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General Notice

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

No. 159

2020

PENALTY REGULATIONS: COMMUNICATIONS ACT, 2009

The Communications Regulatory Authority of Namibia, in terms of section 129(2) of the Communications Act, 2009 (Act No. 8 of 2009), makes the regulations set out in the Schedule.

H. M. GAOMAB II

CHAIRPERSON

COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA

SCHEDULE

Definitions

1. In these Regulations, any word or expression to which a meaning is assigned in the Act, has the same meaning and unless the context indicates otherwise -

“authorisation” means a licence, certificate, permit or any other similar type of authorisation issued under the Act;

“contravention” means a contravention of a provision of a regulation made under the Act;

“failure” means a failure to comply with a provision of a regulation made under the Act;

“monetary penalty” means a monetary penalty contemplated in regulation 7;

“penalty” means any penalty provided for in these Regulations and includes any penalty specified in any other regulation made under the Act;

“punitive measure” means a punitive notice or a monetary penalty;

“punitive notice” means a notice contemplated in regulation 6;

“the Act” means the Communications Act, 2009 (Act No. 8 of 2009); and

“these Regulations” means these Penalty Regulations as amended from time to time.

Objects and application of these Regulations

2. (1) The objects of these Regulations are:

- (a) To consolidate and simplify the penalty regime for contraventions and failures and matters related to penalties in regulations;
- (b) to improve compliance with the Act and regulations made under the Act;
- (c) to promote a transparent, non-discriminatory, well-defined and consistent approach when dealing with compliance, enforcement and penalties;
- (d) within the communications sector, to promote a stable regulatory environment thereby fostering market and investor confidence and understanding;
- (e) to accommodate a layered and flexible approach to enforcement of regulations and proportionality of punitive responses to contraventions and failures;
- (f) to promote a cooperative relationship between the regulator and the regulated focussing on understanding of the regulated environment, regulatory obligations and the enforcement regime and offence prevention;
- (g) to work towards an accountable and a cost-effective regulatory enforcement regime with appropriate safeguards.

(2) Unless the imposition of a punitive measure under these Regulations is specifically excluded in a regulation made under the Act, these Regulations apply to every holder of an authorisation, a user, a customer and any other person (hereafter in these Regulations collectively referred to as “a person”) to whom a regulation made under the Act applies and who commits a contravention or failure.

(3) A punitive measure may be imposed, in the manner provided in these Regulations, on a person who commits a contravention or failure.

(4) These Regulations apply also to a code or standard made or set under the Act.

Jurisdictional matters

3. (1) In the exercise of its powers under these Regulations, the Authority -

- (a) may act of own accord or upon a complaint by an aggrieved person;
- (b) must undertake such investigation as deemed necessary and base its decisions on clearly established facts only.

(2) When investigating a matter under these Regulations, the Authority may, in accordance with its powers in the Act, request from any person such information, documents, books or records as the Authority deems necessary for purposes of such investigation.

(3) Where the Authority imposes a monetary penalty under these Regulations, the amount thereof constitutes a debt due to the Authority by the person on whom it was imposed and may be recovered by the Authority from such person by means of proceedings instituted in any court of competent jurisdiction.

(4) A person against whom a punitive measure was taken or imposed by the Authority may appeal against such measure to a court of competent jurisdiction.

(5) The Authority may postpone compliance with a punitive measure pending the outcome of an appeal under subregulation (4).

Interaction between various punitive actions

4. (1) Punitive measures taken under these Regulations -

- (a) do not exempt a person from civil or criminal liability in respect of the contravention or failure on account of which those measures were taken by the Authority;
- (b) unless specifically excluded, do not preclude the Authority from taking any other punitive action it is authorised to take under the Act with regard to such contravention or failure.

(2) Unless clearly not compatible, the punitive measures provided for in these Regulations are not exclusionary and the Authority may impose more than one such measure if appropriate under circumstances.

- (3) (a) Where the conduct of a person constitutes a contravention or failure with more than one regulation, punitive measures may be taken against such person as regards such person's contravention or failure with any one or more of those regulations.

