



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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## General Notice

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### COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 380

2019

#### DECISION: APPLICATION FOR RECONSIDERATION AMENDMENT OF THE REGULATIONS PRESCRIBING THE NATIONAL NUMBERING PLAN FOR USE IN THE PROVISION OF TELECOMMUNICATIONS SERVICES IN THE REPUBLIC OF NAMIBIA: COMMUNICATIONS ACT, 2009

The Communications Regulatory Authority of Namibia, in terms of section 31 of the Communications Act, 2009 (Act No. 8 of 2009) read together with regulation 12(1) of the Regulations Regarding Rule Making Procedures, as published in Government Gazette No. 4630, General Notice No. 334, dated 17 December 2010, hereby gives notice of the following decision in respect of the Application for Reconsideration of the Amendment of Regulations Prescribing the National Numbering Plan for Use in the Provision of Telecommunications Services (**Number Portability**) as published in the Government Gazette No. 6692, General Notice No. 500, dated 30 August 2018 submitted by **Mobile Telecommunications Limited (MTC)**.

## **1. MAIN HEADINGS**

### **1.1 INTRODUCTION AND BACKGROUND**

In 2016, the Authority published the National Numbering Plan and shortly thereafter commenced with the rule making process of amending the Numbering Plan to set out the scope for number portability as contemplated in section 81 of the Communications Act.

During the rule making process, licensees provided comments on the correct interpretation of section 81(3). The crux of the matter can be crisply summarised as follows: Whether the Communications Act intended for the implementation of both mobile and fixed or only mobile number portability.

On 26 June 2018 the Authority, resolved that on a clear interpretation of the provisions of the Communications Act, mobile number portability is authorised and that fixed number portability must stand over until the legislative amendments are finalised. The reasoning of the Authority was that the mention of mobile number portability in section 81(3) must be interpreted as an exclusion of fixed number portability.

Consequently, the Authority published an amendment to the Regulations prescribing the National Numbering Plan on 30 August 2018 (General Notice No. 500) setting out the scope of mobile number portability and the process for the implementation of mobile number portability.

On 17 December 2018, Mobile Telecommunications Limited submitted an application for reconsideration in respect of the Authority's decision in terms of section 31 of the Act.

### **1.2 PROCEDURAL COMPLIANCE**

Following due process in terms of regulation 12(1) of the Regulations regarding Rule Making Procedures, the Authority published a notice in Government Gazette No. 6826, General Notice No. 4 dated 22 January 2019, allowing fourteen (14) days for public comments from 22 January 2019.

The commenting period lapsed on 5 February 2019. As per the request received from Telecom Namibia Limited, the Authority granted an extension to Telecom Namibia to submit their comments by 15 February 2019. Subsequently Telecom Namibia Limited submitted comments on 15 February 2019.

Further thereto, the Authority published the full reasons for the Authority's decision in Government Gazette No. 6863, dated 26 March 2019 for public comments. On 29 April 2019 MTN Business Solutions submitted written comments and on 3 May 2019 Mobile Telecommunications Limited also submitted written comments on the full reasons for the decision.

## **2. GROUNDS FOR RECONSIDERATION**

Mobile Telecommunications Limited's application for reconsideration is based on both procedural and substantive grounds.

The substantive grounds are as follows:

- (a) The amendment is anti-competitive because it contradicts section 34 of the Communications Act; and
- (b) The amendment contravenes section 23 of the Competition Act.

The procedural grounds are as follows:

- (a) The Authority amended the proposed regulations substantially without notice and or giving MTC and other operators an opportunity to comment on the changes<sup>1</sup>; and
- (b) The Authority did not provide reasons for the exclusion of DID and fixed services from the amendment.

### 3. SUBSTANTIVE ISSUES TO CONSIDER

The grounds listed above, are divided into the following sub issues for consideration. Please note that each sub issue will deal with Mobile Telecommunications Limited's grounds and Telecom Namibia's comments thereto and the Authority's consideration. Please note that MTN Business Solutions also submitted comments to the full reasons of the decision. These comments will be noted but will not be considered as part of the reconsideration as they were not submitted in response to the 22 January 2019 publication on the application for reconsideration.

