therefore stifle innovation and competition to the detriment of end-users.

3.5.3 The Authority, in prescribing further requirements relating to the transfer of data, amounts to, in the first instance, prescribing contractual terms to be applied in respect of the sale of data, and in the second instance, is overly prescriptive.

3.5.4 The inclusion of compensation mechanisms in the Draft Regulations is (i) unreasonable; (ii) irrational; and (iii) vague in so far as it is not apparent how compensation will be calculated and what constitutes "appropriate" compensation.

3.6 We deal with each of these submissions in more detail below.

4. Part C: MTN's Specific Submissions

Ultra Vires

- 4.1 Section 69 of the ECA empowers the Authority to prescribe minimum standards for end-user and subscriber service charters. Pursuant to section 69(5), these minimum standards may extend to, among other things, the provision of information to end-users, complaint procedures, end-user and subscriber charging, billing, collection and credit practices, and any other matter of concern to end-users.
- 4.2 It is an established principle of our law that all exercises of power are subject to the principle of legality. The principle is enshrined in section 1(c) of the Constitution of the Republic of South Africa, 1996, which provides that public bodies derive their powers, authority, and mandate to act, from a relevant empowering provision. Public Bodies are therefore empowered to act only by law and, when so acting, must remain within the constraints of the empowering law. In other words, public or governmental action (including the Authority's action) must be authorised by law and must not go beyond the functionary's powers (or be *ultra vires*).
- 4.3 What is envisaged in section 69 of ECA is the development by the Authority of *minimum criteria* that must be observed by Licensees when providing services to end-users (to ensure fairness, equality, and quality of service to end-users). Regulation 2 of the Charter affirms this interpretation, as it provides that the purpose of the Charter is to "prescribe minimum standards for electronic communication services to an end-user" (our emphasis).
- 4.4 It is notable that section 69(5) of the ECA does not give the Authority the power to interfere in the contractual relationship between Licensees and its end-users nor does it give the Authority the power to prescribe the products and services which are acceptable to provide to end-users. Indeed, one of the express objects of the ECA, as set out in section 2(z), is to refrain from undue interference in the commercial activities of

licensees while taking into account the electronic communication needs of the public. [own emphasis added]

4.5 Put differently, the Authority is given the power in section 69(5) to prescribe the *practices* which must be adopted by Licensees to ensure fairness, quality of service, and transparency. The section therefore allows for the Authority to state how Licensees must conduct themselves in the provision of products and services to end-users, and not what it is that may be provided to end-users from a product and services perspective. MTN submits that the requirement that it and other licensees adhere to prescribed validity periods for the expiry of SMS, voice and data bundles and/or services (collectively, "**the Validity Period Requirements**") amounts to an attempt by the Authority to prescribe contractual terms governing the provision of services to end-users - an act that clearly falls outside the remit of the Authority's powers in section 69(5) of the ECA, making it *ultra vires*. This act by the Authority also falls foul of the object set out in section 2(z) of the ECA, in that it amounts to an undue interference in the commercial activities of Licensees because it seeks to dictate to Licensees the commercial terms that must be applied by the Licensees in making products and/or services available to end-users. MTN submits further that the Validity Period Requirements also constitute an attempt by the Authority to prescribe the products and/or services offered by Licenses to end-users. This is because the Validity Period Requirements, in effect, prevent Licensees from tailoring the expiry periods applicable to services and products offered by them in a manner which enables them to differentiate themselves from their competitors or to meet the different needs of end-users.

4.6 It is MTN's submission that the arguments in paragraph 4.4 and 4.1.5 above apply equally to the provisions in the Draft Regulations relating to:

4.6.1 the compensation of end-users who are unable to utilise specific promotional voice/SMS products and/or data packages or bundles due to a fault

attributable to the Licensee (subsection 8A (6) and subsection 8B (7)); and

4.6.2 the transfer of data in terms of regulation 8B (4) of the Charter (subsection 8B (5)).

4.7 In MTN's view, all these provisions go beyond the powers given to ICASA in section 69 of the ECA and breach the distinction between ensuring fairness, quality of service and transparency, and dictating the products and services offered to end-users as well as the commercial terms offered to end-users. Because the provisions are ultra vires then no matter how laudable the draft provisions may be, they lack the initiating authority, and therefore are susceptible to review.

4.8 MTN is mindful that section 69(5)(f) gives the Authority the power to address in the Charter "any other matter of concern to end-users". However, this seemingly broad provision in section 69 does not, in MTN's view, empower the Authority to prescribe products and services offered to end-users, or to dictate the contractual terms governing the provision of its services to end-users in the Charter. Section 69(5)(f) must be considered in the context of what is meant to be achieved by means of the Charter. As stated above, what is envisaged in section 69(5) is the determination by the Authority of minimum standards and practices applicable to the provision of services to end-users and not the regulation of the commercial practices of Licensees in the retail market. The power to prescribe products and services, or to regulate the terms of a Licensee's contractual relationship with an end-user is not a reasonable consequence of the powers in section 69(5). This is because the imposition of specific terms (including terms prescribing the products/services to be offered and/or the pricing associated with those products/services) applicable to the contractual relationship between Licensees and end-users, goes beyond the prescription of fair practices or minimum standards which must be adopted by Licensees in the provision of services. Simply put, the imposition of terms of this nature is overly prescriptive when compared to what is contemplated in section 69(5) and therefore cannot reasonably be linked to the powers

set out in section 69(5). MTN submits that this falls outside of the remit of the Authority's powers in section 69(5) of the ECA and, consequently, is ultra vires.

4.9 In addition, thereto, obviously neither the perceived powers nor the Draft Regulations can be in conflict with other laws or legal principles, for example the freedom to contract.

4.10 In the circumstances, MTN submits that the Contested Provisions in the Draft Regulations cannot be sustained as the Authority does not have the necessary foundational authority to promulgate them. As such, they ought to be deleted.

