

By email

The Independent Communications Authority of South Africa

Attention: Mr. Pascalis Adams

Email: padams@icasa.org.za

5 May 2022

Dear Mr Adams

COMMUNITY INVESTMENT VENTURES HOLDINGS PROPRIETARY LIMITED: SUBMISSION ON THE DRAFT REGULATIONS REGARDING STANDARD TERMS AND CONDITIONS FOR INDIVIDUAL LICENCES UNDER CHAPTER 3 OF THE ELECTRONIC COMMUNICATIONS ACT 36 OF 2005

1. Introduction

- 1.1 Community Investment Ventures Holdings Proprietary Limited (**CIVH**) is grateful to the Independent Communications Authority of South Africa (the **Authority**) for the opportunity to submit written representations to it on the Draft Regulations regarding Standard Terms and Conditions for Individual Licences under Chapter 3 of the Electronic Communications Act 36 of 2005 (the **Draft Regulations**).
- 1.2 CIVH is a specialised information and communications technology (ICT) holding company and is currently the sole shareholder of fibre network operator, Dark Fibre Africa Proprietary Limited (**DFA**), which holds individual service licences in terms of the Electronic Communications Act 36 of 2005 (the **ECA**). In particular, CIVH holds shares directly in DFA and also holds shares in DFA through CIV Fibre Network Solutions Proprietary Limited (**CIV FNS**), which is wholly-owned by CIVH.
- 1.3 CIVH sets out below its submissions on the Draft Regulations as follows:
 - 1.3.1 the key proposed amendment in the Draft Regulations that is relevant to CIVH and, in particular, DFA i.e. the proposed deletion of the current requirement to notify the Authority of changes to shareholding in terms of the Standard Terms and Conditions, 2010 (the **Standard Terms and Conditions**);
 - 1.3.2 key areas of clarity sought by CIVH in respect of this amendment;
 - 1.3.3 an overview of the current approval requirement in terms of section 13(1) of the ECA;
 - 1.3.4 the potential impact this amendment may have on entities like DFA and CIVH;
 - 1.3.5 understanding the rationale of this amendment in the context of the ECA more broadly and CIVH's recommendations in this regard; and

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1.3.6 CIVH's general observations on other proposed amendments in the Draft Regulations.

2. **Proposed deletion of the current requirement to notify the Authority of shareholding changes**

2.1 Of particular importance to CIVH and DFA is the Authority's proposal in the Draft Regulations to delete regulation 2(1)(c) in Schedules 1, 2 and 3 of the Standard Terms and Conditions in terms of which individual licensees are currently required to notify the Authority of any changes to their shareholding structure. While the Authority has proposed deleting this requirement from the Standard Terms and Conditions, on a plain reading of the Draft Regulations in its current form, it appears that the Authority has not yet included any proposed substitution of this requirement, subject to what is set out in the explanatory memorandum accompanying the Draft Regulations (the **Explanatory Memorandum**). In the Explanatory Memorandum, the Authority appears to suggest that any changes (no matter how insignificant) to an individual licensee's shareholding will need to be approved by the Authority pursuant to a prescribed process in the Individual Licensing Processes and Procedures Regulations, 2010 (the **Processes and Procedures Regulations**), which will presumably be amended.

2.2 If regulation 2(1)(c) of the Standard Terms and Conditions is deleted and nothing is included to substitute and/or replace this requirement, this will effectively mean that individual licensees, such as DFA, will not have to notify the Authority of any changes to their shareholding structures going forward in terms of the Standard Terms and Conditions. However, the requirement to notify the Authority of shareholding changes would still be triggered in terms of regulation 14A(2)(c) of the Processes and Procedures Regulations, until such time and *if* the Authority deletes or amends this requirement as well. CIVH presumes that the knock-on effect of the proposed deletion of the same requirement in the Draft Regulations will necessarily mean that the requirement in the Processes and Procedures Regulations will also be proposed to be deleted, although this is unclear. We assume that interested parties will be given a further opportunity to comment on any proposed changes to the Processes and Procedures Regulations in this regard.

