

INTRODUCTION

- 1 Vodacom welcomes the opportunity to comment on the proposed amendments to the End-User and Subscriber Service Charter Regulations, 2016 published in terms of Notice 4449, in Government Gazette No. 50241 on 29 February 2024 (“the draft regulations”).
- 2 Vodacom supports the objectives of Government and the Authority to ensure that mobile services are as accessible and affordable to as many South African customers and businesses as possible. Vodacom remains committed to reducing the cost of communicating and extending access to communication to all. Vodacom has, in the realisation of these goals, taken steps to reduce the cost to communicate, continues to educate customers on offers best suited to their needs and raises customer awareness on their data, voice and Short Message Service (“SMS”) usage.
- 3 These pro-customer measures include, amongst others, innovative pricing strategies such as the introduction of short validity bundles which allow customers access to lower rates, which now account for around [REDACTED] of Vodacom’s revenues from mobile data services in lower income areas. Customers are also able to access a range of other lower priced bundles, such as voice bundles (like Night Shift), Free Bonus Airtime on selected price plans that customers can use for voice and data, URL specific data bundles, bundles which allow mobile data usage at certain times of the day (e.g., Vodacom’s “Night Owl” portfolio) and other personalized offers.
- 4 As a result of this diverse portfolio, Vodacom has, since 2020:

- 4.1 Reduced mobile data prices by [REDACTED] and voice by [REDACTED], with the average rate paid by lower income customers declining even more rapidly;
 - 4.2 Significantly reduced Out of bundle (“OOB”) rates for mobile data - up to [REDACTED], with OOB revenue accounting for only [REDACTED] of Vodacom’s overall mobile data revenues;
 - 4.3 Continued to offer, through its “Just 4 Your Town” scheme, personalized discounts to prepaid customers in more than [REDACTED] localities where most of the population have income levels below the upper bound food poverty line;
 - 4.4 Provided highly discounted rates for students; and
 - 4.5 Continued to offer zero-rating of content such as educational and health services, such that the proportion of data consumed on Vodacom’s network free of charge has increased by about [REDACTED].
- 5 Vodacom notes from the Explanatory Note published with the proposed amendments that the amendments are the result of concerns raised by various stakeholders, including consumer groups and social media campaigns, which related to:
- 5.1 Data expiry rules;
 - 5.2 High OOB rates and rules; and
 - 5.3 OOB voice and SMS.¹

¹ ICASA Explanatory Memorandum, paragraph 1.2.

- 6 The Authority itself has recorded that it is concerned about the lack of prescribed minimum standards on how voice, SMS and data are rolled over and transferred.² Vodacom understands this to be the Authority's stated rationale but it is not clear that these issues arise from consumer concerns.
- 7 However, the Authority has not, in its Explanatory Memorandum, explained why it believes the current market is failing to deliver appropriate outcomes for customers, beyond, for example, referring to the need to, "cater for ongoing consumer demand for bundles that do not expire prematurely" and that, "there remains strong consumer resistance to the 'loss' of unused data".³
- 8 This is a critical omission which undermines the rationale for the proposed amendments. All regulatory measures, regardless of the legal basis on which they are imposed (and to which Vodacom turns to next), should be proportionate (i.e., they should incur the least cost and apply the least intrusive measure necessary to address the perceived mischief) and be transparent (i.e., clearly articulated and easily understandable to all parties). In this case, in addition to acting *ultra vires* (as discussed below), the Authority has not demonstrated that the proposed measures meet these principles. The Authority has also failed to conduct an impact assessment, which is necessary to demonstrate not only that the proposals have benefit but to prevent unintended consequences that may exacerbate the very issues the Authority intended to address. Therefore, even if the proposed measures were not contrary to the relevant legal framework (which Vodacom believes is the case), the Authority has not

² ICASA Explanatory Memorandum, paragraph 1.4.

³ ICASA Explanatory Memorandum, paragraph 3.5.

demonstrated that they are necessary or that they are the least cost and least intrusive way of achieving its objectives.

- 9 It is Vodacom's assessment, based on the unintended consequences of the Authority's proposed regulations, detailed in our response below, that the draft regulations were not informed by any form of impact assessment. Vodacom submits that had the Authority conducted an impact assessment, it would not have proposed these regulations as they are not in the best interest of consumers. The draft regulations are instead harmful to customers, unreasonable and irrational and, for the reasons set out in these submissions, the proposed measures should be reconsidered or withdrawn.
- 10 Indeed, many of the concerns raised can be addressed without the need for the draft regulations and instead can be dealt with through consumer awareness campaigns and education. Should such education and awareness not resolve these concerns, and should the Authority properly identify any consumer-related concerns that remain and that do merit some form of intervention, Vodacom believes that such intervention should be significantly less invasive than that proposed by the Authority. At the very least, the Authority should demonstrate why less invasive regulations would not remedy any legitimate concerns.
- 11 Vodacom is of the view that the draft regulations in their current form, most notably parts of regulation 1 (definitions) and regulation 8A, can be impugned on several bases.
- 12 First, they are susceptible to legal challenge on the basis that elements of the draft regulations are *ultra vires* the Electronic Communications Act 36 of 2005 ("the Act/ECA").

Secondly, even if they weren't *ultra vires*, the Authority has not demonstrated that they are necessary and proportionate. Finally, the draft regulations if finalised would likely have counter-productive consequences and result in increased costs for the end-user and a diminished product offering for consumers, with the most adverse effects being felt by lower income consumers. In sum, Vodacom submits that the draft regulations are anti-consumer in their effect, unlawful, unreasonable, and irrational.

- 13 In these submissions, Vodacom sets out legal reasons why the draft regulations should not be implemented. In addition, a report by Frontier Economics is attached setting out the economic reasons in support of Vodacom's position.

