

5 May 2022

Independent Communications Authority of South Africa

Attention: Mr Pascalis Adams

Per email: PAdams@icasa.org.za

Dear Sir

ISPA SUBMISSIONS: STANDARD TERMS AND CONDITIONS FOR INDIVIDUAL LICENCES

1. The Internet Service Providers' Association of South Africa (ISPA) refers to the Draft Regulations regarding Standard Terms and Conditions for Individual Licences published in Government Gazette 46050 on 16 March 2022 ("**the Draft Amendment Regulations**") and sets out below its written submissions.
2. ISPA's submissions are:
 - 2.1. Limited to provisions relating to individual electronic communications network service (IECS) and individual electronic communications service (IECS) licences.
 - 2.2. Structured to provide a general submission on the regulatory burden imposed on licensees by ICASA, followed by specific submissions on proposed amendments and related matters.
3. ISPA confirms its willingness to participate in any public hearings which the Authority may decide to conduct prior to finalising the draft amendments.
4. **Regulatory burden**
 - 4.1. ISPA notes that the purpose of the Draft Amendment Regulations is to provide clarity on standard terms for individual licensees and to enhance compliance and streamline the submission of documents to the Authority.
 - 4.2. It does not, however, appear that the Authority recognises the increasing regulatory compliance burden placed on licensees by its regulations. This is particularly true for SMEs, and it is ISPA's position that regulatory compliance is itself a barrier to entry into the industry.
 - 4.3. The President in his 2022 State of the Nation Address made it clear that reducing the regulatory burden for SMEs is a government priority:

"This year, we are undertaking far-reaching measures to unleash the potential of small businesses, micro businesses and informal businesses.

These are the businesses that create the most jobs and provide the most opportunities for poor people to earn a living.

....

There are too many regulations in this country that are unduly complicated, costly and difficult to comply with. This prevents companies from growing and creating jobs."

- 4.4. ISPA submits that ICASA regulation applicable to licensees is often costly and difficult to comply with.
- 4.5. This is aggravated by the fact that the Authority refuses to differentiate between the compliance burden of licensees based on the nature of the licence (i.e. individual or class) or on the annual turnover from licensed services of the licensee. As a result there is one-size-fits-all regulation that applies to MNOs with multi-billion Rand licensed revenue and SME ISPs turning over less than R10 million Rand a year.
- 4.6. ISPA questions the utility of uniformly applying regulation in this manner. Smaller licensees have a limited socio-economic impact, and it is information supplied by the incumbent operators and larger ISPs and other operators which is of value to the Authority.
- 4.7. There is no evidence that the considerations articulated by the President have been taken into account by the Authority in the preparation of the Draft Amendment Regulations.
- 4.8. ISPA requests that the Authority:
 - 4.8.1. Expressly consider the manner in which it can reduce the regulatory compliance burden for SME licensees when finalising the Draft Amendment Regulations.
 - 4.8.2. Expressly consider distinguishing between licensees based on annual revenue from licensed services or other relevant metric when determining regulatory compliance obligations.
 - 4.8.3. Carefully consider any regulatory compliance obligation placed on licensees with specific reference to the relationship between the purpose of the obligation and the cost of compliance.

5. Substitution of Schedule 2, Regulation 2

- 5.1. ISPA notes the proposed deletion in sub-regulation 2(1) of "shareholding" as a change in the details of the licensee requiring the licensee to submit a written notification to the Authority after the proposed change has been effected.