2.3 Key areas of clarity sought by CIVH

2.3.1 CIVH seeks clarity on whether the Authority intends to amend the Processes and Procedures Regulations in the future to:

2.3.1.1 repeal the requirement to notify the Authority of any changes to an individual licensee's shareholding similar to what it has done in the Draft Regulations; and/or

2.3.1.2 substitute the requirement such that an individual licensee will be required to obtain the Authority's approval for any changes to shareholding and, if so:

2.3.1.2.1 whether such approval must be obtained before any changes are implemented or after the implementation of any changes as is currently the case with the notification process in terms of the Standard Terms and Conditions. CIVH assumes that the intention is that it would be a prior approval requirement;

2.3.1.2.2 whether the process and relevant criteria that individual licensees will need to be follow in this regard will be separate and different from the process currently applicable to transfers of individual licences and transfers of control of individual licences in terms of section 13(1) of the ECA read with regulation 11 of the Processes and Procedures Regulations (as outlined briefly further below), or whether it is intended that the same or a similar process with similar criteria will apply.

2.3.2 The bases on which CIVH seeks clarity on the above are set out further below.

2.4 Current approval requirement in the ECA

2.4.1 CIVH notes that there is currently a prior approval requirement in terms of section 13(1) of the ECA read with regulation 11 of the Processes and Procedures Regulations. In terms of the current approval requirement, an individual licensee is required to apply to the Authority beforehand in respect of any direct or indirect changes to its shareholding structure, which changes result in the direct or indirect acquisition of control of an individual licensee. While "control" is not defined in the ECA, the Authority has confirmed its interpretation and

approach in this regard in Annexure A to the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the Application of the ICT Sector Code, 2021 (the **Ownership and Control Regulations**). In particular, the Authority stated that the application for a transfer of control requirement will be triggered whenever someone acquires control rights (such as the ability to exercise material influence over strategy) in an individual licensee, even if the acquisition of shares is small. This means that, even if an entity acquires less than 50% of the shares in an individual licensee, there is still a possibility that the control threshold will be met if the acquirer's shareholding post-transaction has certain control rights attached to it.

2.5 Potential impact of a requirement to obtain the Authority's approval in respect of any changes in shareholding

2.5.1 If the Authority's intention is to extend the current approval requirement in terms of section 13(1) of the ECA to *any and all* changes to an individual licensee's shareholding, irrespective of the size of shareholding and whether it confers any control rights in the licensee, this will have significant and detrimental implications for individual licences such as DFA. CIVH sets out below the key potential implications it believes would follow in this regard:

2.5.1.1 *Application to direct and/or indirect shareholding changes:* It is not clear whether the approval requirement will apply only to *direct* changes to a licensee's ownership structure, or *both direct and indirect* changes to a licensee's ownership structure. If the requirement will apply only to changes to the direct shareholding of a licensee, licensees will likely find a way around this by simply interposing a special purpose vehicle (**SPV**) intermediary entity which will hold 100% of the shares in the individual licensee and in which the shareholders would hold shares. The consequence of this is that the licensees will not be subject to the approval requirement as the use of SPV would ensure that changes to the direct shareholding of the licensee never occur and that such changes would only ever be on an indirect basis i.e. the shareholders of the shareholder (the SPV) of the licensee. If, on the other hand, the requirement is intended to apply also to indirect changes to a licensee's shareholding i.e. where the shareholding of shareholders of shareholders in a licensee changes, this will be impractical as it will require the licensee to constantly monitor changes further up the chain and distant from itself which it would not otherwise do unless in the context of a transaction that would typically be subject to section 13(1) of the ECA. In many instances, licensed entities will not even know what shareholding changes are taking place up the shareholding chain. They may therefore inadvertently fail to comply with the approval requirement through no fault of their own. For example, one of CIVH's shareholders is Remgro Limited (**Remgro**), which is a listed company. Remgro's shareholding structure changes all the time as shares are bought and sold. CIVH is not aware and can never be aware of the changes that are taking place at Remgro level every day, and would not be in a position to seek approval for every indirect change to its shareholding structure.