THE DRAFT REGULATIONS ARE *ULTRA VIRES*

- 14 The Authority states in the notice to the draft regulations, that it derives its power to amend the existing regulations from section 4, read with section 69(3) of the Act.
- 15 The scope of the power conferred on the Authority by these two sections is determined on a proper interpretation of these provisions. The correct approach to the interpretation of statutes is now well established – our Courts will consider the text, purpose, and context of the provision in a unitary exercise.⁴

Proper interpretation of empowering provisions

- 16 Section 4 of the ECA is a general regulatory power. It provides that the Authority may make regulations with regard to any matter which in terms of the Act or related legislation must or may be prescribed, governed, or determined by regulation.
- 17 Section 69 is entitled “Code of conduct, end-user and subscriber service charter”. Section 69(3) empowers and requires the Authority to prescribe regulations setting out the minimum standards for end-user and subscriber service charters.
- 18 The ECA defines a service charter as follows:

'service charter' means a document, developed by a licensee after consultation with its staff, subscribers and end-users which sets out the

⁴ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) ([2021] ZACC 13).
Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

standards of service subscribers and end-users can expect and is a performance measurement and accountability tool that focuses on subscriber and end-user service outcomes.⁵

- 19 Section 69(3) does not empower the Authority to make regulations that do something more or different.
- 20 Further, the power of the Authority in section 69(3) must be read with and in terms of sections 69(4) and 69(5).
- 21 Section 69(4) confirms that the Authority may develop different minimum standards for end-user and subscriber service charters for different types of services. Section 69(5) sets out the matters which an end-user and subscriber service charter may address.
- 22 The list in section 69(5)(a)-(e) is not intended to be exhaustive, as the introductory words record that the matters which an end-user and subscriber service charter may address “*include, but are not limited to*” this list and section 69(5)(f) states that the end-user and subscriber service charter may address “*any other matter of concern to end-users and subscribers.*” However, this does not mean that section 69(3) creates a wide and unfettered power for the Authority to promulgate regulations. The Authority remains empowered, in terms of section 69(3), only to set minimum standards for end-user and subscriber service charters.
- 23 Therefore, section 69(3) read with section 69(5), is prescriptive and narrowly tailored. Anything that falls outside of the scope of a service charter, is *ultra vires*.

⁵ ECA section 1 – definitions.

- 24 The text of the definition of “service charter” read with the text of section 69(3), therefore reflects that the regulations should only address what subject matter the service charter should cover when:
- 24.1 publishing the standards of service subscribers and end-users can expect;
 - 24.2 setting out the performance measurement and accountability tool that focuses on subscriber and end-user service outcomes.
- 25 The text of the ECA specifically requires the content of the service charter – being the details of how the service will be provided – to be determined by the licensee. It does not contemplate the regulations doing so. The text of the ECA merely requires the Authority to prescribe the subject matter to be covered by a licensee in its service charter.
- 26 This interpretation is sensible and customer-centred. The needs and usage patterns of end-users are dynamic and are constantly changing, particularly in a technologically driven market. It is appropriate that a licensee should be afforded the requisite flexibility to respond to the needs of the end-users as effectively and as time-consciously as possible. Regulations, on the other hand, are based on data obtained at a specific point. They cannot respond simultaneously to the changes in usage and needs.
- 27 The purpose of section 69, read in the context of the rest of the ECA, supports this textual interpretation. There are many other provisions in the ECA that confer power on the Authority to make regulations to address specific issues. The scheme of the ECA therefore does not support an interpretation that section 69 has a wide purpose. The scheme of the ECA supports an interpretation that the purpose of section 69 is restricted to ensuring

service charters prepared by licensees cover the issues required to be addressed by a service charter.

28 Consequently, the scope of section 69(3) is limited to empower the Authority only to regulate what must be covered by a service charter and does not include the power to regulate the products and services offered by the licensee in the market.

29 The application of the *eiusdem generis* principle to section 69(5) also confirms the limited scope of the power conferred in section 69(3). The limited type or *genus* of matters that the legislature intended to cover with section 69(3) is clear from 69(5)(a) to (e):

29.1 Sub-section (a) contemplates that the Authority will impose minimum standards for how service charters should address the provision of information to end-users and subscribers regarding services, rates, and performance procedures;

29.2 Sub-section (b) contemplates that the Authority will impose minimum standards for how service charters should address the provisioning and fault repair services;

29.3 Sub-section (c) contemplates that the Authority will impose minimum standards for how service charters should address the protection of private end-user and subscriber information;

29.4 Sub-section (d) contemplates that the Authority will impose minimum standards for how service charters should address end-user and subscriber charging, billing, collection, and credit practices; and

- 29.5 Sub-section (e) contemplates that the Authority will impose minimum standards for how service charters should address complaint procedures and the remedies that are available to address the matters at issue.
- 30 These are all matters related to how licensees engage with their end-users and subscribers in conducting the business of a licensee. They are not matters related to the products and services that are offered by the licensee.
- 31 In respect of the draft regulations, the Authority exceeds the scope of its powers in two respects. It firstly seeks to prescribe the substantive terms of a service charter, where the Act leaves that to the licensee; and secondly, it goes beyond the ambit of section 69 and seeks to impermissibly regulate the products and services offered by the licensee in the market.
- 32 Another important contextual consideration is the content of section 67, recorded in a separate chapter of the ECA. That section empowers the Authority to prescribe regulations defining relevant markets and impose pro-competitive licence conditions on licensees where there is ineffective competition. Such regulations might involve restrictions on the scope or attributes of the products or services offered by licensees, but they cannot be imposed by the Authority without following the extensive investigative steps set out in section 67.
- 33 Vodacom notes that the Authority does not rely on section 67 to make the current draft regulations, however, the content of that section provides context in determining the proper interpretation of section 69. Where the power to make regulations involving competition

considerations is contemplated in another section of the ECA (being section 67) and that section imposes a series of pre-conditions before the Authority can make such regulations, this is a significant and persuasive indication that the legislature did not intend to give the Authority the same powers, with no pre-conditions, in section 69.

- 34 Vodacom submits, having regard to the submissions above, that on a proper interpretation of section 69(3), read with section 4, being the empowering provision in the ECA relied on by the Authority, that section does not confer power on the Authority to regulate the attributes of the products and services offered by licensees. Consequently, if regulations were promulgated by the Authority that did purport to regulate the attributes of the products and services offered by licensees, such regulations would be *ultra vires* and unlawful.

The ultra vires draft regulations

- 35 A bundle is defined in the draft regulations as follows:

“**Bundle**” means a set amount of data, voice minutes, SMSs, OTT services, or a combination thereof, valid for a specific period of time, sold for a single price for the set of services included in the bundle;”

- 36 This confirms that the attributes of the product being sold as a “bundle” for a particular price are determined by i) the amount of the service offered (data, voice etc.); and ii) the time during which that service may be used. This necessarily accepts that if the amount of the service changes or the time changes, then the attributes of the product being offered will have changed – making it a different product that will justify a different price.