Expiry periods for voice, SMS and data bundles and/or services

4.11 Without derogating from the arguments made in paragraph 0 above, MTN submits that requiring Licensees to adhere to prescribed validity periods (as set out in the Validity Period Requirements) not only amounts to the Authority fixing the terms applicable to the provision of data services, but also prevents (or at best, restricts) Licensees from being able to compete with one another insofar as this aspect is concerned. Licensees will be prevented from offering different validity periods to end-users and consequently will not be able to differentiate themselves through SMS, voice, and data validity periods. Licensees will consequently be unable to differentiate themselves in pricing for their products and services (i.e., lower product/service variety results in lower pricing variety). The absence of the ability to compete with one another then has a consequential negative impact for the end-user. Simply put, if MTN is required to offer the same SMS, voice, and data validity periods to end-users as those offered by its competitors, MTN will be prevented from differentiating its offerings from that of its competitors. This may have the effect of stifling competition and may ultimately be to the detriment of the end-user, in that it may hinder any form of innovation where voice, SMS and data packages are concerned. In effect MTN (and other Licensees) will by the stroke of a pen not be able to offer hourly, daily, weekly, or monthly bundles at all as all bundles, no matter how big

or small, and regardless of the end-users' needs or preferences will need to carry a six-month validity period. Accordingly, the Authority's proposal would mean that MTN could no longer offer diverse packages and pricing points, which would have the concomitant effect of end-users losing the ability to choose from a large variety of products and services. Some users prefer shorter validity periods at a lower price compared to higher validity bundles at a higher price because of their adhoc or irregular sources of income and sporadic needs who want to be able to access services affordably and on demand. Shorter validity bundles are priced at lower effective rates which increases affordability. However, MTN also offers 3-, 6- and 12-month bundles for the same reason. This will inevitably disadvantage the end-user both from a choice, and an affordability point of view. The outcome of this will be fewer services with less variation which will make it difficult for customers to find a service that matches their needs. MTN would like to emphasise that competition is not based on price alone but is also based on the ability of the end-user to choose products and services that are suitable to their unique needs. The proposed regulations undermine the work that has been done over the last few years to make services more affordable. The Authority's proposals in this regard are, in MTN's view, contrary to the objectives of the ECA itself, which mandates the Authority to promote:

4.11.1 competition within the ICT sector; and

4.11.2 the interests of consumers regarding the price, quality, and the variety of electronic communications services.

4.12 Furthermore, it is important to bear in mind the significant commercial consequences on Licensees that will arise from the Authority imposing a six-month minimum expiry period, particularly in so far as data bundles and services are concerned. MTN's current data pricing structure includes a wide variety of products with a variety of expiry options. These structures have been designed through end-user demand to, amongst other things, take account of the commercial

impact that data expiry periods can have on the operation of MTN's network infrastructure.

4.13 Pre-paid data bundles are more affordable when the validity period is shortest. Smaller purchases allow end-users more control over their spend and increase data affordability by lowering the cost barrier. As an example, small data purchases with short validity periods will be cheaper than bigdata purchases with longer validity periods. This is because the smaller data purchases with short validity periods allow the networks of Licensees to be used consistently over a period so that the infrastructure does not lie idle. The more predictable the traffic demand, the more accurate the provision of capacity is. This ensures that network resources are not idle, and unnecessary cost are avoided. Short validity bundles are a great tool used to stimulate demand in a particular area or time of day where network resources are underutilised. Moreover, products with shorter expiry periods enable Licensees to accurately forecast their own expenditure and pass the benefits of these accurate forecasts onto end-users through reduced pricing as a way of offering additional value to customers. This has resulted in data usage growing substantially amongst low-income users.

4.14 For purposes of network provisioning and planning, MTN bases its services on carefully considered information about the service requirements of end users and is required to take into consideration the service requirements of end-users over a specific period and for specified volumes. MTN's planning and ability to provide its services to end-users occurs well in advance due to long lead times for network deployment. Capacity is planned to cater for this requirement and to allow for a margin of headroom on the network for unexpected traffic growth volumes. Where MTN is unable to predict or determine the time frames of data usage and traffic due to an open ended or much longer usage-window, it significantly and negatively impacts the service which MTN provides to its subscribers. This is because if traffic exceeds these volumes, the quality of the service experienced by end-users on the network will be negatively impacted. Conversely, if capacity is over

4.17 Another important issue which the Authority has not considered is the significant investment which MTN and its competitors has made into customer value management.

4.18 Accordingly, MTN submits that the Authority ought to delete these subsections in the Draft Regulations.

Economic concerns

4.19 South Africa's socio-economic landscape means that most South Africans either do not use telecommunication services at all or spend very little on these services. Consequently, a vigorous form of competition can be found at the margins. South African operators compete strongly to expand their market.

4.20 As such, operators have turned to innovative allocative measures to expand their consumer base and improve the choices available to consumers. These initiatives involve pricing structures which are dependent on a variety of expiry options. The mechanisms through which this occurs are various commercial innovations. Examples of these initiatives were started by MTN, such as, its numerous Social Bundles offerings. These are aimed at allowing lower-income consumers to access more data. MTN is by no means unique in this regard, with Vodacom, Telkom, and Cell C each offer their own versions of these initiatives.

4.21 It is widely recognized in the economic literature that what is otherwise understood to be "price discrimination/differential pricing", is not anti-competitive in nature, and firms use this as legitimate basis of allowing consumers to self-select into their chosen deals. The result is that those subscribers who spend less on mobile services (or less on data services) enjoy a far lower effective price for data, which in turn gives rise to an increase in overall output.

4.22 In addition, price discrimination, is a difficult concept to pin down in economics. In his text on the theory and practice of Competition Policy, Motta (2004) explains that he "[does] not give a precise definition of price

discrimination, which can easily become a thorny issue.¹ Tirole (1988), similarly points out that “[i]t is hard to come up with a satisfactory definition of price discrimination”, and that many definitions often need to be amended.² Bishop and Walker (2010) state that “[i]t is difficult to provide a satisfactory definition of ‘price discrimination’”, and Armstrong (2008) also notes that “[f]here seems to be no consensus on a precise definition”.³

4.23 In essence, Armstrong (2008) explains that, in the absence of price discrimination, firms set uniform prices that (i) do not depend on the identity of the consumer (i.e. they are anonymous), (ii) do not involve quantity discounts (i.e., there is no “intra-product” discount), and (iii) do not involve discounts for buying a range of products (i.e., there is no “inter-product” discount).⁴ Different types of differential pricing occur when one (or more) of these principles is relaxed.⁵ For instance, third degree price discrimination is a form of “non-anonymous” differential pricing, whereby customers are charged different prices based on their observable characteristics. Commonly cited examples of this are student or senior citizen discounts, which allow these categories of consumers to enjoy lower prices.⁶

4.24 As mentioned above, it is commonly accepted in economics that price discrimination is not inherently likely to be economically inefficient or anticompetitive. The OECD background paper on price discrimination also explains that “*there is nothing intrinsically unfair about price discrimination*”.⁷ Indeed, there exists a significant body of economic literature which illustrates that price discrimination can be more efficient than the alternative of charging the same price to every

¹ Motta, M. (2004). *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press. Page 491, footnote 106.

² Tirole, J. (1988). *The theory of industrial organization*. MIT Press. Page 133.

³ Bishop, S. and Walker, M. (2010). *The economics of EC competition law: concepts, application and measurement*. London: Sweet & Maxwell. Page 251.