2.5.1.2 *Timelines for approval:* An approval requirement is likely to cause significant delays in licensees being able to implement their shareholding changes. This is in the context of the Authority's current timelines to approve applications for transfers of individual licences and transfers of control of individual licences in terms of section 13(1) of the ECA, which CIVH understands are generally between 6 and 18 months depending on the Authority's capacity and the nature and complexity of the application.

2.5.1.3 *Frequent and fluctuating shareholding changes:* All entities holding individual licenses are not the same - some licensees undergo frequent shareholding changes. For example, as discussed above, one of CIVH's shareholders is Remgro), which as a listed company is subject to daily if not hourly shareholding changes. These shareholding changes flow down to CIVH and to DFA. It would not be practical or feasible for DFA (in which Remgro indirectly holds shares through CIVH) to have to obtain approval from the Authority each time that such changes are made, particularly where such changes are very small and have no bearing on the control structure of DFA. Similarly, licensees or their shareholders often undertake rights issues to raise additional funding. For example, CIVH conducts rights issues where additional equity funding is required. CIVH has done a number of these,

as previously notified to the Authority. These rights issues similarly may result in very small changes to the effective shareholding structure of DFA. It would not be practical to require approval for the reasons set out above.

- 2.5.1.4 *Administrative burden:* A requirement to obtain the Authority's approval for any changes of shareholding, no matter how small, will also create a high administrative burden both for the Authority and the relevant licensee. From the perspective of the individual licensee: (i) it would have an additional and onerous requirement to comply with in addition to the various other obligations applicable to individual licensees; and (ii) compliance with this requirement would be costly from a financial and time perspective. From the perspective of the Authority, the volume of applications that will be submitted to the Authority in respect of every individual licensee will mean that the Authority may take a significant time to consider, evaluate and approve these applications. This will be counterproductive as licensees will be less incentivised to comply with the approval requirement.
- 2.5.1.5 *Disincentive to invest in communications assets:* If any and all direct and indirect shareholding changes in the holder of individual licences require prior regulatory approval, CIVH's view is that prospective investors are less likely to want to invest in the sector, for the reasons given above (delay, and inability to sell or acquire relatively small numbers of shares including to address funding needs).
- 2.6 The rationale of the requirement to obtain the Authority's approval in respect of any changes in shareholding in the context of the ECA more broadly
 - 2.6.1 CIVH does not believe that a requirement to obtain the Authority's approval in respect of any and all changes to an individual licensee's shareholding will be consistent with the objects of the ECA and the existing prior approval requirement in terms of section 13(1) of the ECA.
 - 2.6.2 *Objects of the ECA*
 - 2.6.2.1 Section 2(y) of the ECA provides that the Authority must "...refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public". CIVH believes that a requirement to get approval for any shareholding change no matter how small would do just the opposite – it would cause undue interference in all sales and/or acquisitions of shares in individual licensees no matter how insignificant, and irrespective of whether any control threshold is met. CIVH also does not believe that the needs of the public necessitate such a requirement; instead such a requirement would impede the ability of licensees to attract investment.
 - 2.6.3 *Existing requirement in section 13(1) of the ECA and the absence of any other approval requirement in the ECA*
 - 2.6.3.1 There is a clear reason for the approval requirement in section 13(1) of the ECA for licensees to get approval from the Authority before someone directly or indirectly acquires a controlling stake in the licensee. It makes sense for the Authority to have the power to evaluate whether a prospective transferee (i.e. the person acquiring an individual licence or acquiring a control interest in an individual licensee) is suitable. The Authority's power to evaluate transactions where someone is acquiring a licence or acquiring control of a licence-holder is similar to the Authority's powers when it considers applications for new individual licences in terms of the ECA. On the other hand, CIVH does not think that a similar rationale can be said to exist in the context of small or relatively insignificant changes to an individual licensee's shareholding structure, particularly where no changes to control occurs.
 - 2.6.3.2 In addition, it appears that the Authority is proposing to include a requirement to obtain its approval for any and all changes to an individual licensee's shareholding structure in the form of regulations (i.e. delegated legislation) where the empowering legislation (i.e. the ECA) does not itself require such an approval. As such, if the Authority were to impose

a requirement in regulations that goes beyond what the empowering legislation provides for, CIVH considers that the Authority will be acting outside the scope of its powers.