- 5.2. This is linked to draft amendments to the Process and Procedure Regulations for Individual Licences (“**the Draft Process and Procedure Amendment Regulations**”), published for comment on 27 March 2022. These include a proposal for a new regulation 14C:

14C: Changes in Shareholding

- (1) *In the event a licensee proposes changes to its shareholding, however minute, the licensee must submit to the Authority, prior to implementing the proposed changes, a letter detailing:*
- (a) *Current shareholding;*
 - (b) *Proposed changes in shareholding; and*
 - (c) *Past shareholding changes since the issuance of the licence.*
- (2) *If the Authority determines that the submitted changes amount to changes in ownership/transfer of control, the Licensee will be instructed to make a submission in line with regulation 11 read with regulation 12.*
- (3) *If the Authority determines that the submitted changes do not amount to changes in ownership/transfer of control, the Licensee will be instructed to make a submission in line with regulation 14 (A).*
- 5.3. In the explanatory memorandum the Authority states the following:

“It has been noted that the notification process is susceptible to abuse or incorrectly applied to the extent that it alters or changes ownership. Through a notification the Authority is unable to sufficiently monitor and manage the change in the shareholding specifically to the extent that it changes ownership and control over time. Any shareholding changes have the effect of changing the shareholding structure of that entity and such changes may conflict with the objectives and mandate of the Authority as found in the ECA. Thus, the process of any changes in shareholding will be subject to approval by the Authority and will be guided and prescribed in the Process and Procedure Regulations for Individual Licences.”

- 5.3.1. The Authority’s position that “any change in shareholding will be subject to approval by the Authority” is in direct conflict with section 13 of the ECA. Where a change in shareholding does not amount to a change in control then ICASA’s approval is not required.
- 5.3.2. The Authority points to abuse by licensees when the core reason for the difficulties currently being experienced are directly due to the failure of the Authority to lay down clear guidelines for licensees as to what will constitute a transfer of control over a licence (something which the Authority has publicly recognised).

- 5.3.3. The Authority has further failed to respond to licensees who have submitted a notification of a change of ownership in circumstances where an application for transfer of control would have been the correct procedure.
- 5.3.4. As a result there are numerous licensees facing referral to the Complaints and Compliance Committee or which have already been ordered to reverse transactions entered into more than five years ago.
- 5.4. The Authority is still not offering clear guidelines on what constitutes a transfer of control over a licence: rather it seeks to introduce an internal process during which an internal determination will be made regarding whether a transfer of control is contemplated in a transaction or across a series of transactions.
- 5.4.1. The Draft Process and Procedure Amendment Regulations do not provide any insight into the basis on which the Authority will make such determination.
- 5.4.2. No indication is given as to the time in which the determination will be made. The length of time taken by the Authority to process applications for transfer of control over an individual licence is already completely at odds with commercial reality.
- 5.4.3. The law applicable to what constitutes a transfer of control in an entity can be extremely complex and it is commonplace for licensees to consult with senior counsel for guidance when considering changes in ownership. This is particularly the case where a licensee has institutional investors that exit according to their own investment mandates.
- 5.5. The following submission on this point was received from an ISPA member:

The proposed process regulations, rather than assisting in the path to compliance will hamper companies conducting the ongoing management of their business and shareholders in achieving their compliance objectives

There are many cases where small or large transactions are necessary, efforts to improve their B-BBEE compliance through forming employee share option programmes, requirements to buy back shares where a shareholder has to exit, the sale of shares where an estate of a shareholder is required in the execution of the estate, sales to empowered shareholders to increase the companies HDG equity holding to meet compliance requirements, and any other share transactions that shareholders may need to do in the course of business. The proposed process regulation hampers rather than encourages.