#### a) **Whether the amendment contravenes section 34 of the Communications Act?**

Section 34 of the Communications Act provides that the Authority must in the performance of its functions under the Act, promote, develop and enforce fair competition and equality of treatment among all providers of telecommunications services and users of such services.

Mobile Telecommunications Limited considered the presence of a service and technology neutral licensing regime, the issuance of 22 such licenses since 2011 and the issuance of infrastructure sharing regulations as signifying the Authority's intent to ensure competition in the market. Mobile Telecommunications Limited argues that limiting number portability to mobile numbers is therefore, against the principles and efforts of promoting fair competition.

Mobile Telecommunications Limited further indicated that the omission of fixed porting is aimed at protecting Telecom Namibia Limited and that Mobile Telecommunications Limited will suffer prejudice since it is in the infant stages of rolling out fixed services and cannot gain customers from Telecom Namibia Limited, which is a monopoly provider of fixed services.

Mobile Telecommunications Limited argues that the Authority as an administrative body failed to apply its mind, where it failed to take into account or refused to take into account fair treatment of all licensees and promotion of competitive practices. Mobile Telecommunications Limited and MTN Business Solutions both submitted that porting is technically possible between fixed and mobile as what is ported is the number, not the services hence there should be no distinction.

MTN Business Solutions argues that the Authority is under a duty to promote competition and the exclusion of technology only by virtue of the type of technology used to provide a telecommunications service would be anti-competitive, which practice is prohibited in section 33 of the Communications Act.

#### **Authority's Response**

Section 34 of the Communications Act states that the Authority must promote, develop and enforce fair competition and equality of treatment among **all providers of telecommunications** and broadcasting services and users of such services (Own emphasis). Section 2(k) of the Act states that one of the objects of the Communications Act is to ensure fair competition.

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<sup>1</sup> Please note that Mobile Telecommunications Limited is referring to the fact that the first regulations published for public comments were for both mobile and fixed porting, however the final regulations were only for mobile porting. It is this substantial change that they allege was not published for comments.

Telecom Namibia Limited was declared dominant for wired end user access and national data transmission by the Authority, in terms of section 78 of the Act, as per Notice No. 214, Government Gazette No. 6054 dated 28 June 2016.

By omitting fixed porting, the Authority would be perceived to be protecting a dominant operator and restricting other operators to enter the fixed end-user access market. Management agrees with Mobile Telecommunications Limited in that by allowing mobile number portability, Telecom Namibia will have access to the mobile customers of Mobile Telecommunications Limited. However, a limitation on fixed porting means that Mobile Telecommunications Limited and other licensees will not have access to the fixed customers of Telecom Namibia. This would constitute an anti-competitive practice. At the same time, the Communications Act indicates that fair competition should be promoted for all providers of telecommunications services.

Therefore, the Authority's agrees with the contention that its decision to exclude fixed number portability amounts to an unfair differentiation in treatment of providers of telecommunications services for which there is no justifiable legal basis.

It is also important to note that the regulations on number portability are not drafted in terms of sub-section 81(3), which highlights the timelines for the rollout of mobile porting. The regulations are drafted in terms of sub section 81(4), which merely sets out the obligation for number portability in generic terms without any differentiation.

#### **b) Whether the amendment contravenes section 23 of the Competition Act?**

Section 23 (1) of the Competition Act provides that:

“Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of Part III of this chapters.”

Mobile Telecommunications Limited is of the view that the Authority is an association of undertakings as defined in the Competition Act and its decision in respect of Number portability is anti-competitive as contemplated in section 23.