⁴ Armstrong, M. (2008). *Handbook of Antitrust Economics*, Chapter 12, edited by Paolo Buccirossi. MIT Press. Page 434.

⁵ Armstrong, M. (2008). *Handbook of Antitrust Economics*, Chapter 12, edited by Paolo Buccirossi. MIT Press. Page 434.

⁶ Armstrong, M. (2008). *Handbook of Antitrust Economics*, Chapter 12, edited by Paolo Buccirossi. MIT Press. Page 434; Motta, M. (2004). *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press. Page 492.

⁷ OECD (2016). *Price Discrimination: Background note by the Secretariat*. Page 9. Available online: [https://one.oecd.org/document/DAF/COMP\(2016\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf) [17 May 2019].

customer (i.e., uniform pricing), and can be consistent with vigorous and effective competition.

4.25 This point is reflected in the OECD background paper on price discrimination, where it is stated that “[p]rice discrimination is typically good for the economy and, providing it does not exclude rivals, it often benefits consumers by increasing trade and driving firms to compete”, and that “discrimination often makes markets more competitive”.⁸ It is also highlighted by a former director of the Office of Fair Trading (“OFT”), now the Competition and Markets Authority (“CMA”) in the UK: “The fact of price discrimination does not by itself allow an inference of market power, still less dominance. There are ample circumstances in which competition and price discrimination are quite consistent.”⁹

4.26 As such, differential pricing is widely presumed to be pro-competitive, and welfare-enhancing in that it increases output levels. This in turn means that consumers who would otherwise be excluded from the market under a uniform pricing regime are able to purchase products at lower effective price levels, and that firms are able to spread their fixed costs over larger volumes, thereby resulting in lower per unit prices for all (i.e., economies of scale). A prime example of this is MTN’s low-cost short validity bundles such as 3 voice minutes for R1 and 1GB hourly bundle for R2¹⁰.

4.27 The positive welfare effects of differential pricing are understood, when one considers that second degree price discrimination usually involves a seller offering a “menu” of product-price combinations to all consumers. Such selling practices are designed to induce customers to self-select into the offering that suits them best, which may be

⁸ OECD (2016). Price Discrimination: Background note by the Secretariat. Pages 5 and 9. Available online: [https://one.oecd.org/document/DAF/COMP\(2016\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf) [17 May 2019].

⁹ Bishop, S. and Walker, M. (2010). The economics of EC competition law: concepts, application and measurement. London: Sweet & Maxwell. Page 250. Citing: Armstrong, M. and Vickers, J. (2001). Competitive price discrimination. *The RAND Journal of Economics*, 32(4). Pages 579-605.

¹⁰ Offers currently available on MTN’s MoMo App

determined by their willingness to pay, or by their specific needs in each consumption episode.¹¹

4.28 Second degree price discrimination may also present in more subtle forms, such as promotional “freebies”, or intertemporal pricing to manage the intensity of demand at different points in time.¹² For instance, a toothpaste manufacturer may offer all customers the opportunity to purchase a single tube, or two tubes with an extra tube included at no additional charge. Once again, this has a similar effect to a regular volume discount since the effective price per unit is reduced. An example of intertemporal differential pricing is the charging of lower gym membership fees to those who are willing to exercise at off-peak hours. This allows the firm to stimulate demand more effectively during less busy periods, and relieve demand at times when capacity is constrained, thereby efficiently allocating demand for a scarce good. In each of these cases, those customers with a lower willingness to pay can seek out and self-select into those offerings that afford them the opportunity to pay lower per-unit prices, while those with a higher willingness to pay may be less inclined to do so. A six-month expiry period will nullify this self-selection propensity.

4.29 It is widely recognised in the economic literature that these approaches to differential pricing can be efficient and welfare enhancing, in the sense that they maximise the size of the “pie” that is shared between producers and consumers.¹³ This is because those consumers who would otherwise be excluded from participating in the market under a uniform pricing regime are able to purchase goods at lower prices, which

¹¹ Bishop, S. and Walker, M. (2010). *The economics of EC competition law: concepts, application and measurement*. London: Sweet & Maxwell. Page 251; Motta, M. (2004). *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press. Page 492; an OECD (2016). *Price Discrimination: Background note by the Secretariat*. Page 7. Available online: [https://one.oecd.org/document/DAF/COMP\(2016\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf) [17 May 2019].

¹² Armstrong, M. (2008). *Handbook of Antitrust Economics*, Chapter 12, edited by Paolo Buccirossi. MIT Press. Page 435.

¹³ Armstrong, M. (2008). *Handbook of Antitrust Economics*, Chapter 12, edited by Paolo Buccirossi. MIT Press. Page 435; Motta, M. (2004). *Competition Policy: Theory and Practice*. Cambridge: Cambridge University Press. Pages 493 to 495.

in turn gives rise to an increase in total output and a reduction in deadweight loss.¹⁴

4.30 In addition to increasing output and ensuring “that consumers face prices that allow them to purchase”, the OECD background paper on price discrimination sets out that price discrimination can lead to substantial economic benefits for two other main reasons: (i) it can increase competition, and (ii) it can create dynamic incentives for innovation and investment to the benefit of consumers¹⁵.

4.31 It is for these reasons that differential pricing, and even price discrimination, *quod non*, are not often challenged by competition authorities¹⁶ For instance, the OECD background paper on price discrimination notes that “[t]he sensible decision, which many agencies have taken, is to adopt a default view that price discrimination is typically beneficial”. Bishop and Walker (2010) similarly explain that: “*In general, where price discrimination leads to an increase in total sales, consumer welfare is likely to be improved relative to the benchmark of uniform prices.*”¹⁷[...]

*“In terms of second-degree price discrimination: forcing a firm to charge a uniform price ... may not benefit customers if total output falls. This is likely to happen if the move to a uniform price lead to prices rising above the willingness to pay of some customers, who therefore stop buying the product.”*¹⁸

4.32 Moreover, as Bishop and Walker (2010) explain, customers who end up paying a higher per unit price because of differential pricing are likely to be, on average, wealthier than those customers who pay a lower per unit

¹⁴ The OECD background paper on price discrimination explains that one clear and generalizable test of whether price discrimination is leading to (more) efficient outcomes is if it has led to an increase in output. See OECD (2016). Price Discrimination: Background note by the Secretariat. Page 10. Available online: [https://one.oecd.org/document/DAF/COMP\(2016\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf) [17 May 2019].

¹⁵ OECD (2016). Price Discrimination: Background note by the Secretariat. Pages 9 and 10. Available online: [https://one.oecd.org/document/DAF/COMP\(2016\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf) [17 May 2019].

¹⁶ Motta, M. (2004). Competition Policy: Theory and Practice. Cambridge: Cambridge University Press. Pages 495.