- 5.6. ISPA calls on the Authority to:
- 5.6.1. Undertake a process to develop clear guidance for licensees on the factors which it will take into account in determining whether a change of ownership amounts to a transfer of control.
 - 5.6.2. Taking into account the confusion which has been a feature of changes of control over licences, exercise regulatory forbearance by declaring a limited period amnesty to licensees seeking to update records of their shareholding with the Authority. This would require the Authority to forego referral of such licensees to the CCC for non-compliance, subject to such licensees making application to ICASA for approval for any transfer of control that has occurred.
- 5.7. The proposal that the Authority may determine a “fee” for late notifications is not supported as this is not a fee but a penalty.
- 5.7.1. The Authority maintains that this fee is intended to deter licensees from submitting late notifications and to promote the integrity of the Authority’s database and records.
 - 5.7.2. No guidance is provided as to the proposed amount of this fee.
 - 5.7.3. ISPA understands that administrative fees charged by the Authority must be related to the cost incurred: the lateness of a submission does not result in additional costs so there is no cost-based justification for the proposal.
- 5.8. ISPA does not support the proposed sub-regulation 2(3), which seeks to prohibit licensee from changing their name or trading name “to the extent that it may be in conflict or be confused with the name and/or trade name of another licensee”.
- 5.8.1. ISPA’s submission is that the Authority should not involve itself in making decisions of this nature. The Authority as a communications regulator does not have the level of expertise in intellectual property law and competition law to make legal determinations relating to passing off and unfair competition.
 - 5.8.2. This is more properly a matter for the Companies and Intellectual Property Commission (CIPC), the competition authorities and the courts. As regards a change of name CIPC will have already undertaken its own vetting process.
 - 5.8.3. In ISPA’s view the Authority would expose itself to potential legal liability were it to assume such a role.

6. Substitution of Annexure B

6.1. Structure of the licence

6.1.1. The explanatory memorandum states that the new licence format is intended to “simplify the licence template” by separating the licence into 2 distinct parts:

6.1.1.1. Part 1: reflecting information the applicant is required to submit during the application process “where applicable for the Authority’s approval” and the term of the licence.

6.1.1.2. Part 2: reflecting information that the licensee is required to lodge to the Authority in the form of a notification to update the changes as provided for in Part 2 of Annexure B.

6.1.2. ISPA notes that applying the logic of this distinction consistently would require that the name of the licensee be reflected in Part 2, as the amendment of the name of the licensee is subject to a notification process.

6.1.3. Further, not all changes in ownership structure require an application, i.e. it is possible for details of ownership to fall both within Part 1 (where the change amounts to a change in control) and Part 2 (where the change does not amount to a transfer of control).

6.1.4. This position is not changed by the process to be introduced as proposed in the Draft Process and Procedure Amendment Regulations involving the assessment of a proposed transaction by the Authority. The ECA is explicitly clear that an application is required only where there is a transfer of control. The same consideration applies to ownership held by persons from historically disadvantaged groups.

6.2. Clause 2: Licence Period

6.2.1. The term “Effective Date” is capitalised in the definition proposed in Regulation 1: it should be capitalised when used in clause 2.1 of Annexure B.

6.3. Clause 3: General Licence Terms

6.3.1. ISPA is uncertain what terms are to appear in this section, noting that universal service and access obligations are recorded in separate regulations. In addition, terms which are subject to change should ideally be contained in an annexure. ISPA notes that regulation 11 (Specific terms and conditions) has not been amended.

6.3.2. It appears that this clause would be better titled “Specific Licence Terms”.

7. The existing schedule to individual licences

- 7.1. With reference to the preceding submission, ISPA understands that it may be that the Authority intends “General Licence Terms” to refer to the terms and conditions currently found in the schedule to individual ECNS and ECS licences issued by the Authority.
- 7.2. These terms and conditions relate to:
 - 7.2.1. The licensee’s trading name
 - 7.2.2. Geographic coverage of services
 - 7.2.3. Rights and obligations
 - 7.2.4. Licence Fees, and
 - 7.2.5. Force majeure.
- 7.3. ISPA submits that it is a significant oversight and omission that these terms and conditions are not being reviewed as part of this process.
 - 7.3.1. The origins of these terms and conditions is not clear and ISPA is unaware of the regulatory process which resulted in their drafting and finalisation.
 - 7.3.2. In ISPA’s view certain of these terms and conditions are inconsistent with the ECA.
 - 7.3.3. For example, paragraph 3.1 of the terms and conditions for an IECNS licence purports to authorise the holder of the licence to “construct, maintain and operate an electronic communications network, as well as provide electronic communications network services”. This is not correct in law and with reference to the definition of “electronic communications network services” in section 1 of the ECA: an ECNS licence is not required to construct or maintain an electronic communications network.
- 7.4. ISPA requests that the Authority:
 - 7.4.1. Clarify what terms will be included under “General Licence Terms”.
 - 7.4.2. Confirm that it will review the terms and conditions which currently form part of the IECNS and IECS licence documents¹.