- (b) Notwithstanding paragraph (a), a person is not liable to more than one monetary penalty under these Regulations in respect of the same contravention or failure subject thereto that a monetary penalty imposed under regulation 7(2), if it constitutes both a daily monetary penalty and a once-off monetary penalty, is deemed to be one punitive measure.

(4) Punitive measures imposed by the Authority under these Regulations may differ between persons according to the criteria which the Authority considered and which were relevant to the contravention or failure.

(5) Notwithstanding subregulation (1)(b), sections 114 to 117 of the Act pertain to regulatory and general offences and contraventions or failures of provisions of the Act as specified in those sections and therefore do not apply to contraventions or failures of provisions of regulations made under the Act.

Warning notices

5. (1) Without derogating from the Authority's right to issue a punitive notice and impose a monetary penalty under these Regulations, the Authority may at any time issue a warning notice to a person if the Authority has reasonable grounds to suspect that such person's conduct may constitute a contravention or failure or, based on the perceived conduct of such person, such conduct would likely, or has the potential to, result in a contravention or failure.

(2) A warning notice must be in writing and regulation 6(3)(a) to (f) and (h) apply with the necessary changes to a warning notice.

(3) Regulation 3(1)(b) does not apply to warning notices.

Punitive notices

6. (1) Punitive notices issued under these Regulations aim at promoting, enforcing and ensuring compliance with regulations made under the Act and must be in writing.

(2) A punitive notice, without limiting the power of the Authority to issue a warning notice or any other general notice deemed appropriate under circumstances, may include one or more of the following types of notices:

- (a) A compliance notice instructing a person to take such action as may be necessary to ensure compliance;
- (b) a cease and desist notice instructing a person to cease, within a specified period, with a contravention or failure;
- (c) a remedial notice requiring a person to implement remedial action by taking such action or adopting such practice as the Authority requires and as set out in the notice for remedying a contravention or failure or preventing the re-occurrence of a contravention or failure;
- (d) a compliance programme notice instructing a person to draw up, submit for approval to the Authority and implement a particular programme for compliance;
- (e) a monetary penalty notice ordering a person to pay a monetary penalty determined in accordance with these Regulations.

(3) Subsequent to an investigation contemplated in regulation 3(1)(b), the Authority may issue a provisional punitive notice which notice -

- (a) must specify the type of notice;
- (b) must specify the name of the person to whom the provisional notice is issued;
- (c) must describe the contravention, failure or other type of behaviour involved or which is a cause of concern which, in so far as available, must include the place and date or time when it occurred and such other relevant facts and information substantiating such contravention, failure or behaviour so as to enable the person to whom the notice is addressed to make representations thereon to the Authority;
- (d) must set out the reasons for the provisional notice;
- (e) must, if applicable, indicate the consequences of such contravention, failure or behaviour;

- (f) must, if applicable, indicate the period within which there must be compliance with the notice should the notice become final;
 - (g) must inform the person to whom the provisional notice is addressed of such person's right to make written presentations to the Authority regarding the notice or any other matter related thereto within the time period specified in the provisional notice;
 - (h) may contain such other information as the Authority may deem appropriate.
- (4) Prior to the issue of a provisional punitive notice set out in subregulation (2), the Authority may request the relevant person to submit such additional information to the Authority as the Authority may require -
- (a) to enable the Authority to determine the type of punitive notice which is to be issued and the contents thereof; or
 - (b) regarding the manner in which such person intends to comply, or the steps which such person intends to take to comply, with the anticipated punitive measure.
- (5) After considering a written presentation or, in the event where notwithstanding the request no representations were received, the Authority may, together with the reasons therefor -
- (a) withdraw the provisional punitive notice; or
 - (b) issue a final punitive notice with or without amendments and specify a reasonable period or periods within which the person to whom the final notice is addressed must comply with the punitive notice.