¹⁷ Bishop, S. and Walker, M. (2010). The economics of EC competition law: concepts, application, and measurement. London: Sweet & Maxwell. Page 252.

¹⁸ Bishop, S. and Walker, M. (2010). The economics of EC competition law: concepts, application, and measurement. London: Sweet & Maxwell. Page 254.

price¹⁹. This means that it is often those individuals at lower levels of affordability that ultimately benefit the most from differential pricing. The OECD background paper on price discrimination similarly states that price discrimination can mean that “more consumers are served and that those on lower incomes pay lower prices”.²⁰

- 4.33 In general regulation should promote competition, encourage investment, reduce unnecessary costs, and remove obstacles for firms to compete. Excessive regulatory interventions, that fetter a mobile network operator’s pricing freedoms will harm competition and will harm consumers, the poorest and most vulnerable consumers. Economic regulation must be targeted at the obstacles to efficiency; the specific bottlenecks in the provision of better quality and affordable (mobile) data services. Mobile network operators require the freedom to price independently and mandating price uniformity is not the manner to incentivise or encourage effective competition in the market.
- 4.34 MTN’s provision of data consumption opportunities, including promotional offers, and time-limited bundles, allows subscribers to self-select into their chosen deals. The result is that those subscribers who spend less on mobile services (or less on data services) enjoy a far lower effective price for data, which in turn gives rise to an increase in overall output. This is typical of efficient and welfare-enhancing differential pricing and is consistent with vigorous and effective competition.
- 4.35 Pre-paid churn rates indicate that millions of pre-paid subscribers readily switch between the competitive offerings of different mobile network operators every month. Therefore, from an economic perspective, the idea of restricting this pricing autonomy, may have the unintended consequence of undermining these welfare enhancing outcomes in the South African mobile data market. Moreover, the

¹⁹ Bishop, S. and Walker, M. (2010). The economics of EC competition law: concepts, application and measurement. London: Sweet & Maxwell. Page 254.

²⁰ OECD (2016). Price Discrimination: Background note by the Secretariat. Page 9. Available online: [https://one.oecd.org/document/DAF/COMP\(2016\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf) [17 May 2019].

Authority's decision-making is required to comply with the requirements of administrative law, including having regard to all relevant considerations and ensuring that decisions are rational and reasonable.

The transfer of unused data

4.36 At the outset, we wish to point out that MTN is already providing this service to its end-users, subject to specific terms and conditions prescribed by MTN. It is MTN's submission that the provision in subsection 8B (5) of the Draft Regulations is overly prescriptive and again, amounts to an attempt by the Authority to dictate the specific products, commercial services and commercial terms that must be made available to end-users by MTN. By imposing the obligation to not place any form of limitations on the transfer of data, the Authority is attempting to prescribe contractual terms governing the provision of data to end-users and the products and services which must be made available to end-users. Thus, it is MTN's submission that this conduct on the part of the Authority goes beyond what is contemplated in section 69(5) of the ECA. In particular, the Authority is not empowered in terms of section 69(5) of the ECA to design or prescribe the products and services which must be made available to end-users. This is something that always ought to be at the discretion of Licensees. It is, and must always be, for the Licensees to determine the commercial viability of specific products and services.

4.37 MTN submits that unlimited and unrestricted data transfer will open licensees up to arbitrage i.e., allowing subscribers to transfer data an unlimited number of times could open a secondary market, where data can be resold by the subscriber. MTN through customer value management, provides discounted personalised offers to subscribers based on their unique usage behaviour and individual profile. Unlimited data transfer provides an opportunity for subscribers to transfer their highly discounted bundles for commercial gain. The same would apply to data purchased at a promotional discount, regional discount as well as URL based services such as WhatsApp bundles. URL based bundles are sold at a discounted rate.

4.38 We draw the Authority's attention to paragraphs 3.12.3.3 to 3.12.3.4 of the Authority's reasons document published on 7 May 2018 in Government Gazette No. 41613 wherein the Authority discusses the submissions by licenses on the amended End-user and Subscriber Service charter Regulations of 2016. The Authority states the following:

*"3.12.2.3. However, after consideration of submissions on the first draft EUSSC Regulations and the second draft EUSSC Regulations, the Authority has included the provision for roll over of unused data for all users before expiry. **The Authority is of the view that the business rules (including terms and conditions of the roll over) relating to the roll over of unused data should be determined by licensees.** In addition, the Authority is of the view that rolled over data should be depleted first before the depletion of new allocated data bundles to ensure that end-users derive maximum benefit from the rolled over data.*

3.12.2.4. Without being overly prescriptive in respect of the expiry period of rolled over data, the Authority would like to encourage Licensees not to expire rolled over data before the expiry date of new allocated data bundle."

4.39 Herein, the Authority references the provisions for roll over of unused data in section 8B (3) of the Charter. The same principle was applied to the transfer of data. For the reasons set out above, MTN therefore submits that subsection 8B (5) in the Draft Regulations ought to be deleted.

4.40 In any event, who ultimately will take responsibility for the data so transferred? The secondary market so established cannot be the responsibility of the Licensees. Customer service issues flowing from this secondary market ought to be regulated by the Authority but it has not done so and as a result there is no guidance as to which regulations may or may not be applicable.

Compensating end-users where end-users are unable to utilise specific promotional voice/SMS or data products due to a fault on the part of Licensees

4.41 MTN submits that the obligations in subsection 8A (6) and 8B (7) requiring Licensees to compensate end-users where they are unable to utilise specific promotional voice, SMS, or data products due to a fault attributable to the Licensee is not only impermissibly vague, but also unreasonable and irrational. MTN has reached this view for the following reasons:

4.41.1 Firstly, it is not clear to which "specific promotional voice/SMS products" and "specific promotional data packages or bundles" the obligations contemplated in the proposed amendments in the Draft Regulations will apply. The Explanatory Memorandum²¹ which the Authority published alongside the Draft Regulations does not address or provide any clarity as to what constitutes a "specific promotional" product or package, nor does it offer any examples of what may constitute the "specific promotional" packages. It cannot be that the obligation will apply to all promotional products and packages offered by Licensees as the Authority expressly qualifies the obligation to apply to "specific" products and packages, yet the Authority has failed to define or identify the "specific" products and packages or the criteria that will apply in determining the application of this subsection. The Draft Regulations therefore perpetuate vagueness in this regard.