8. Substitution of Schedule 3, Regulation 2

- 8.1. ISPA refers to its comments above in respect of proposed amendments to Schedule 2, Regulation 2.

¹ The same considerations apply to class ECNS and class ECS licences.

9. Amendment of Schedule 3, Regulation 9

- 9.1. ISPA notes the extensive information submissions to be made to the Authority under sub-regulations 9(1) and 9(1A). The rationale advanced for this information collection is that it will eliminate information asymmetries.
- 9.2. Under the proposed sub-regulation 9(1)(b) IECS licensees must provide:
 - 9.2.1. The name of the new product or service, or the amended or terminated service.
 - 9.2.2. The objective and reason(s) for launching a new product/service or amending or terminating a service.
 - 9.2.3. The effective date of the new product or service or amendment or termination of a product or service.
 - 9.2.4. The price and all other fees applicable to the product or service.
- 9.3. Under the proposed sub-regulation 9(1A) IECS licensees must provide:
 - 9.3.1. the name of the product or service being terminated;
 - 9.3.2. the objective and reason(s) of termination of a product or service; and
 - 9.3.3. the effective date of termination of a product or service.
- 9.4. In addition, under the existing sub-regulation 9(2), IECS licensees must submit on a bi-annual basis a record of actual services provided and tariffs charged over the preceding six months.
- 9.5. ISPA submits that sub-regulation 9(1) should not deal with termination of a product or service as this is comprehensively covered under sub-regulation 9(1A).
- 9.6. ISPA wishes to bring to the Authority's attention a practical difficulty in complying with this regulation:
 - 9.6.1. The notification obligations and corresponding time periods set out in sub-regulations 9(1) and 9(1A) are only applicable to the holders of IECS licences.
 - 9.6.2. They do not apply to IECNS licensees, such as the fibre network operators (FNOs) which provide wholesale network access services to ISPs, allowing ISPs to provide ECS such as Internet access and voice services to their subscribers.
 - 9.6.3. FNOs also change their products and services which requires ISPs to change their products and services, but FNOs are not subject to a regulatory notification obligation. During the COVID-19 state of disaster most FNOs sought to benefit consumers by increasing their line speeds at no cost: this was done with no notice to ISPs active on their networks. In these circumstances an ISP which is an IECS licence could not comply with sub-regulation 9(1).

9.7. ISPA requests that the Authority:

- 9.7.1. Carefully consider the utility to the Authority of each item of information requested above, noting the cost to licensees of preparing and submitting this information and of dedicating a resource for this purpose.
- 9.7.2. Consider whether SME licensees with an annual revenue from licensed services lower than a determined amount can be exempted from complying with this obligation.

10. Substitution of Annexure C

10.1. ISPA refers to its comments in respect of the substitution of Annexure B.

11. Errata:

- 11.1. The heading to Schedule 2² incorrectly references class electronic communications network services.
- 11.2. The heading to Schedule 3³ incorrectly references class electronic communications services.
- 11.3. Annexure B, clause 1.3⁴: "Ownership held by persons from historically disadvantagedu groups:"
- 11.4. Annexure C, clause 1.3⁵: "Ownership held by persons from historically disadvantagedu groups:"

Conclusion

12. ISPA trusts that the above is of assistance.

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³ Page 19 of the pdf

⁴ Page 17 of the pdf

⁵ Page 25 of the pdf