- 37 In draft regulations 8A(6) – 8A(10), the Authority proposes to regulate the roll-over and transfer of bundles and unused portions of bundles. The Authority records in the Explanatory Memorandum that it seeks to prescribe minimum standards on how voice, SMS and data are rolled over and transferred.
- 38 However, the Authority is not empowered to do so. There is no express provision in section 69(5) that gives the Authority the power to compel licensees to roll-over and transfer unused bundles. Not only is section 69 silent on both roll-over and transfer but the *genus* of matters covered by section 69(5) does not provide scope for the regulator to prescribe the time period for which a licensee’s bundled products must make services (data, voice, etc) available.
- 39 By dictating that a bundle must be transferred or rolled over at the end of a particular validity period, the draft regulations seek to prescribe the attributes of the bundle products to be offered. They prescribe the nature of the bundle: the potentially unlimited number of end-users who may utilise the bundle, the volume of services that may constitute a transferred bundle and the bundle’s validity period. For example, consider the impact of draft regulation 8A(6), which requires that 50% of the remaining unused bundle is rolled over, at least twice, at the end of the validity period.
- 39.1 Assume the end-user purchases a 1GB data bundle for 30 days and pays a price of R49. This is the “Bundle” as defined by the regulation: 1GB of data services; a validity period of 30 days to use those services; a price of R49 for that combination. The licensee is required to enable the end-user to receive 1GB of services on the network in the agreed 30-day period.

- 39.2 As explained below, Vodacom understands that the draft regulations require that if, at the end of the agreed 30-day period, the end-user has not used the data services, the licensee must roll over 50% of the unused data for the equivalent validity period (i.e. another 30 days).
- 39.3 Then, at the end of the 60 days, if the end-user still hasn't depleted her data the licensee is then required to roll-over 50% of the remaining data previously roll-over for a further 30 days.
- 39.4 In doing so, the Authority purports to alter the attributes of the Bundle - it is no longer a Bundle of 1GB of data services with a validity period of 30 days, but data services with a validity period of 90 days with three bundle sizes.
- 39.5 Now, instead of only enabling the end-user to receive 1GB of services on the network for a 30-day period, the licensee is required to enable the end-user to receive up to 1GB in 30 days, up to 500MB in the next 30 days (depending on the usage in the first 30 days), and up to 250MB in the final 30 days.
- 39.6 This is a completely different "Bundle" to the one for which the price was set.
- 40 The effect of the draft regulations would be to change, fundamentally, the product bundle offerings that are made available by Vodacom in providing, access to the Vodacom network. In doing so, they would detrimentally affect the choices available to consumers and the prices at which services will be available.

- 41 The adverse effect of these proposed regulations on consumers and competition in the sector is addressed in detail below and in the Frontier Expert report annexed to this submission. At this stage, Vodacom highlights how the above example emphasises the *ultra vires* nature of the proposed regulations: how the proposed regulations would directly impact product design and price modelling associated with the product offering, making this regulation indirectly a form of price regulation too. This is because pricing is set based on product construct. So by prescribing the attributes of the product that licensees must offer, the Authority is also impacting the prices that licensees charge for their different products. If this change in the nature of the bundle were imposed, licensees would be forced to alter their prices in consequence thereof.
- 42 The prescription of products (which includes the period over which access to the licensee's network must be allowed) does not fall within the concept of "minimum standards" contemplated in section 69 of the ECA and violates sections 2(f), (n) and (y) of the ECA.
- 43 Licensees are entitled to develop different products which allow for bundles to expire within short periods or longer periods. These packages may differ in price, and it is the different combinations of service, validity period and price that provide end-users with choices. The Authority is empowered by section 69(3) to determine the minimum standards that service charters should include. That is a written policy that outlines the standards that licensees must uphold when dealing with end-users. Anything beyond that is patently beyond the scope of the Act, is *ultra vires* and falls to be impugned on review.
- 44 The draft regulations, in imposing compulsory roll-over and transfer and dictating the terms on which this must be done is *ultra vires* the powers conferred in section 69 of the ECA.

ADDRESSING THE INDIVIDUAL DRAFT REGULATIONS

45 Subject to the general observations referred to above, Vodacom has no comment at this stage in respect of the following parts of the draft regulations:

45.1 Regulation 1: the following terms: activation (1a); bundle (1b); day (1c); hour (1d) and promotional bundle;

45.2 Regulation 8A(1);

45.3 Regulation 8A(2)(b);

45.4 Regulation 8A(4); and

45.5 Regulation 8A(5).

46 We now address the parts of the draft regulations to which Vodacom does object and set out our reasons for those objections. All of the submissions below are made without derogating from the submissions above relating to the *ultra vires* nature of these draft regulations. The submissions below are in addition to the submissions made above. Obviously, where the draft regulations are *ultra vires*, they would be set aside for that reason, and it would not be necessary to interrogate the rationality or reasonableness of the clauses. The submissions below are made to cover the event that some of the final regulations are found not to be *ultra vires*.

Amendment to Draft Regulation 1

47 Draft regulation 1 proposes to define 8 terms. However, the definitions seeking to distinguish short-term, medium-term, and long-term bundles are unhelpful, as they contain an obvious error or suffer from imprecise drafting. The following difficulties arise with these three definitions:

47.1 a short-term bundle is defined as a bundle valid for less than 7 (seven days) and so it appears that a 7-day bundle is excluded from being a short-term bundle. This is because a 7-day bundle is not valid for less than 7 days.

47.2 a medium bundle is a bundle that is valid “between seven (7) to thirty (30) days” (i.e. a bundle with a validity period greater than 7 days). This means that a medium-term bundle does not include 7-day bundles. It is not clear if it is intended to include 30-day bundles.

47.3 Further, because a long-term bundle is defined as a bundle valid for more than 30 days, a 30-day bundle is not a long-term bundle either.

47.4 On the text, therefore, draft regulation 1 in its current form does not regulate a 7-day bundle and may not regulate a 30-day bundle.