Telecom Namibia Limited points out that the Supreme Court, in the matter of **Namibia Association of Medical Aid Funds v Namibian Competition Commission and Another**, held that an association established in terms of section 23 of the 1995 Act is not an association of undertakings. Further that associations of undertakings must be horizontally or vertically aligned and there is no such alignment between the Authority, Mobile Telecommunications Limited and Telecom Namibia Limited. Telecom Namibia Limited thus concludes that the Authority issued the regulations in its capacity as a regulator and does not carry on business for gain or reward.

#### **Authority's Response**

The Authority rejects Mobile Telecommunications Limited's argument that the decision to exclude fixed number portability is anti-competitive in terms of section 23(1) of the Competition Act. The reason being that CRAN is not an undertaking as defined in the Competition Act because it does not carry on business for gain or reward.

Further CRAN is not in an association with Telecom Namibia Limited or Mobile Telecommunications Limited because for entities to be an association of undertaking in terms of section 23 of the Competitions Act, they must be horizontally or vertically aligned, an element that is missing.

**c) Whether section 81 may be interpreted to include both fixed and mobile porting?**

Mobile Telecommunications Limited submits that it agrees with the Authority's interpretation that section 81(3) excludes fixed number portability, however that the exclusion is merely to obligate a timeline within which mobile number portability must be enforced and the intention was clearly not to exclude the applicability of Number Portability to fixed services. Further that the Authority cannot tacitly assume that section 81 does not apply to fixed number portability when it does not expressly state same.

Mobile Telecommunications Limited further argues that the definition of number portability also does not exclude fixed number portability. Mobile Telecommunications Limited is also of the view that the law of interpretation adopted by the Authority leads to injustice and contrary to the intention of the legislature and that the Authority erred in not considering further laws of interpretation and the broader scope of the Act.

Mobile Telecommunications Limited finally submitted that the Authority implemented a number range plan in terms of which all licensees have 10 digit numbers to enable number porting and abolished the 6 or 7 digit geographical number. Further that the Authority amended the applicability of number portability but failed to amend the number range plan.

Telecom Namibia Limited argued that section 81 empowers, the Authority to issue a numbering plan requiring mobile number portability by all service and technology neutral licensees within two years and does not mention fixed number portability.

Further that the Communications Act provides a distinction between mobile and fixed telephony and even provides a definition for the latter in section 1. Telecom Namibia concludes on this point that if the language in a statute is plain and unambiguous, there must be a limit to departing from the ordinary meaning of words.

Telecom Namibia Limited also indicates that the Authority must promote competition but must in terms of section 81(6) ensure that no customers are unnecessarily inconvenienced by alterations in the numbering plan and the allocation of numbers does not confer any competitive advantage to any particular licensee. Telecom Namibia Limited concludes that fixed porting will result in the change of customer's numbers, which change is what is prohibited in section 81(6).

MTN Business Solutions submits that it is operating in a fixed market space and the exclusion of fixed portability will prevent MTN from gaining customers from the fixed monopoly.

**Authority's Response**

The question whether the Authority is vested with the power to impose number portability on fixed and mobile services must be determined on a proper interpretation of all the provisions of section 81 of the Communications Act.

The principle which should be applied when interpreting sections 81(3) and 129(1)(f) was emphasised by the Supreme Court of Namibia in *Joe Gross t/a Joes Beer House v Meintjies* (2005) NR 413 (SC) where the following was stated:

*"the primary rule of interpretation is that one must, in construing an Act of Parliament, adopt the ordinary grammatical meaning of the words as used by the Legislature unless such an approach would lead to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislature could have intended."*

Section 81(1) of the Act provides that the Authority must "*prescribe a national numbering plan for use in the provision of telecommunications services*". In *Minister of Justice v Magistrates*

Commission, the Supreme Court of Namibia stated that in its most basic meaning, the word must is obligatory and does not give choice or discretion. There is no choice, the Authority must “prescribe a national numbering plan”.