Monetary penalties which may be imposed by the Authority

7. (1) In the event of a contravention or failure by a person, the Authority may by means of a monetary penalty notice -
- (a) impose a daily monetary penalty of not exceeding N\$ 10,000.00 for each day during which the contravention or failure continues, irrespective of the number of days during which such contravention or failure continues provided that such daily monetary penalties may not accumulate to more than N\$ 1,000,000.00; or
 - (b) impose a once-off monetary penalty not exceeding N\$ 1,000,000.00; or
 - (c) if appropriate, order the holder of an authorisation to compensate its subscribers or customers to the amount and in the manner set out in the monetary penalty notice.
- (2) A compensation order in terms of subregulation (1)(c) is subject to the following conditions:
- (a) The subscriber or customer must have suffered direct financial loss as a result of the contravention or failure which financial loss must be easily quantifiable;
 - (b) the compensation ordered may not exceed the direct financial loss suffered by the subscriber or customer as a result of the contravention or failure;
 - (c) when deciding whether or not to order compensation and, if the Authority decides to order compensation, when deciding on the amount thereof, the Authority must have regard to the authorisation holder's means;

- (d) if a subscriber or customer received compensation for loss or damage resulting from the contravention or failure from any other source, the latter must be deducted from compensation ordered in terms of subregulation (1)(c);
- (e) a subscriber or customer may only be compensated once for financial loss suffered as a result of the same contravention or failure.

(3) Where a person fails to comply with a final punitive notice of the Authority as contemplated in regulation 6(5)(b), the Authority may, in addition to any other penalty which it may impose for a contravention or failure by that person, impose on such person by means of a monetary punitive notice a once-off penalty not exceeding N\$ 50,000.00.

Interest on amounts due

- 8.** The Authority may charge interest on –
- (a) the failure to pay any fee, levy or other monetary amount (excluding a monetary penalty) payable under the Act by the date which such payment is due which interest may not exceed a rate of three percent above the prevailing prime rate as determined by the Bank of Namibia, which interest shall be in addition to any other penalty which may be imposed with regard to such late payment;
 - (b) any monetary penalty not paid by the due date which interest may not exceed the prevailing prime rate as determined by the Bank of Namibia.

Criteria to be considered by Authority when deciding on imposition of penalty

9. (1) Subject to regulation 7(2), when deciding on the type of punitive measure or measures to impose or the size or amount of a monetary penalty, the Authority must take into consideration the following criteria in so far as they are relevant:

- (a) The nature, extent and gravity of the contravention or failure including the consequences thereof;
- (b) the duration of the contravention or failure and whether it constituted a single contravention or failure or more than one;
- (c) the nature and extent of any loss or damage suffered as a result of the contravention or failure;
- (d) whether the person has engaged in any similar conduct and has been found in the past to be in contravention or failure in respect of that conduct;
- (e) whether any other sanction, penalty or fine has already been imposed under the Act or any other law with regard to the contravention or failure;
- (f) the extent to which the contravention or failure was deliberate or reckless or the degree of negligence involved;
- (g) the level of profit derived or to be derived from the contravention or failure;
- (h) whether the person who committed the contravention or failure showed a disposition to cooperate with the Authority in relation to the contravention or failure and any pro-active or voluntary steps taken by such person to remedy the contravention or failure;

- (i) whether the person has in place a compliance programme or a corporate culture or governance structure conducive to compliance as evidenced by, amongst others, guidelines, internal rules, educational programmes and disciplinary or other corrective measures in response to an acknowledged contravention or failure and, if so, whether the person has been complying therewith;
- (j) the deterrent effect of the relevant punitive measure;
- (k) in the event of the contravention or failure having been committed by the holder of an authorisation, whether such holder of an authorisation holds a dominant position in the market as anticipated in the Act or the degree of power the person who committed the contravention or failure, whether the holder of an authorisation or not, has as evidenced by the person's market share and ease of entry into the market;
- (l) any other circumstances under which the contravention or failure took place or relevant thereto which the Authority deems appropriate to take into consideration.

(2) The Authority must record the consideration of the above criteria, the evaluation thereof as regards their relevance to contravention or failure under consideration and the outcome of such evaluation.

False or misleading information

10. No person may furnish false or misleading information to the Authority or any other authority, or make any false or misleading statement to the Authority or any other authority, knowing such information or statement to be false or misleading, in terms of the Act or in terms of any regulation made under the Act.

Amendment of regulations

11. The regulations set out in the Annexure are hereby amended as set out in the third column of the table.

Transitional provision and commencement

12. (1) These Regulations do not apply to a contravention or failure which took place or which commenced prior to the commencement date set out in subregulation (2).