48 The failure to address these two periods is not justified and seemingly not intended but the words used make these definitions impermissibly vague and the result of these terms not being properly defined is likely to cause confusion and render the scheme of the draft regulation unworkable. Leaving these definitions unchanged would render the structure of

the proposed regulations incoherent and irrational. This runs contrary to the requirement, central to the rule of law, that regulations must be clear, cogent, and capable of being complied with.

Vodacom's submission and proposal on the definitions

49 Vodacom understands that these definitions are included to address concerns regarding the treatment of roll-over of unused bundles and transfer of bundles. Vodacom has made it clear, elsewhere in these submissions, that the imposition of compulsory roll-over and transfer terms on all products is unlawful. If such compulsory terms, where the definitions are used, are found to be unlawful, these definitions would be superfluous.

50 These proposals are therefore made in the alternative and in the event that the service charters are required to provide for roll-over and transfer options on a non-compulsory basis. Vodacom proposes that the Authority adopt the following definitions:

50.1 A short-term bundle should be “a bundle valid for 7 days or less from activation.”

50.2 A medium-term bundle should be “a bundle valid for more than 7 days but less than 30 days from activation.”

50.3 A long-term bundle should be “a bundle valid for 30 days or more.”

51 This approach is reasonable and sensible. A 7-day bundle is on its face a short-term bundle. 7-day bundles make up a [REDACTED] proportion of the bundles purchased by Vodacom's low-income customer base. As detailed in the Frontier Report, the 7-day bundle is particularly

popular among low-income customers. In the event that 7-day bundles were included as medium-term bundles, the proposed regulation would cause harm to this vulnerable group. This is because the effect of any price increases for medium-term bundles (likely to be caused by mandatory roll-over) would be felt disproportionately by lower-income consumers, given their reliance on these kinds of bundles to meet their communication needs. The Authority must ensure that its regulations do not undermine the ability of licensees to offer bundles that are used by lower-income consumers at the most advantageous price points to them. This requires a 7-day bundle to be included as a “short-term bundle”.

- 52 Further, it is neither logical nor rational to include both a 7-day and 30-day bundle as medium-term bundles as the period between them is too great and they are not used by consumers in the same way.
- 53 The Authority is aware that there are very few bundles with longer terms than 30 days and very little demand for bundles with longer terms than 30 days. Vodacom considers that a 30-day bundle would be considered by consumers as a long-term bundle and submits that it should be classified as such.
- 54 Vodacom believes that this differentiation accords with the stated intention of the Authority when having regard to the needs of low-income consumers.

AMENDMENT TO REGULATION 8A

55 In the section below, we deal with the wording of the specific provisions in proposed Regulation 8A to which Vodacom objects. We do so without prejudice to the *ultra vires* arguments set out above. The grounds set out in this section explain why, even if the regulations were not *ultra vires* (which they are), they would also be impugned as irrational, unreasonable and contrary to consumer interests.

Substitution of 8A(2) and (3)

8A(2) – *“At all times a Licensee must ensure that end-users are provided with the option to: (a) opt out of usage depletion notifications; (b) buy additional bundles via the USSD platform, push notification, or any other appropriate means; and (c) opt in to or opt out of out-of-bundle usage charges.”*

56 Vodacom understands that this draft regulation is proposed to raise consumer awareness about their consumption patterns, to empower the end-user to make informed decisions concerning their usage, to exercise the option to purchase additional bundles and to opt in or out of OOB usage.

57 Vodacom stresses that the bundle depletion notifications are in the interests of the end-user, and it believes they should be conserved for that reason. Vodacom stresses that an informed end-user is an end-user who is empowered with the correct information to determine which products are best suited for their needs. The depletion notices are part of several measures to advance that.

- 58 Vodacom is of the view that this draft regulation is not in the interests of the consumer and must, for that reason, be reconsidered. The Authority should be slow to allow an end-user to opt out of a notification that exists for their own good.
- 59 In respect of **draft regulation 8A(2)(c)**, Vodacom understands that the intention of the Authority here is to provide end-users with the option to accept or reject OOB usage charges for voice, SMS and OTT services. Vodacom does not object to the regulation but wishes to confirm that flexibility will be permitted in implementing draft regulation 8A(2)(c) particularly where the draft regulation is silent on what “*at all times*” means.
- 60 Vodacom has extensive experience with end-user usage patterns, needs and education. This informs Vodacom’s position that the option to opt-out presented to the end-user can be implemented in a variety of ways, such as an election made at the commencement of the subscription or service; through a periodic reminder of the option; or through an option on the Vodacom App to permit switching OOB charges on or off based on their needs at different times.
- 61 Vodacom believes that this draft regulation will be complied with in circumstances where the end-user is provided with an initial opportunity to make an election and is at all times thereafter empowered to switch her preference.
- 62 Vodacom is of the view that the end-user is best served by receiving the least disruptive and least cumbersome method of compliance. If Vodacom is left to determine how this option is provided – it can provide this option in a meaningful way to the end-user without disruption through the USSD, push notification, or any other appropriate means.

- 63 In respect of **draft regulation 8A(3)**, Vodacom understands that the Authority seeks to prevent bill shock on the part of the end-user by prohibiting any OOB charges upon depletion of a bundle, until the end-user purchases a new bundle or otherwise opts in.
- 64 Vodacom has several measures in place, such as usage depletion notifications and soft locks, to mitigate against the risk of bill shock. Vodacom provides its customers the means to manage and view their spend during the month. A customer can set/manage their own limit (in Rands) at a per bearer (voice, SMS, or data) level. The spend limit per bearer will be in place for a calendar month, i.e. it resets every calendar month. The customer will receive notifications at 50%, 70%, 80%, 90% and 100% thresholds of their set spend limits (per bearer). Once a customer has reached the set limit, on the specific bearer, she will no longer be able to generate chargeable usage on that bearer. A customer who has reached their spend limit (voice or SMS) is still able to receive voice calls or SMSes, conditional to the incoming voice call or SMS event carrying no charge against the user. A customer is also allowed to purchase additional bundles, on the bearer for which the spend limit has been reached, to gain access to the service again. A customer can adjust their spend limits during the period as required i.e. upwards to increase spend or downwards to reduce spend. A customer's ability to make calls to Emergency Services (112) and Vodacom Customer Care lines (082 111 or 08135) is not affected by spend limits.
- 65 The reasons set out in the *ultra vires* section above apply to this draft regulation. Vodacom has the sole prerogative to determine the applicable tariff in respect of its products i.e. in bundle or OOB. It also determines what tariff should apply when a particular bundle is depleted. This decision is a commercial one made after considering all the factors that determine price (such as validity period and length of commitment etc). The effect of this

regulation is that it goes beyond addressing how Vodacom should communicate with clients and it prevents Vodacom from applying the default OOB rate which the customers has already consented to when signing up for the product/service or to alternatively terminate the service.