4.41.2 Secondly, the obligations suggest that "appropriate" compensation may take the form of a rebate or the

²¹ Explanatory Memorandum on the draft End-user and Subscriber Service Charter Amendment Regulations, 2022, published in *Government Gazette* 46154 of 31 March 2022 ("**Explanatory Memorandum**").

extension of the validity period of the product concerned. It is therefore not clear from the Draft Regulations how the compensation would be calculated. It is unclear whether, for example, Licensees would be free to determine how compensation shall be calculated and when it would be payable. Similarly, it is not clear who determines the "appropriateness" of the compensation or how appropriateness is measured. MTN submits that this will inevitably lead to each Licensee determining how compensation is calculated and whether such compensation is appropriate. This will, in turn, likely lead to a situation where end-users who subscribe to similar services from different Licensees and who experience the same or similar inability to access those services, being provided with different compensation – this draft provision therefore perpetuates inconsistency. The inconsistent approaches adopted by Licensees is likely to result in end-users constantly being at odds with their service providers (because of the lack of clarity as to how this compensation is determined). Accordingly, MTN is of the view that the obligations are irrational in that the obligations as currently drafted may result in end-users stating that they are experiencing unfair treatment by one Licensee when compared to the treatment received by other Licensees (where compensation is concerned). This of course contradicts the principles envisaged in section 69 of the ECA – being the development by the Authority of minimum criteria that must be observed by Licensees when providing services to end-users (to ensure fairness, equality, and quality of service to end-users) (our emphasis). The Authority's

failure to provide reasons for why the obligations are imposed, lends further strength to the argument that the obligations are irrational. This is because it is not clear how the imposition of the obligations are rationally related to the outcomes stated in the Explanatory Memorandum, which are to strengthen the provision of quality of service²², to enable the Authority to continue monitoring and enforcing compliance with customer care standards²³, and to address concerns raised by various stakeholders with regards to data expiry rules, high-out of bundle rates and rules, and out-of-bundle voice and SMS rules²⁴. Simply put, it is unclear how the proposals made by the Authority in this regard will achieve the outcomes stated in the Explanatory Memorandum, especially in circumstances where the Authority has not conducted any processes or inquiries which confirm that the proposals will indeed achieve the outcomes in the Explanatory Memorandum. The Authority has similarly just stated that it is reacting to concerns of subscribers without having raised those concerns with MTN. It is therefore unclear whether the concerns related to MTN practices or practices of other operators. If the concerns relate to other Operators, it would be irrational to oblige MTN to correct a practice that occurs in another operator's domain.

4.41.3 Thirdly, the Consumer Protection Act²⁵ does not place similar obligations of compensation on suppliers who provide promotional offers to

²² Paragraph 1.2 of the Explanatory Memorandum.

²³ Paragraph 1.3 of the Explanatory Memorandum.

²⁴ Paragraph 1.4 of the Explanatory Memorandum.

²⁵ Consumer Protection Act 68 of 2008

consumers. It is therefore unclear on what basis, and what factors, the Authority considered before proposing these proposals in the Draft Regulations. In the circumstances, MTN submits that the Authority's failure to consider the measures that will need to be taken into account in the determination and calculation of the compensation owed to the end-users and the measures to determine the appropriateness of the compensation, means that the Authority has failed to consider relevant factors thereby making the regulations susceptible to review should they become final – which of course means that the Authority has failed to discharge its obligations as prescribed in the Constitution and the applicable administrative laws.

4.41.4

Fourthly, it is MTN's understanding that the obligation to compensate end-users, stems from the overarching obligation on Licensees to provide quality services and products to end-users. MTN submits that service and/or product quality (where applicable) is already regulated in terms of the Code of Conduct for Electronic Communications and Electronic Communications Network Services Licensees²⁶("Code of Conduct"). It is not clear to MTN why the Authority has elected to include subsections 8A (6) and 8B (7) in the Draft Regulations when both section 9 of the Charter and the Code of Conduct already regulate service quality. Moreover, the Code of Conduct currently provides for remedies where a product or service is defective - none of which requires Licensees to compensate end-users. In light of the Authority's

²⁶ Regulations in respect of the Code of Conduct for Electronic Communications and Electronic Communications Network Services Licensees, published under *Government Gazette* 30553 of 7 December 2007.

failure to provide reasons for (i) why the obligations are imposed in the Draft Regulations as opposed the Code of Conduct, (ii) why the Authority is imposing additional qualitative service requirements where these are already addressed elsewhere in the Charter; and (iii) why the obligations are imposed in addition to what is already provided for in the Code of Conduct, MTN submits that the proposed obligations are irrational as it is not clear how the imposition of these additional obligations is rationally related to the outcomes stated in the Explanatory Memorandum. In other words, it cannot be said to be rational or reasonable for the Authority to seek to further regulate issues relating to a defect in the quality of service provided to end-users in circumstances where this is already regulated in the Code of Conduct and the Charter. It is simply unreasonable for the Authority to seek to punish Licensees more than once for the same issue.

- 4.41.5 Fifthly, promotional services are offered to end-users at the licensee's discretion, with the objective of rewarding customers for their loyalty and building brand affinity. The Authority cannot be prescriptive about this since the end user has not paid for the promotional services.
- 4.41.6 Regulation 9 (1) and (2) of the Charter "Quality of Service" provide for ECS and ECNS availability at a minimum level of 95% measured over 6 months (average). The regulations go on to qualify that regulation 14 "Rebate" is subject to regulation 9, meaning that the quality of service metrics need to be considered first, before a rebate is due. For example, if the availability for a 6-month period falls

below 95% a rebate is due in terms of regulation 14.

See regulation 14:

*“(1) **Subject to regulation (9)**, an end-user is entitled to a rebate if he/she has not received services in terms of a contract entered into with a licensee to which payment has already been effected for the services.”*

4.41.7 Lastly, in the absence of an adequate explanation of the Authority's rationale for the inclusion of these obligations, and the evident vagueness of the obligations, MTN sees no rational reason for the inclusion of subsection 8A (6) and 8B (7) and believes that these obligations ought to be deleted.

4.42 Although the Charter makes provision for *force majeure* events, MTN would like to reemphasize that in the current South African context, a significant number of network failures and outages are caused by load shedding which, is a *force majeure* event. The impact of load shedding is significant, and end-users do not always understand the link between network availability and load shedding. The Authority should also note the impact of battery theft and site vandalism which affect quality of service.

5. Part D: Specific comments on the Draft Regulations

5.1 ***Ad Regulation 2 of the Draft Regulations – Amendment of Regulation 1 of the Charter***

MTN does not object to the amendments to regulation 1.

5.2 ***Ad Regulation 3 of the Draft Regulations – Amendment of Regulation 8A of the Charter***

5.2.1 **8A (4)** – for the reasons set out above, MTN submits that these proposed amendments ought to be deleted.