2.6.4 *Rationale to ensure compliance by licensees*

2.6.4.1 In paragraph 2.2.3 of the Explanatory Memorandum, the Authority notes that the current notification process in the Standard Terms and Conditions has been subject to abuse and incorrect application where there are changes in ownership and, as a result of this, the Authority seeks to better monitor and manage changes to an individual licensee's ownership and control "over time". CIVH's view on this is simple: if individual licensees are abusing and/or incorrectly applying an already existing requirement, there is nothing to suggest that the same would not occur in the context of an entirely new requirement. In the following paragraph CIVH sets out its recommendations on ways in which the Authority could achieve the proposed rationale in a manner that is more appropriate, feasible and practical for it and for individual licensees.

2.6.5 *CIVH's recommendations*

2.6.5.1 *The need for clarity and guidelines on when section 13(1) of the ECA will be triggered:* CIVH believes that the industry would benefit from further clarity on the instances in which the requirement in section 13(1) of the ECA is triggered. Although the Authority has given very useful guidance in Annexure A to the Ownership and Control Regulations on what constitutes "control" of a licence, CIVH thinks it would be useful for the Authority to provide insights on the particular types of transactions which will amount to transfers of control that would trigger the requirement in section 13(1) of the ECA. This should ideally be done pursuant to a public consultation process. CIVH believes that, if individual licensees understand *when* the approval requirement in terms of section 13(1) of the ECA is triggered, it will make it easier to ensure compliance. One of the primary reasons for CIVH's recommendation in this regard is that there appears to be some disparity between the Authority and industry stakeholders on whether or not a particular transaction constitutes a transfer of control. For example, in the context of CIVH specifically, DFA's shareholding changed in 2020 following a rights issue when the balance of shares held by CIV FNS and CIVH changed such that CIV FNS held less than 50%, and CIVH held more than 50%. In DFA's and CIVH's view, this did not amount to a transfer of control because CIVH is the ultimate holder of 100% of the shares in DFA and CIVH already and always had sole control of DFA. DFA did not, accordingly, apply for approval. However, the Authority held a different view. Although CIVH was entirely confident that its approach would be upheld by the courts, it unwound the shareholding change so that CIV FNS again held 50%+ of the shares in DFA to avoid the need to have to deal with compliance proceedings.

2.6.5.2 *The imposition of appropriate sanctions and penalties:* In the event that individual licensees fail to comply with the requirement under section 13(1) of the ECA when it is triggered, or the requirement to notify the Authority of changes to its shareholding when such changes occur, the Authority should impose appropriate and proportionate sanctions in this regard. For example, the sanctions that the Complaints and Compliance Committee has proposed (and the Authority has presumably imposed) on individual licensees who do not comply with section 13(1) of the ECA where this is triggered, has simply been to require the parties to unwind the transaction. CIVH does not believe that this is necessarily an appropriate and practical means to enforce the requirement in section 13(1) of the ECA. CIVH believes that the Authority should consider imposing sanctions on individual licensees similar to the sanctions imposed by the Competition Tribunal where there is prior implementation of a transaction if the parties do not comply with the merger notification requirement. In this instance, the Competition Tribunal would typically impose an administrative fine and require the parties to apply for merger approval. It is only if the approval is not granted that the transaction be unwound. CIVH believes that stronger enforcement measures, rather than additional compliance requirements, would better incentivise compliance.

3. **General proposals in the Draft Regulations**

CIVH proposes

the definition of "Effective Date" in the Draft Regulations should instead read as "the date on which the licence comes or came into effect which may be different from the date on which the licence is issued or signed by the Authority". References to "date of issue" in regulation 5(1) in schedule 1 should presumably be changed to "effective date".

4. **Conclusion**

CIVH thanks the Authority for the opportunity to make submissions on the Draft Regulations and hopes that the Authority will take its views and concerns into account when finalising the Draft Regulations.

Yours faithfully

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Neo Moshimane
Executive Director