- 66 Furthermore, in respect of voice services, this requirement will detrimentally impact the experience of a customer on a call. For example, if an end-user is on a voice call and her voice bundle becomes depleted, Vodacom can seamlessly continue the voice call and transition the end-user to out of bundle charges. This would occur after the consumer has received multiple bundle depletion notifications and options to buy additional bundles, and is thus fully aware of the position. The effect of the draft regulation is that the call will be terminated, diminishing the overall customer experience and undermining call continuity. Vodacom emphasises that it is important to provide an undisturbed voice call, particularly when a voice call relates to a personal emergency or other important call such as a job interview or an attempt to access basic services etc.
- 67 Thirdly, Vodacom objects to this regulation on the basis that it is disproportionate and that less drastic alternatives are available to the Authority. In Vodacom's experience, end-users understand and can quantify a minute for purposes of a voice call as opposed to what a megabyte represents. This means that customers can intuitively quantify their out of bundle usage based on the duration of a voice call. As a result, end-users are better able to manage and control their OOB usage on voice. In any event, Vodacom sends usage depletion notifications to subscribers when their usage of voice bundles reach 50%, 80%, 95% and 100% depletion at present, as currently required by the regulation 8A(1). For this reason, the current regulations (addressing data bundle depletion) are sufficient and need

not be extended to voice. In respect of SMS, the sale of SMS bundle sales has reduced significantly with the rise of messaging services like WhatsApp. The draft regulation is unlikely to have an impact, particularly because bill shock on SMS is non-existent. Consequently, the current regulations (addressing data bundle depletion) are sufficient and need not be extended to SMS either.

68 Finally, Vodacom is of the view that the Authority should encourage licensees to implement measures that notify end-users of their usage depletions and use communication methods to limit bill shock without compelling the termination of service. Less drastic and invasive measures which are available, are preferable, such as:

68.1 Reminders to customers about the Voice Limit Lock functionality and how it works to prevent bill shock.

68.2 Implement an in-call whisper to notify customers that the bundle is near depletion and that on depletion OOB rates will apply.

68.3 Notify customers through smart notifications and prompt customers to buy a bundle.

Technical feasibility

69 The implementation of the measures proposed by the draft regulations would require significant adjustments to Vodacom's systems such as its core billing environment. If these requirements were imposed, Vodacom would require approximately [REDACTED] in order to implement the proposals set out above. These amendments will come at a material cost,

which will ultimately affect the overall cost of mobile services and be financially detrimental to end-users.

Substitution of 8A(6), (7) and (8)

8A(6) – “A Licensee must, in the case of medium-term bundles, at the end of the validity period, roll-over 50% of any unused bundle for an equivalent validity period, provided that any unused portion of any bundle should be rolled over at least twice.”

8A(7) – “A Licensee must, in the case of long-term bundles, at the end of the validity period, roll-over 25% of any unused bundle for an equivalent validity period, provided that any unused portion of any bundle should be rolled over at least once.”

8A(8) – “The roll-over of bundles must occur without requiring any action and without incurring any cost to the end-user.”

70 Vodacom understands this proposal to relate to addressing concerns related to the expiration of unused data. Vodacom also understands that this provision is intended to apply to prepaid, post-paid and hybrid users in respect of voice, data, and SMS.

71 As discussed in relation to the definitions above, Vodacom understands that draft regulation 8A(6) is intended to apply to bundles with a duration longer than 7 days (but less than 30 days) and to require that,

71.1 In respect of **data** - at the end of the initial (first) validity period 50% of the unused data in the bundle will be rolled over to the following period and, at the end of the second period, 50% of the remaining unused data will be rolled over to a third

period.

- 71.2 In respect of **voice** - at the end of the initial (first) validity period 50% of the unused minutes in the bundle will be rolled over to the following period and, at the end of the second period, 50% of the remaining unused minutes will be rolled over to a third period.
- 71.3 In respect of **SMS** - at the end of the initial (first) validity period 50% of the unused SMSs in the bundle will be rolled over to the following period and, at the end of the second period, 50% of the remaining unused SMSs will be rolled over to a third period.
- 71.4 The duration of the second and third period, in each case, will be the same as the initial validity period.
- 72 In respect of long-term bundles (duration of 30 days or more) only one roll-over is prescribed - at the end of the initial (first) validity period, 25% of the unused data/minutes/SMS will be rolled over to the second period.
- 73 Firstly, these draft regulations are *ultra vires* for the reasons detailed in the section above. The Authority is empowered to set a service charter and its powers do not extend beyond that. It is not empowered to determine product specifications and impact price.
- 74 Secondly, the proposal in these regulations does not accord with the stated aim of the Act, which is to promote the interests of consumers with regard to the price, quality and the variety of electronic communications services and variety and to refrain from undue

interference in the commercial activities of licensees (sections 2(n) and 2(y) of the ECA). Not only is the draft regulation *ultra vires* for this reason too, but it also undermines the consumer's right to free choice and her right to optimise her spend.

75 In Vodacom's experience, clients make decisions concerning what bundles to purchase and on what terms, based on their needs at a particular time. Therefore, when an end-user purchases a bundle with a particular validity period, at a particular price and of a particular size – she makes an informed decision based on the product offering available and her needs at the time of purchase.

76 Vodacom emphasises that a product permitting access to the network for a shorter period will attract a lower effective rate per MB than a product which permits access over a longer period, all else being the same. Many end-users who manage the use of bundles closely can maximise efficiency and minimise cost by selecting the bundle most suitable to them.