5.2.2 **8A (5)** – MTN proposes that the Authority reconsider the first in first out principle in favour of the shortest expiry first principle. Whilst the first in first out principle makes sense, it does not consider the varying validity of bundles. For example, if a subscriber buys a weekly bundle on 15 May which expires at 23:59 am on 22 May and a daily bundle on 22 May which expires at 23:59 am on 22 May, the daily bundle has the shortest expiry and must be expired first before the weekly bundle. If the first in first out principle was applied, the daily bundle would have expired before the subscriber got a chance to use it because the weekly bundle would have been applied first, as it is the oldest bundle in the depletion order. Please refer to figure 1 below, setting out the difference between the next expiry depletion priority vs the first in first out depletion priority. The first in first out priority will mean that customer will lose out on shorter expiry bundles which were purchased after the first bundle but expire before the first bundle. This would result in customers forfeiting their first in bundles with a lower validity period, which are also the lower priced bundles without having used them.

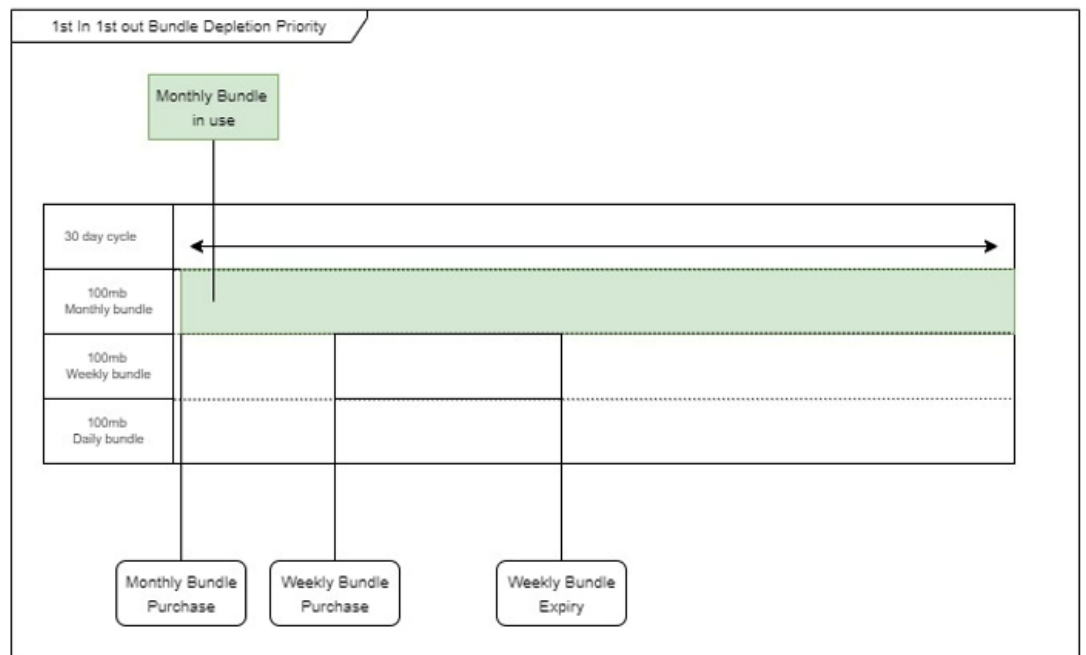
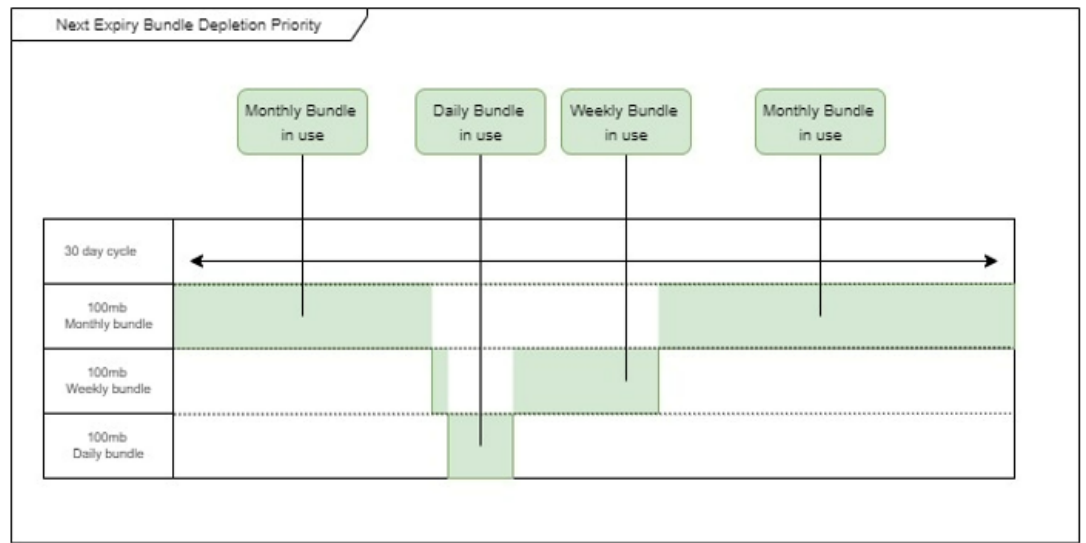


Figure 1

5.2.3

8A (6) – for the reasons set out above, MTN submits that the proposed amendments ought to be deleted.

5.3 ***Ad Regulation 4 of the Draft Regulations – Amendment of Regulation 8B of the Charter***

5.3.1 **8B (3)** – for the reasons set out above, MTN submits that these proposed amendments ought to be deleted.

5.3.2 **8B (3A)** – MTN proposes that the Authority reconsider the first in first out principle in favour of the shortest expiry first principle. Whilst the first in first out principle makes sense, it does not consider the varying validity of bundles. For example, if a subscriber buys a weekly bundle on 15 May which expires at 23:59 am on 22 May and a daily bundle on 22 May which expires at 23:59 am on 22 May, the daily bundle has the shortest expiry and must be expired first before the weekly bundle. If the first in first out principle was applied, the daily bundle would have expired before the subscriber got a chance to use it because the weekly bundle would have been applied first, as it is the oldest bundle in the depletion order.

5.3.3 **8B (5)** – for the reasons set out above, MTN submits that these proposed amendments ought to be deleted.

5.3.4 **8B (7)** – for the reasons set out above, MTN submits that these proposed amendments ought to be deleted.