(2) These Regulations will become effective on date of publication of these Regulations in the Government Gazette (or on a specific date).

ANNEXURE A

(Regulation 11)

Column 1 Government Gazette and Government Notice	Column 2 Title of Regulations	Column 3 Extent of Amendment
Government Gazette No. 5037 of 13 September 2012 Government Notice No. 308 of 2012	Regulations regarding Licence Conditions for Telecommunications Service Licences	Repeal of regulations 21, 23 and 25.
Government Gazette No. 5037 of 13 September 2012 Government Notice No. 309 of 2012	Regulations regarding Licence Conditions for Broadcasting Service Licences	Repeal of regulations 16, 18 and 20.
Government Gazette No. 5269 of 19 August 2013 Government Notice No. 329 of 2013	Regulations regarding Licence Conditions for Class Comprehensive Multiplex and Signal Distribution Service Licences, Multiplex Licences and Signal Distribution Service Licences	Repeal of regulation 22.
Government Gazette No. 5357 of 6 December 2013 Government Notice No. 474 of 2013	Regulations Setting Out Cost Accounting Procedures and Reporting Requirements	The substitution for regulation 12 of the following regulation: “ 12. Submission of information A licensee must submit information and reports in the manner and format set out in these regulations.”.
Government Gazette No. 5357 of 6 December 2013 Government Notice No. 475 of 2013	Regulations Setting Out Minimum Technical Standards for Set-Top Box Decoders	Repeal of regulation 9(2).
Government Gazette No. 5659 of 30 January 2015 Government Notice No. 22 of 2015	Regulations in respect of Type Approval and Technical Standards for Telecommunications Equipment	Repeal of regulation 16(2).
Government Gazette No. 5713 of 21 April 2015 Government Notice No. 152 of 2015	Notice of Regulations Prescribing Quality of Service Standards Applicable to Service Licensees	(a) The substitution for regulation 7 of the following regulation: “ 7. Submission of information A licensee must submit information and reports in the manner and format as set out in these regulations.”; and (b) the substitution for regulation 8 of the following regulation: “ 8. Contraventions and failures Each failure to comply with, or contravention of, a quality of service standard set out in items 1 to 3 of Annexure A, and each such repeated failure or contravention, constitutes a separate failure or contravention with regard to which a penalty may be imposed.”.

<p>Government Gazette No. 5983 of 1 April 2016 Government Notice No. 97 of 2016</p>	<p>Regulations Prescribing the National Numbering Plan for Use in the Provision of Telecommunications Services in the Republic of Namibia, Numbering Licence Fees and Procedures for Number Licences</p>	<p>(a) The amendment of regulation 16 -</p> <p>(i) by the repeal of subregulation (2); and</p> <p>(ii) by the substitution for subregulation (3) of the following subregulation:</p> <p>“(3) Where the Authority finds that a licensee has failed to comply with a responsibility, an obligation or a term or condition subject to which numbering resources were allocated to such licensee, the Authority may -</p> <p>(a) impose an appropriate penalty on such licensee in accordance with regulations made under section 129(2) of the Act; and</p> <p>(b) in addition to paragraph (a), withdraw one or more of such licensee’s rights to use numbering resources allocated to that licensee and regulation 21(5) applies to such withdrawal with the necessary changes.”;</p> <p>(b) the repeal of regulation 40(2) to (6); and</p> <p>(c) the repeal of item 8 of Annexure 1A.</p>
<p>Government Gazette No. 6141 of 4 October 2016 Government Notice No. 400 of 2016</p>	<p>Regulations Prescribing Sharing of Infrastructure</p>	<p>(a) The repeal of regulation 15(2) to (5); and</p> <p>(b) the substitution for regulation 16 of the following regulation:</p> <p>“Prohibitions</p> <p>16. No carrier, dominant carrier, utility or other person may -</p> <p>(a) fail to submit, within a timeframe specified by the Authority, information requested by the Authority pursuant to these regulations;</p> <p>(b) submit or publish false or misleading information about its infrastructure, network elements or any other matter;</p> <p>(c) obstruct or prevent an inspection or investigation carried out by the Authority pursuant to these regulations;</p> <p>(d) engage in any act or omission whose effect would be to defeat the purposes of these regulations.”.</p>