77 All the conditions on which the different products are sold are known to the end-user at the point of sale and so the end-user agrees to the conditions that apply in respect of the chosen bundle and knows what to expect. For example, the consumer's choices may include:

Daily (Today)	Weekly	Monthly
250MB - R17 - 0.07c per MB	300MB - R31 - 0.10c per MB	420MB - R53 - 0.13c per MB
1.5GB - R32 - 0.02c per MB	600MB - R52 - 0.09c per MB	600MB - R74 - 0.12c per MB
	1.2GB - R73 - 0.06c per MB	1.2GB - R89 - 0.07c per MB

- 78 As is apparent from the schedule above, the price per MB is higher if the validity period is longer. To understand why the price per MB is higher for bundles with longer validity, one needs to consider that operators design their networks around demand during peak hours and accordingly price their products. Licensees design their networks to meet the peak capacity demand for a given site and region. The more accurate it can predict the traffic demand and traffic during peak hours, the more optimal it can plan the design of its network to accommodate the capacity required. The introduction of shorter validity and night owl bundles, helps licensees to predict peak traffic demand more accurately, enabling more optimal network capacity provisioning, which in turn allows them to lower the price per MB for these bundles. Longer validity bundles however make it more difficult to predict peak traffic demand and optimal network capacity provisioning. Less optimal network capacity provisioning leads to higher network costs, which in turn leads to an increase in the price per MB.
- 79 If the draft regulations were to have the effect of increasing the validity period of 14 day (two week) bundles – so that portions of the bundle will now be valid for 42 days (6 weeks) – this would necessarily have an impact on the price charged for that offer. More generally, prices of all medium and long-term bundles will have to increase to reflect their longer validity. The draft regulation disregards the decision of the end user and seeks to prescribe the characteristics of product offerings. In addition to being *ultra vires*, this is anti-consumer choice and is unreasonable and irrational.
- 80 Moreover, some customers might not be able to afford to buy bundles they are currently using if, as a result of the draft regulation, these bundles would increase in price. As detailed in the Frontier Expert Report, the draft regulations are likely to have several adverse

consequences. The proposals in effect are an extension of the validity of medium-term and long-term bundles. In response, mobile operators are likely to increase prices for medium-term and long-term bundles to reflect the increased validity of these bundles under the proposed regulation. Longer-validity bundles provide consumers with extra flexibility over when their mobile services can be used by, which is reflected in higher per-unit prices for voice, SMS and data relative to shorter-validity bundles.

81 These consumers may have to buy smaller bundles or shorter-validity bundles as a result of the Authority's proposed blanket regulation. This is anti-consumer choice and is unreasonable and irrational.

82 It should be noted, as discussed in the Frontier Economics' report, that the expiration of services in markets with differentiated pricing, is not uncommon in other markets, for instance, public transport, gym memberships, etc. Limited validity periods for services are not generally viewed as harmful for consumers and are often a feature of competitive markets in which firms price differentiate. Furthermore, and as explained above, expiring service offers is an important tool for making efficient use of a network.

83 If the Authority wishes to introduce roll-over protection in the interests of consumers who are concerned that they may buy more than is required in the chosen period, the service charter may require licensees to describe and provide more transparency on the roll-over options available on their different products. Those customers who want the protection of roll-over may then have that option available and can compare the roll-over options offered by different MNOs. The solution does not however lie in prescribing a blanket measure that imposes rollover on all products and denies consumers a fixed validity period product at a

cheaper price. In addition, the Authority has not provided any analysis of the alleged impact of rolling over (or not rolling over) portions of unused data – in fact, the impact of such an arrangement does not appear to have been explored at all.

- 84 Should the Authority require roll-over to be available, some flexibility should be permitted to provide consumers with a choice to implement roll-over (or not) and in distinguishing products to which roll over applies or does not apply. Roll-over options can be implemented in different ways, depending on the systems available within the operator to support such activity. If the Authority requires service charters to address roll-over, the determination of how and when roll-over options are provided should be left to each licensee to consult and determine the best formulation based on the feedback it receives, its experience, technical knowledge, and engagement with its customers.
- 85 Furthermore, Vodacom emphasizes that roll-over should be an area in which operators compete. As detailed in the Frontier report, licensees currently use data roll-over as a means of product differentiation to attract customers. Differences in roll-over policies across operators are consistent with a competitive market in which roll-over is a parameter of competition (alongside price, allowances, duration, etc.). Licensees are free to adjust their approach to roll-over to best suit customers' preferences. However, the effect of the draft regulation would be to impose a uniform regulation on product attributes across the whole market (rather than just requiring operators to offer an option for roll-over, as they do now). The Authority would effectively be removing roll-over as a parameter of competition, reducing the incentives of operators to innovate on roll-over as a means of further differentiating their product offerings from rivals. This is detrimental to consumer choice and welfare.

86 Finally, Vodacom requests confirmation from the Authority that “promotional bundles,” as defined in draft regulation 1, are intended to be excluded from roll over as they are from transfer. In paragraph 4.1.5 of the Explanatory Memorandum, it is clear that the Authority intended to draw a distinction between standard bundles and promotional bundles and to clarify how they should be treated in respect of roll-over and transfer. Vodacom submits that promotional bundles are by their very nature time-bound and peculiar. It is irrational and arbitrary to treat promotional bundles differently by including them for purposes of roll-over and excluding them from transfer. As such, promotional bundles should be excluded from roll-over as they are excluded from transfer.

Technical feasibility

87 Vodacom anticipates that complying with the proposed draft regulations will necessitate the development of customized solutions by vendors which [REDACTED]
[REDACTED] This customization will likely result in scenarios where Vodacom
[REDACTED]
[REDACTED]
[REDACTED].

88 Additionally, these proposed changes pose challenges for Vodacom in [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Substitution of 8A(9) and (10) -Transfer

8A(9) – “A Licensee must provide an end-user with an option to transfer bundles or portions thereof to any end-user utilising services of the same Licensee, and the same bundle conditions, including but not limited to those applicable to expiry, roll-over and transfer, must continue to apply to the transferred bundle or portions thereof.”

8A(10) – “The transfer of bundles in terms of sub-regulation (9) must not be limited to specific service types, with the exception of uncapped, free or promotional bundles, and applies to any SIM card or device on the same network, including SIM cards or devices owned by the same end-user, and exists without limit on the number of times that the end-user may transfer such bundles.”