The Act does not draw a distinction between “fixed” and “mobile” services, instead it refers to “telecommunication services”. Section 1 of the Act defines “telecommunications services as services whose provision consists wholly or partly in the transition or routing of information on telecommunications networks by means of telecommunications processes but does not include broadcasting services”. The rule of statutory interpretation requires that words and phrases included in a definition clause be understood within the meaning ascribed to them by the definition clause.

Section 81(3) provides that the “numbering plan must require mobile number portability by all technology and service neutral licensees within two years from the date of commencement of this Act”. This provision directs the Authority to implement the numbering plan with respect to “mobile number portability” within a specified period of time.

The Authority has no discretion, as it “must” attend to this exercise within a period of two years from the date of commencement of the Act. Significantly, section 81(3) does not exclude fixed services, it is only silent on the period within which the exercise must be implemented. The urgency or a specified period is the only reason why mobile service is expressly stated.

Again and significantly, the contextual approach which was discussed above illustrates that the Legislature did not draw a distinction between fixed and mobile services apart from the urgency in respect of mobile number portability.

The term “may” is used in subsection 81(4), gives the Authority the discretion to include additional requirements in the numbering plan relating to number portability, on matters relating to numbering that will promote competition or protect consumers. Subsection 81(5) provides that the Authority “must allocate to licensees...” Furthermore the term “licensees” is not qualified, since the statute does not use the term “fixed” or “mobile”. When regard is had to the context of the Act the conclusion is that the Legislature intended to refer to both fixed and mobile services.

With specific regard to Telecom Namibia Limited’s comment on this matter, the numbering plan and requirement to move number’s shorter than 9 digits to the “86” range (Telecom) was specially done not to confer any competitive advantage to any particular licensee. Numbers that already consisted of nine digits for existing services (DID) in the 6 range were maintained in the 6 range. Note number portability requires that all numbers must contain the same number of digits. (This is thus not an unnecessary change in numbers) this is a technical requirement to be able to implement number portability. This point was addressed during rulemaking process of the numbering regulations in 2014-2016.

Subsection 81(6) provides that the Authority “must ensure that no customer of any licensee is unnecessarily inconvenienced by alterations in the numbering plan, and the allocation of numbers does not confer any competitive advantage to any particular licensee”. The clause “no customer of any licensee” is used which clearly shows that the provisions apply to fixed and mobile services. Subsection 81(7) deals with the “conditions under which prefixes, individual numbers and number ranges may be used”. Again, this subsection does not draw a distinction between fixed and mobile services.

Subsection 81(8) imposes an obligation on the Licensee to include the necessary provisions to meet number portability or other obligations contemplated in this section in their interconnection agreements. Again, it is significant to note that the statute used the term “Licensees”. Thus, no distinction is drawn between fixed and mobile services.

In conclusion, a summary of the interpretation of section 81 is as follows:

- a. The definition of telecommunications services only excludes broadcasting services. Had the legislature intended to exclude fixed services, an express clause to that effect could have been inserted in section 81;
- b. The section does not contain an express distinction between fixed and mobile services;
- c. The language used in section 81 is clear and unambiguous and the content shows that section 81 authorised the Authority to impose number portability obligations on both fixed and mobile services.
- d. **Whether the process was defective by not allowing licensees to comment on the exclusion of fixed porting before final publication?**

Mobile Telecommunications Limited submits that the Authority substantially amended (in terms of impact) the regulations (by the exclusion of fixed porting) without notice and without giving MTC and other operators the right to be heard on the changes and thus contravening the *audi alteram partem maxim*.

#### **Authority's Response**

Regulation 11(1)(a) of the Regulations Regarding Rule-Making Procedures provides that after considering all written submissions timeously filed and oral submissions if any, the Authority may publish final regulations in the *Gazette*, with or without changes to the draft regulations.

The Authority accepts that Mobile Telecommunications Limited (and other licensees) were not given the chance to be heard after the material change to exclude fixed porting was made to the Regulations. However, it is submitted that the opportunity to apply for reconsideration is a chance to be heard that is afforded to Mobile Telecommunications Limited and all the other licensees. Mobile Telecommunications Limited's application for reconsideration was published in the *Gazette* and the licensees were afforded an opportunity to submit their comments.