Government Gazette No. 6466 of 9 November 2017 Government Notice No. 468 of 2017	Regulations Regarding Procedures for the Adjudication of Disputes	Amendment of regulation 12 by the substitution for subregulation (4) of the following subregulation: “(4) No person may, without lawful excuse, refuse to answer a question put to that person by the Authority in terms of subregulation (3)(b).”.
Government Gazette No. 6589 of 8 May 2018 Government Notice No. 178 of 2018	Regulations Prescribing the Provision of Universal Service by Telecommunications Service Licensees	Repeal of regulation 13(2) to (5).
Government Gazette No. 6593 of 14 May 2018 Government Notice No. 179 of 2018	Regulations to Ensure Fair Competition in the Telecommunications Sector	(a) The amendment of regulation 18 by the repeal of paragraph (a) of subregulation (2); and (b) the repeal of regulation 19.
Government Gazette No. 6888 of 29 April 2019 Government Notice No. 104 of 2019	Regulations Prescribing Procedures Regarding Application for, and Amendment, Renewal, Transfer and Cancellation of Spectrum Licences	(a) The amendment of regulation 17 - (a) by the substitution for paragraphs (a) and (b) of subregulation (1) of the following paragraphs: “(a) issue an appropriate punitive notice to the person in question as set out in the Penalty Regulations, 2019; and (b) in such notice require the person in question to inform the person’s end-users, customers or subscribers, if any, within the period stated in the notice of the date on which the person will discontinue using the radio frequency spectrum.”; (ii) by the deletion of subregulation (2); and (iii) by the renumbering of subregulation (3) to subregulation (2) and the substitution thereof with the following subregulation “(2) Failure by a person to comply with subregulation (1) may result in the sealing, altering or seizure of apparatus or equipment as anticipated in section 102 of the Act.”; the deletion of regulation 27; and the deletion of regulation 28(2), (3), (4), (5) and (6).”.

ANNEXURE B

SUMMARY AND ANALYSIS OF COMMENTS RECEIVED

The purpose of this document is to review the comments received from stakeholders on CRAN's proposed Penalty Regulations. The *Notice of Intention to Make Regulations Prescribing Penalties under Section 129(2)* was published in *Government Gazette* No. 7004 on 25 September 2019. Written comments were received from MTC Mobile Telecommunications Limited ("MTC") and MultiChoice Namibia ("MultiChoice").

COMMENTS BY MTC

a) Comment 1

MTC referred to Section 129(2) of the Act which states that "*Regulations made under this Act may prescribe penalties for the contravention of their provisions or for the failure to comply with their provisions*". MTC opines that section 129(2) does not authorise CRAN to draft separate general penalty regulations applying to all regulations generally. Rather penalties must be included in respect of regulations drafted under section 129(1).

Authority's response

It is the Authority's position that Section 129(2) applies to Regulations made under the Act and is not only limited to section 129(1) Regulations. There is no requirement that a law (whether an act or regulation) must be contained in a single instrument as they are not read or applied in isolation but in conjunction with other laws impacting on them. As such, the Penalty Regulations must be read together with the Regulations to which they apply and regarded as being part thereof. This is specifically addressed by regulation 2 of the proposed Regulations.

b) Comment 2

According to MTC, the Penalty Regulations contravene sections 114 and 115. Acts cannot be amended by means of Regulations nor can they override the Act. They therefore suggested that sections 114 and 115 must be amended first to ensure alignment with the Penalty Regulations.

Authority's response

The Authority is of the view that MTC misinterpreted the scope of the Regulations and Section 114 - 115. Section 114 offences are statutory offences created in the Act – i.e. since the Act prohibits certain matters (for example providing telecommunications or broadcasting services without a licence, acting outside the scope of a licence or failing to comply with a condition of a licence), the same prohibitions will not appear in Regulations made by CRAN. The Penalty Regulations apply to contraventions of Regulations only and are thus separate from contraventions already covered in the Act.