- 91 These regulations are also *ultra vires*, for the reasons addressed above. Vodacom further submits that they are not in the interests of end-users either. As discussed below and in Frontier Economics’ report, they increase the risk of arbitrage significantly and severely restrict a licensee’s ability to provide different services. This exposes many end-users to a

potential increase in the price of services. Vodacom details below the inextricable link between arbitrage and increased prices.

- 92 Should the Authority require transfer to be available, this cannot be compulsory (for the same reasons discussed above in relation to roll-over) and flexibility in implementing it and in distinguishing products to which it applies or does not apply, should be left to the licensees. The Authority can only prescribe that transparency of the terms and conditions is required, if transfer is provided.
- 93 Firstly, Vodacom already provides every subscriber on its network with several options to transfer data to other subscribers and to effectively administer and manage data transfers. The Authority has not explained why these options are inadequate. Licensees must be allowed to place legitimate limitations on data transfers so that the effect of transfer options can be properly managed. To do otherwise would significantly undermine the licensee's ability to price differentiate and hence deprive consumers of the benefits of such price differentiation, i.e. consumers would no longer benefit from services which are tailored to their specific needs.
- 94 For example, the reduced functionality and specific use-case of a Fixed Wireless Access (FWA) service (i.e., the fact that it is typically used at one location only and that FWA consumers are more likely to use data-intensive applications such as streaming video content) means that Vodacom charges lower unit prices for FWA than for fully mobile data services. Managing mobile services, which includes handovers between cells where subscribers move across cells, is more complicated and expensive than providing a dedicated service to a fixed location. Mobile services also require spectrum across all

technologies (2G, 3G, 4G and 5G) as customers still use 2G and 3G handsets, while FWA services rely on 4G and 5G only, which are more cost-effective.

- 95 Vodacom would not want to charge the user of FWA data for these additional services if she is not going to use them. However, if the data sold to a FWA user can be transferred to a mobile customer and used for mobile services, then the price of that data must be set to also relate to the provision of mobile services. That would automatically make the price of FWA services higher, to the prejudice of customers who only wish to use data services from a fixed location.
- 96 Furthermore, large bundle data packages⁶ such as MBB are designed to meet the needs of “heavy” users, such as those who use their connections to watch Netflix or other Video on Demand (VoD) services. These packages meet the needs of customers to have a large amount of data at a low unit cost. This reflects the fact that mobile allowances are likely to exhibit diminishing marginal utility: as the size of the bundle increases, the benefit (or ‘utility’) provided by additional voice, SMS or data allowances falls. This is reflected in a lower unit price for these allowances as the size of the bundle increases.
- 97 If data from a large bundle which has been specifically designed for and sold to a “heavy” user can be transferred to a mobile customer who only demands a small amount of data and the number of such transfers is unrestricted, it would result in arbitrage and would undermine Vodacom’s ability to offer large data packages at a low unit cost.

⁶ While we use data bundles as an example, the same arguments apply to voice minutes and SMS.

- 98 By imposing reasonable limits on data transfer, Vodacom can ensure that larger bundles, offered via FWA and MBB, can still be offered at a reasonable price without cannibalising smaller bundles. If it did not do so, it would have to discontinue its current product offering and replace it with uniform unit prices per GB of data across all its data bundles. Therefore, customers who are currently benefitting from low unit prices on large data bundles, or other discounted offers, such as personalised tariff plans, shorter-validity bundles and so on, would be worse off. FWA and MBB products at low unit prices would have to be discontinued because it would cannibalize regular mobile product sales i.e. customers who would ordinarily purchase once-off bundles from licensed operators would purchase bundles from the secondary market to take advantage of cheaper pricing (making FWA and MBB offers commercially unsustainable) and leading to a reduction in the sale of bundles. In short, Vodacom and other licensees would not be able to offer different options to their customers.
- 99 Similar considerations apply to the restriction on transfers between other products and services.
- 100 This ability to set differential tariff offers including prices is critical for operators to maximize the use of their networks and meet the needs of their customers. It allows the licensee the freedom to create different products each with its unique features, benefits, and conditions. Licensees are thereby able to meet the needs of end-users, including creating a range of products and price differentiation which benefit poorer customers, who are then able to access tariffs that charge a lower unit price for a level of usage.
- 101 This ability to price differentiate would be lost if the draft regulation is implemented. If unrestricted transfer was permitted, there would be opportunities for arbitrage and the

creation of a secondary data market for as long as there remained a price difference between any existing services (for example, FWA services and nomadic mobile services). For example: a trader would purchase a large FWA bundle which has a lower unit rate than an equivalent mobile internet data product; then, acting as a "wholesaler" or "reseller", sell and transfer portions of that bulk data to mobile data users. This would immediately reduce Vodacom's mobile services direct sales. The only way that Vodacom could respond to this situation would be to make MBB, FWA and other large data service unit prices and mobile data unit prices equivalent – to the severe prejudice of legitimate MBB, FWA and other large data bundle users.

- 102 FWA and MBB services are just one example of where Vodacom can differentiate its prices and service offerings by effectively managing data transfer options. URL-specific bundles, personalized Just 4 You (J4U) bundles, and various other offers in Vodacom's current portfolio provide both choice and cost benefits to users of specific services. The existence of these products inter alia relies on limitations on the transfer of data to prevent arbitrage. If unlimited data transfer was enforced, the customers using these low-cost products would also lose out.
- 103 The proposed regulations would strip Vodacom (and other operators) of the ability to properly manage transfer options to prevent arbitrage between tariff offers. Consequently, many of the existing services on the market (FWA, MBB, URL-specific bundles, personalized bundles, etc.) would be negatively impacted, as any differentiation in price between these services could lead to arbitrage. Put another way, the draft regulation would force operators to withdraw from the market many of the effective and affordable services they currently offer. For example, low-income users might currently benefit from low unit rates on

personalised J4U tariffs. Low average revenue per user (ARPU) subscribers, as a proxy for affordability, are [REDACTED] more engaged in bundles with a validity of 7 or less days. The result is subscribers paying [REDACTED] less on average per MB of data compared to high ARPU subscribers. In pro-poor geographies, low ARPU subscribers typically pay [REDACTED] less compared to high ARPU subscribers for this category of bundles. With unlimited transfers and the resulting risk of arbitrage, Vodacom would have to discontinue or substantially review these personalised tariffs.