5.4 ***Ad Regulation 1 (MTN notes that the Authority may have made a typographical or formatting error in numbering the Regulations in the Charter as the numbering of the Draft Regulations restarts at 1 from this point on in the Draft Regulations) – Amendment of Regulation 8C.***

- 5.4.1 **8C (1)(d)** - MTN does not object, and in fact welcomes the opportunity to conduct education awareness campaigns on cybersecurity and the protection of personal information as this would fall under the ambit of section 68 (5) (c) of the ECA.
- 5.4.2 **8C (3)** – MTN does not object to issuing consumer alerts to end-users relating to matters of protection of end-users. However, MTN finds that the provisions of regulation 8 C (3) are impermissibly vague and ambiguous in that the requisite power and authority for the Authority to direct Licensees to send out messages, is not found in the provisions of the regulation. It states that, "*Such directives may include, but are not limited to...*". The Authority seems to be giving itself unfettered powers to instruct Licensees to send any messages it deems necessary without any form of consultation or checks and balances to determine whether the Authority is in fact empowered to do so. In addition, MTN submits that the Authority does not have the power (in terms of section 69 of the ECA) to instruct Licensees to send out messages relating to public health warnings, public safety notifications and State of Disaster / State of Emergency notifications. During the recent state of disaster, Licensees were legally obliged to send out notifications in terms of regulations promulgated under the Disaster Management Act²⁷, which is the **correct** legislative instrument to deal with such matters. Mobile network operators, without any hesitation, sent the notifications as required under the Information and Communications Technology ("ICT") Covid-19

²⁷ Act No. 53 of 2002

National Disaster Regulations,²⁸ and went over and above to assist with public awareness messages to support those providing Covid-19 relief and conducting vaccination drives, therefore MTN is perplexed as to why the Authority wishes to bring these provisions into the Charter, since it is clear that Licensees need not to be forced by way of regulation to step up and provide assistance when required.

5.5 ***Ad Regulation 2 – Amendment of Regulation 9 of the Regulations***

5.5.1 MTN commends the Authority for recognizing that the quality of service metrics in the Charter are outdated. While we recognize that the Authority has identified a trend that operators around the world are shutting down their 2G networks to free up spectrum for upcoming new technologies, this is not quite the case for mobile operators in South Africa. Sections of our population still make use of legacy devices (feature phones) and benefit from 2G connectivity, and the advantages of legacy devices, such as long battery life (particularly in areas where the provision of electricity is intermittent). As a result, MTN intends to decommission 3G services within the medium-term and not to decommission 2G in the near future. MTN is currently refarming spectrum away from 3G services towards 4G services and will only consider decommissioning 2G services after this process is complete. MTN believes that the process of decommissioning any technology including 2G technology should be operator led and driven. This accords with the

²⁸ Government Gazette No. 45458 published 11 November 2021

principle of technology and service neutrality which is supported in the South African regulatory environment.

- 5.5.2 This active refarming of spectrum from 3G to 4G, is necessary to ensure the sustainability of the 4G network. MTN's focus on the quality of 4G services will result in the degradation of 3G services, which will become redundant if the same area has 4G coverage. Therefore, the enhanced targets for 3G services set by the Authority will become harder to achieve, while MTN is actively reducing its reliance on 3G technology which is a choice that the operators should make within a competitive environment. This will not impact subscribers as 3G services are replaced with more advanced 4G services.
- 5.5.3 As networks are evolving and Licensees may have different strategies, it is important to not place an undue burden on operators to keep 3G services active and meet quality of service metrics, whilst they are attempting to invest in better technologies. MTN submits that the Authority limit their 'quality of service' obligations to those technologies that operators are actively offering i.e., if an operator only provides 2G and 4G services then quality of service obligations for technologies not being actively used and invested in should not apply.
- 5.5.4 MTN notes that the Authority is introducing more onerous quality of service metrics, however these need to be more clearly defined. For example, the 3G coverage target of -105dBm is very onerous if it is required for 100% of the drive test samples. 100%

is something we strive for, but it cannot practically be 100% for each sample measured.

5.5.5 In addition, MTN submits that there should be allowance made for power grid instability and its related impact on the network experience. For example, if the grid in Northern Region is severely unstable over protracted periods MTN cannot guarantee the required quality of service metrics. Whilst we acknowledge that the regulations make provision for impossibility of performance in regulation 16, it is not clear how outages beyond MTN's control, such as load shedding, will be accounted for in the measurement criteria.

5.5.6 **9(13)** – In respect of the proposed Mean Opinion Score (MOS), this measurement parameter is a subjective metric, used for evaluating the perceived audio, video and audio-visual quality, with the quality being assigned a value between 1 and 5 with 1 indicating bad quality and 5 indicating a perceived excellent quality experience. At best it can be characterized as being an algorithmically estimated score. A MOS of 4 is considered good on the Absolute Category Rating (ACR) scale which the Authority has placed as the level to be achieved for VoLTE specifically for 4G PS Data services. As this is a subjective criteria MTN queries the inclusion of such criteria because all regulations need to be objectively implemented. It is therefore impermissibly vague and ambiguous. If the Authority wishes to continue with such subjective criteria, MTN suggests that no penalties may be applicable in circumstances where the criteria is not satisfied. Moreover, MTN recommends that the

Authority set the MOS value to that of less than 4 and that this should be the weighted average over a specified time frame across the overall performance of the network, namely 6 months. This would provide an even reflection of the traffic distribution as opposed to a mere snapshot of performance at a specific point at a specified time. This is especially because the Authority selects areas which consist of towns, farm areas, rural areas, major road arteries, economic activity nodes and areas of previous complaints, which would provide a very distorted view of the overall network performance and quality.

5.5.7 MTN notes the disparity between the proposed average throughput requirements (i.e., >10MBps) in the Draft Regulations compared to the throughput obligations laid out in section 12 of the Invitation to Apply published on the 10 December (Government Gazette 45628) which now form part of MTN' license obligations under the Radio Frequency Spectrum License No: IMT/RF0003/APR/22.²⁹

"A minimum downlink single user throughput of 5Mbps at the edge of the cell (particularly in Batch 3 classified municipalities) within five (5) years from the effective date of this license or within 5 years from the date the digital migration process is completed whichever comes later."³⁰

5.5.8 The Authority must therefore amend the throughput requirements as articulated under "4G PS DATA SERVICES (4G Preferred mode)" in the Draft Regulations, to align with the throughput

²⁹ Issued on 9 May 2022 with an effective date of 1 July 2022

³⁰ Paragraph 4.1 of MTN's Radio Frequency Spectrum License No: IMT/RF0003/APR/22.

obligations contained within MTN's Radio Frequency Spectrum License issued in May 2022.

5.5.9 Additionally, the Radio Frequency Spectrum License provides a time of 5 years to meet those throughput obligations and thus the measurement parameters as indicated in the proposed regulation 9 can only be seen as future targets and not as immediate requirements for the time being.

5.6 ***Ad Regulation 7 – Substitution of Regulation 10 of the Charter***

5.6.1 **10(1)** – MTN does not object to the substitution of regulation 10(1) in the Charter with regulation 10(1) in the Draft Regulations.