It is stressed that there is no overlapping between sections 114 – 116 and the Penalty Regulations and as such, there is also no contradiction. Section 129(2) does not authorise the creation of criminal offences but only "penalties".

c) Comment 3

The Penalty Regulations do not accommodate the *audi alteram partem* rule in that they do not allow a person to present their case prior to being found guilty and having a penalty imposed.

Authority's response

Regulation 6(3)(g) of the Penalty Regulations states that all punitive notices must inform the person to whom the notice is addressed of his/her right to make written presentations to CRAN on any matter related to the notice within the time frame specified in the notice.

Regulation 6(5) makes it clear that CRAN can only further act with regard to a punitive notice as to whether it will withdraw the notice or issue a final notice (with or without amendments) after it has considered a written presentation (or if notwithstanding CRAN's request, no presentation was received). These measures fulfil the *audi-rule* and it is assumed that MTC misread these regulations and the criticism regarding failure to accommodate hearing the other party is not substantiated.

d) Comment 4

MTC avers that CRAN should retract the Penalty Regulations in total and revert to relevant provisions in the Act and deal with penalties as provided for in the Communications Act.

Authority's response

It is submitted that MTC misinterprets the Act and the Penalty Regulations and does not make a case for its averments. The Act clearly authorises the imposition of penalties in section 129(2) for any and all regulations made under the Act.

COMMENTS BY MULTICHOICE**a) Comment 1**

MultiChoice supports CRAN's initiative to consolidate and simplify the penalty regime for contraventions of regulations.

Authority's response

Noted

b) Comment 2

MultiChoice raised that It is important that due process be followed when penalties are imposed, specifically as regards:

- i. Steps taken to determine if a contravention has in fact occurred;
- ii. Adequately addressing a licensee (person) right to be heard on any allegations of non-compliance, prior to imposing a penalty.

Authority's response

Regulation 6(3)(c) and (d) requires CRAN to indicate in a punitive notice a description of the contravention or type of behaviour which is a cause of concern and, as far as is available, the place and date/time of the contravention plus the reasons for the notice. The latter implies that CRAN cannot issue a notice unless: (a) it has applied its mind; (b) there is evidence of a contravention; and (c) some investigation was done to determine the facts.

As regards the holding of investigations and specifically providing therefor in the regulations, it is not advised to add too much detail on investigations in the regulations as it may place undue administrative burdens on CRAN. Common law (as expressed in Article 18 of the Constitution) requires CRAN to "apply its mind" before acting which in certain circumstances may require a

full investigation and in other circumstances may be so evident that a formal investigation is not necessitated. Common law administrative justice requirements relate to applying one's mind and acting on clearly established facts only (irrespective how those came to the attention of CRAN). The type of "investigation" CRAN will undertake will depend on the facts of each case and it is recommended that CRAN merely be required to make such investigation as it deems necessary.

Cross reference is included as regards CRAN's powers under the Act to request information from licensees and other persons. If there is not such a clear case and perceptions or reasonable grounds only to suspect a contravention, a warning notice may be issued and regulation 5 specifically provides for such circumstances. Concerns regarding a person's right to be heard are addressed above with regard to a similar comment expressed by MTC.

c) Comment 3

Regulation 3 ("jurisdictional matters") states that when acting under the Penalty Regulations, CRAN can do so out of own accord or upon receiving a complaint from an aggrieved person. MultiChoice proposes that the Regulations spell out the process by amongst others:

- i. Specifying the form of the complaint (they suggest the form set out in the Adjudication Regulations);
- ii. Clarifying whether this pertains to all complaints or only those under the Act (see sec 90(1) and 131);
- iii. Assessing and excluding frivolous, vexatious and mala fide complaints;
- iv. Providing for an investigation of the complaint first under the Adjudication Regulations.

Authority's response

The purpose of regulation 3(1) is to merely make the point that punitive measures may also follow where a complaint is received by CRAN and it is not necessary for CRAN to always have to act out of own accord. The purpose is not to create a new process for such complaints or copy an existing one. The latter are administrative/implementation matters and it is for CRAN to decide, when they receive a complaint which appears to validate taking punitive measures, the form of such complaint and the process to be followed whether it be under existing processes or, if not, are uniquely adapted for purposes of the Penalty Regulations.