- 104 Secondly, in the event of the finalization of these draft regulations, licensees will no longer be able to use price differentiation to manage demand across their networks. For example, the ability to offer different prices at various times of the day, (or at different times of the week), for bundles used today, within 3 days, within a week, etc., is an essential instrument in assisting a mobile provider to optimize the use and recovery of its network. Inefficient network use results in higher unit costs, leading to higher prices for customers or to reduced returns on investments, or some combination of the two.
- 105 Further issues on the network could arise compromising experience for other customers. For example, if a customer who purchases a regional/geographic Just 4 Your Town bundle at a discounted price because of spare capacity in that specific area is allowed to transfer that bundle to a customer outside that area, it would firstly defeat the purpose of the promotion and, if done in volume, would impact the experience of customers in the area where the bundle has been transferred to as that area would have reduced capacity.
- 106 The effect of these draft regulations would therefore be the Authority denying mobile service providers in South Africa the ability to optimize the use and recovery of its network

an instrument for managing capacity that is used not only by mobile service providers internationally but by providers in many other industries that invest in capacity and therefore need to optimize the use of that capacity.

107 In addition, [REDACTED] d if the draft regulation were imposed. If operators were required to allow the transfer of data allowances across different charging systems (i.e., post-paid and pre-paid), this would inevitably compromise one (or both) of those charging systems. Specifically, the transfer of data between different types of bundles would force operators to offer uniform prices for all types of service. Such practices would leave operators with little choice but to allow much fewer rates across all bundles and would require only one charging system for consumers (as consumers would no longer have incentives to commit).

[REDACTED] Even if operators did retain both commitment (post-paid) and no commitment (pre-paid) bundles, the Authority's proposed regulations would require Vodacom [REDACTED]
[REDACTED]
[REDACTED]

109 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] In

addition, integrating the systems to track the remaining validity period of different portions of transferred bundles, to ensure that a recipient can use the transferred bundles on the same bundle conditions (e.g. a non-FWA customer receiving an FWA bundle which requires a specific router etc.) would be a substantial challenge for operators. If customers could receive multiple data transfers from different users with different bundle rules and with different remaining validities, accounting for this in operators' billing systems would become unfeasibly complex.

110 Finally, Vodacom urges the Authority to consider the full ramifications of arbitrage on the end-user, particularly the low-income users. Faced with arbitrage, mobile operators will have little choice but to drastically reduce the range of tariffs they offer, with all of an operator's products converging to substantially more uniform rates (unit prices per GB, per minute and per SMS). These uniform rates will be higher than the lower rates currently offered to customers on short-validity bundles or dedicated mobile broadband contracts. This reduced choice will, therefore, have a negative impact on consumer welfare, particularly for those consumers who currently benefit from access to lower rates.

111 As per the Frontier Economics Report, the draft proposal appears to be based on a fundamental misunderstanding of the impact of arbitrage. That is, in its Explanatory Memorandum (paragraph 4.2.16), the Authority accepts that its proposal could result in arbitrage, but then states that the Competition Commission considers significant price differentiation to be harmful to consumers. This is not the case. Whilst some consumers may pay more as a result of price differentiation, they would typically be higher-income consumers with a higher willingness to pay. Low-income consumers with a lower willingness and ability to pay for a set amount of data would be expected to pay less.

Therefore, the Authority's proposal, if it is enacted, will actually harm lower-income consumers.

112 Not only does arbitrage stand to increase the price of services for the end-user, it also opens up end-users to potential risks in trading in a secondary market.

113 The creation of a secondary informal market is not only detrimental to Vodacom but is also potentially hazardous to the end-user. In the case of Vodacom, an unregulated reseller or middleman would be able to use the Vodacom network to their benefit without making any payment or investment in infrastructure. In the case of the end-user, they would be engaged in informal transaction with these unregulated resellers. Vodacom points out that such resellers are not accountable to the Authority. In the absence of any oversight, the reseller would be free to engage with the end-user on a potentially exploitative and illicit basis. If something goes wrong, and the end-user is prejudiced, the end-user will have no protection or recourse.

114 For these reasons, these draft regulations are unreasonable and irrational.

Technical feasibility

115 Transfer from one customer to another is technically feasible in the consumer environment however complexities arise specific to ensuring that bundle conditions are maintained per the draft regulations (e.g. on the transferred bundle we need to ensure the roll-over of 50% of unused portion for two periods etc.) are very complex policies to manage. Managing various bundle validities during service transfers, intersecting with the draft roll-over requirements will be a nightmare for licensees.

116 Vodacom has specialised products and services, such as those sold to business customers for use by their employees. These are commercial products, largely utilised by corporates in various private and public sector institutions. If the employees of these business customers could transfer data to their friends and family, this would undermine the product purchased by the firm. The following products are examples of those that would have to be excluded from transfer:

116.1 Enterprise Bundle is a pool of voice, SMS and/or data which is allocated to a corporate customer. Mobile end-users in the organisation access these bearers without it being further allocated as bundles to the end-user; and

116.2 Corporate APN is a business product which provides secure access to an organisation's network, it is a pool of data which is assigned to an organization and users utilize from this pool, there are no bundles assigned to end-users;

Substitution of 8A(11)

117 Vodacom notes that where a disturbance or incident has occurred, Vodacom will not always be aware of what has transpired. The customer must therefore log the issue with Vodacom and Vodacom will investigate, validate and then re-allocate a new bundle.



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

120 However, certain occurrences do not attract responsibility on the part of Vodacom. As per the definition of "fault" in the regulations, incidents that fall outside of Vodacom's control such as outages, criminality and vandalism cannot be directly attributed to the licensee and require no action by the respective licensee.

Short title and commencement

121 As stated earlier in the submission, Vodacom contends that the draft regulations cannot be promulgated or implemented in their current form. In the event that the Authority wishes to promulgate amended regulations, after considering the submissions it receives, the Authority should suspend the commencement date of the amendments and consult the affected licensees on the time required to comply.

122 As noted above, many of the proposed changes will involve massive changes to the back-office systems at Vodacom, which cannot be achieved in the short term. Vodacom would only be able to commence work on making the adjustments when the full details of the final requirements are known. Licensees should be consulted when the final version of the

regulations is settled upon, then consideration can be given to the systems that may be impacted and the time and cost involved in making those changes.