5.6.2 **10(2)** – MTN objects to the substitution of Regulation 10(2) on the basis that it is impermissibly vague and ambiguous. The Authority is proposing to measure quality of service by certain methods *“and other methods that the Authority finds relevant to audit Licensees on.”* The Authority is proposing to give itself unfettered powers to use any method it deems fit, regardless of whether that method is clearly defined and understood upfront by mobile network operators, is measurable, conforms to relevant technical standards, is scientific and objective, and is relevant to the quality of service metrics being measured. The inclusion of this subjective phrase is (i) unreasonable; (ii) irrational; and (iii) vague in so far as it is not apparent what methods could be used to measure quality of service and is subjective. MTN further notes that the Authority specifically identifies Mobile Network Operators (a definition for this is not provided for in the Charter, nor the ECA) as opposed to “Licensees”, the Authority’s selective

focus on Mobile Network Operators is subjective and it is beholden upon a National Regulator that regulations such as these are applicable to all ECNS/ECS licensees and not merely a select few that have been isolated by the Authority.

5.6.3 **10(5)** – MTN does not object to the insertion of regulation 10(5) of the Draft Regulations.

5.6.4 **10(6)** – MTN submits that it is not necessary to require Licensees to provide the Authority with access to Licensees' platforms to collect raw network performance data, where Licensees are already obliged in terms of regulation 10(5) of the Draft Regulations to provide the Authority with raw network performance data. MTN further submits that the installation of software and hardware into or onto a Licensees' systems is overly intrusive, and may expose Licensees to breaches of network security, confidential information, trade secrets and personal information of end-users without any safeguards.

5.7 ***Ad Regulation 8 of the Draft Regulations – Substitution of Regulation 11 of the Charter***

5.7.1 **11(1)** – MTN does not object to the substitution of Regulation 11(1) of the Charter with Regulation 11(1) of the Draft Regulations.

5.7.2 **11(2)** – MTN does not object to the insertion of Regulation 11(2) of the Draft Regulations.

5.8 ***Ad Regulation 9 of the Draft regulations – Short title and Commencement***

5.8.1 Should the Authority elect to publish the Draft Regulations in their current form and without

amendments to address the concerns as raised by MTN (which should not occur based on the submissions made above), MTN submits that it would not be reasonably practicable to expect Licensees to be able to comply with the Draft Regulations immediately upon the date of publication. In some instances, system development may be required to implement the changes required. MTN urges the Authority to consult widely with all relevant stakeholders, to sincerely take the submissions into consideration and to ensure that Licensees are afforded a reasonable time to implement the requisite compliance programs. It is difficult for MTN to predict how long it will take to implement compliance until it has sight of the final regulations, however, based on previous experience, MTN would need at least 24 months to plan, implement, test, and deploy the changes required.

6. Conclusion

6.1 In its explanatory memorandum the Authority makes reference to the rationale for the proposed amendments as:

"...general concerns raised by various stakeholders, including consumer groups and social media campaigns, with regards to data expiry rules, high out-of-bundle rates and rules, and out-of-bundle voice and Short Messaging Service ("SMS") rules currently applied by licensees."³¹

6.2 The Authority does not state which period were the concerns raised and the sample subscribers raising those concerns. It is MTN's view that these concerns referenced by the Authority are outdated and have been overtaken by changes to market conditions, especially with reference to

³¹ Paragraph 1.4 of the Explanatory Memorandum

high out of bundle rates and out of bundle rules. Firstly, the Charter introduced new out-of-bundle rules in 2019 where subscribers cannot go out-of-bundle unless they have opted to go out of bundle, and out-of-bundle rates have declined over time. MTN's pre-paid out of bundle effective rate has dropped by [REDACTED] from 2019 to date and MTN's out of bundle revenue has dropped significantly (approximately [REDACTED]) during this period. Moreover, the overall reduction in data prices is well noted by the Authority in Bi-Annual Tariff Analysis reports. The Authority stated in the latest Bi-Annual Tariff Analysis Report that:³²

*"The Authority observed increased competitiveness between licensees in terms of the number of promotions that were offered in the market, during the period under review...The increased number of promotional offers is seen as a strategic tool to incentivise, reward (loyal customers), attract new customers and to alleviate the financial burden brought by the pandemic by providing more affordable access to digital services. The extensions and/or amendments of previous promotions could also be an indication of customers' positive reaction towards promotional offers."*³³ [our emphasis]

6.3 It is through this type of promotional activity that subscribers benefit from lower data prices. In the Authorities own words, these promotions assist customers with access to affordable data. For example, in the Authority's latest Bi-Annual Tariff report the Authority states the following in relation to MTN's Prepaid Personalised Data Bundles:

"The bundles shown in the table above are offered to selected customers at varying data volumes in accordance to their spending profiles. For example, MTN may offer selected customers a weekly 200MB, 220MB or 400MB data bundle, depending on their spend profiles, for a price of R20. Customers benefit from the low in-bundle rates attached to the

³² <https://www.icasa.org.za/uploads/files/2021-22-FY-Q4-Bi-Annual-Tariff-Analysis-Report.pdf>

³³ <https://www.icasa.org.za/uploads/files/2021-22-FY-Q4-Bi-Annual-Tariff-Analysis-Report.pdf>

Personalised Data Bundles, with the highest being R 0.17 per MB, therefore customers receive more value for money³⁴. [emphasis added]

- 6.4 If the regulatory interventions proposed by the Authority are implemented, this promotional activity would cease as licensees will no longer have the space to provide innovative offers based on validity. In any event, there is no explanation given by the Authority between the different views in the Bi-Annual Tariff Report and the views that it expresses now as a reason for the proposed changes.
- 6.5 MTN urges the Authority to reconsider the drastic regulatory interventions it proposes. Firstly, most of the proposed interventions are ultra vires as the Authority does not have the powers to impose these regulatory interventions under the ECA. Secondly, the Authority does not provide rational reasons as to why the regulatory interventions should be imposed and is proposing extreme regulatory interventions when it is not justified. Thirdly, the Authority is introducing vague and subjective regulatory requirements, specifically in relation to compensation as well as quality of service measurements.
- 6.6 The ICT sector in general is one of the sectors which is highly regulated in the South African economy. This is despite a national outcry to reduce regulatory burden in order to facilitate economic growth. The End-User and Subscriber Service Charter Regulation is one of many examples of regulatory overreach. We urge the Authority to reconsider the necessity of this Regulation.

³⁴ <https://www.icasa.org.za/uploads/files/2021-22-FY-Q4-Bi-Annual-Tariff-Analysis-Report.pdf>
Paragraph 2.1.1.1.3.1.