It is not the complainant who will drive the punitive process but CRAN – after receiving the complaint as well as all relevant facts which can be obtained from such complainant (which will be part of CRAN's "investigation" process), CRAN will proceed with punitive steps if deemed necessary (and CRAN will exclude complaints which are frivolous, vindictive or *mala fide*).

As regards defining complaints, the latter is not recommended as it is not within the objectives of the Penalty Regulations – the Penalty Regulations aim at any complaint by an aggrieved person which can potentially start punitive steps by CRAN. This includes even informal ones – for example, if complaints are aired on social media platforms and come to the attention of CRAN and validate further investigation and the initiation of punitive steps, then CRAN should be able to do so.

d) Comment 4

As regards where CRAN acts out of own accord, MultiChoice proposes:

- i. Inclusion of an investigation process;

- ii. Giving of reasons for final decision by CRAN whether to withdraw notice or issue a final one;
 - iii. Warning notices should always be a first step in the investigation process (unless it would jeopardise the investigation);
 - iv. A list of matters to be included in a warning notice (including allowing a person to rectify a contravention);
- a. Allowing for written and/or oral submissions by alleged offenders.

Authority's response

Comments that CRAN must provide reasons for a decision to withdraw a punitive notice or issue a final one are supported and the necessary changes were made to the final Regulations. However, it is not supported that every alleged contravention must first receive a warning notice including not proceeding with punitive measures if failure is rectified following a warning notice.

The latter can frustrate the robustness of the enforcement regime, can cause complications as regards necessary exemptions and create loopholes for circumventing the enforcement regime. Warning notices serve a specific purpose and it is in CRAN's discretion whether a situation (even all situations) requires an initial warning notice or not. Multichoice's comment on conducting of investigations is addressed above.

The proposal regarding additional inclusions in warning notices are deemed value adding and the necessary changes are made to the final Regulations. As with regards warning notices, it is the Authority's position that they should remain general and flexible and since they have no enforceable impact, it is not deemed necessary to regulate their issue and contents in detail.

e) Comment 5

As regards aligning the maximum penalty in the Penalty Regulations with those in the Act, MultiChoice comments:

- i. N\$ 1 million penalty is only applicable where telecommunications/broadcasting services are provided without a licence;
- ii. Other regulatory offences such as operating outside the scope of a licence carry a penalty of N\$ 500,000;
- iii. Contraventions of regulations are more akin to operating outside the scope of a licence and should therefore be limited to N\$ 500,000.

Authority's response

The Authority made due consideration when deciding on the maximum penalty. The maximum penalty of N\$ 1 million was aligned to the maximum amount as that appearing in the Act.

It is noted that section 129(2) does not contain a limit or guidelines as regards the size of monetary penalties which may pose future challenges irrespective of the final size of the maximum monetary penalty in the Penalty Regulations.

f) Comment 6

Irrespective references to section 116 enforcement orders, as regards orders relating to compensation by licensees to its subscribers/customers, MultiChoice states:

- i. There is no authority for such orders in the Act;
- ii. Quantification of harm so that compensation is reasonable and proportionate;
- iii. Lack of criteria in Penalty Regulations governing amount/manner of compensation which may be ordered as well as circumstances under which it may be ordered;
- iv. Common law (assumed to be civil law) already provides for compensation to customers through ordinary civil courts and thus this can be deleted from regulations;
- v. If maintained more detail should be included in regulations.

Authority's response

During drafting of Penalty Regulations, the concept of "penalty" was analysed and found to be wide and not limited to fines only. Thus on a liberal interpretation, penalty could well include monetary compensation to customers. However, since these are penal (oppressive) provisions, courts may follow a restrictive interpretation. If retained, the proposals to add more criteria and detail to this type of notice is supported and the necessary changes were made to the final Regulations.

g) Comment 7

Using both terms "contravention" and "failure" is unnecessary since a failure to comply amounts to a contravention.

Authority's response

This is standard legislative drafting and the Penalty Regulations follow the terminology as applied in the Act which consistently refers to "contraventions" and "failures".