- e. **Whether the Authority gave reasons for its decision to exclude fixed porting?**

Mobile Telecommunications Limited also submits that the Authority did not provide reasons for the amendment or arguments from other licensees which swayed the decision. This, Mobile Telecommunications Limited argues is also in conflict with the principle of fair administrative action.

#### **Authority's Response**

The Authority admits that no reasons were provided for the amendment and Mobile Telecommunications Limited was not placed in a position to properly set out their grounds for reconsideration of the decision.

The full reasons for the decision were however, later published as indicated above and all licensees were afforded an opportunity to comment on the reasons and those comments are part of this reconsideration. As a matter of fact Mobile Telecommunications Limited's comments to the notice documents have been treated as an amplification of its application for reconsideration.

#### **4. CONCLUSIONS**

- a) Upon reconsideration, the Authority agrees with Mobile Telecommunications Limited that the decision to exclude fixed portability contravenes section 34 of the Communications Act, based on the fact that the interpretation of section 81 of the Act does not indicate an intention to exclude fixed numbers. The decision thus results in a differentiation in treatment amongst licensees, which is not legally authorised and one that has the impact of creating an

unlevelled competitive playing field amongst licensees, based on their respective dominant positions in the market,

- b) The Authority rejects Mobile Telecommunications Limited's submission that the amendment contravenes section 23 of the Competition Act, due to the fact that the Authority and licensees (obligated to do number portability) are not vertically or horizontally aligned and the Authority does not carry on business for gain or reward.
- c) The Authority agrees with Mobile Telecommunications Limited that section 81 of the Communications Act may not be interpreted to exclude fixed porting. This is due to the fact that the modern principle of statutory interpretation is to have regard to the context in which the words occur, even when the words to be construed are clear and unambiguous. The language used in section 81 is clear and unambiguous and the context shows that section 81 of the Communications Act authorises the Authority to impose number portability obligations on both fixed and mobile numbers.
- d) The Authority rejects Mobile Telecommunications Limited's aversion that the process was defective by not allowing licensees to comment on the exclusion of fixed porting before final publication. This is due to the fact that in terms of regulation 11(1)(a) of the Rule Making Procedure Regulations, the Authority may after considering all written submissions publish the final regulations with or without changes to the draft regulations.
- e) The Authority did not publish the reasons for its decision to exclude fixed porting in the final publication. However the reasons were subsequently published on 29 March 2019, Government Gazette No. 6863, General Notice No. 63 and Mobile Telecommunications Limited was afforded an opportunity to comment on this reasons which have also been considered as part of this process.
- f) The Authority after a further consideration, is of the view that the legislature intended to cover both fixed and mobile number portability and this transpires clearly from the words used in the Act. If it had not been the case, then a limited number portability approach would not have supported the objects of the Act. All section 81(3) does is merely give a prominence to the timelines for mobile porting but this should not be interpreted as an exclusion clause for fixed portability.
- g) Finally an interpretation seeking to establish the extent of the number portability regulation should not be confined to section 81(3) because that section does not give the Authority powers to enact regulations. The interpretation must however focus of section 81(4), which prescribes the enactment of number portability regulations for telecommunications services. This sub-section has no exclusionary clauses and uses generically defined terms such as "number portability" and "telecommunications services". A broader interpretation of interpretation of the entire context of section 81 also does not result in any intention, express or tacit, to exclude fixed number portability.

## **5. DECISION**

In terms of section 31 of the Communications Act, 2009 (Act No. 8 of 2009), the Authority herewith reconsiders and sets aside its decision of 26 June 2018; substitutes it with the following:

- i. Approval for Number Portability to be implemented, applicable to both fixed and mobile numbers.

**H. M. GAOMAB II**  
**CHAIRPERSON OF THE BOARD DIRECTORS**  
**COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA**

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