MTN Submission

Proposed Amendments to the Regulations on the Processes and Procedures in Respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences and Applications for Special Temporary Authorisations in Terms of the Electronic Communications Act, 2005, as Amended

13 May 2022

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1. Introduction

1.1 On 24 March 2022, the Independent Communications Authority of South Africa (the "Authority") published draft regulations (the "Draft Regulations"), in Government Gazette No. 46084 which are intended to amend the Processes and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences and applications for Special Temporary Authorisations in terms of the Electronic Communications Act, 2005, as amended (the "Process Regulations"), together with a notice inviting interested persons to submit written representations in respect of the Draft Regulations by 15 May 2022.

1.2 Mobile Telephone Networks Proprietary Limited ("**MTN**") welcomes the opportunity to make submissions to the Authority on the Draft Regulations. The purpose of these submissions is to set out MTN's concerns in respect of the Draft Regulations, MTN's concern as to the commercial viability of the changes contemplated in the Draft Regulations, as well as the manner in which the changes in the Draft Regulations negatively impact the interests of historically disadvantaged persons **("HDPs")** in the information communications technology ("**ICT**") sector. MTN's submission also makes proposals on how to strengthen some of the Authority's proposed amendments.

1.3 MTN hopes that the Authority will elect to hold a public hearing to enable all parties to make oral submissions in regard to the issues relating to the Draft Regulations. If the Authority elects to do so, MTN would appreciate the opportunity to make such oral presentations at the public hearings.

1.4 MTN submits that the ICT sector requires further transformation and recognises that the intervention of the Authority in this context is vital. MTN supports the position that meaningful participation by historically disadvantaged groups ("**HDGs**") in the ICT sector is not only required but is essential to the ICT sector as a whole. MTN further submits that regulations (or proposed amendments to existing regulations) by the Authority must be congruent with not only the powers of the Authority, [as set out in the Electronic Communications Act, 36 of 2005 (the "**ECA**"), the Independent Communications Authority of South Africa Act, 13 of 2000 (the "**ICASA Act**") and other relevant statutes], but also the overall objectives of the transformation of South Africa as a whole – to have meaningful economic participation by the majority of the population.

1.5 MTN is concerned about the proposals in the Draft Regulations regulating changes in shareholding of licensees as MTN believes that these restrictions create a number of legal and regulatory challenges,

place an unnecessary administrative burden on licensees, and will discourage future investment in the South African ICT sector.

1.6 While these submissions will deal with a number of issues arising from the Draft Regulations, our main focus will be on the provisions which have a significant impact on the definition of HDGs, and the changes in shareholding of licensees. MTN is furthermore concerned that the proposed amendments will make the draft regulations problematic for a number of reasons as will be elaborated on below.

1.7 MTN has therefore structured its submission as follows:

1.7.1 Part A: MTN's views on amendments to the definition of HDGs in the Draft Regulations; and

1.7.2 Part B: MTN's views concerning the proposed notifications by licensees to the Authority in instances where there are any changes in shareholding of the licensees.

2. Part A: Amendments to the definition of HDGs and HDPs

2.1 The Draft Regulations have proposed to substitute the existing definition of 'Historically Disadvantaged Persons ("HDPs")' in the Process Regulations.

2.2 The **existing definition** of HDP in the Process Regulations is as follows:

'*"historically disadvantaged persons" means South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds*'

2.3 The **new definition** proposed by the Authority in the Process Regulations is as follows:

'*"Historically Disadvantaged Persons ("HDP") – means women, persons with disabilities and youth, who before the Constitution of the Republic of South Africa, 1996 came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion"*'

2.4 The proposed new definition is problematic in both principle, and practice. The Draft Regulations impose new 'qualification' criteria that must be met before a person may be considered an HDP. Specifically, the qualifying criteria imposed by the Draft Regulations requires that a black person, woman, youth, or person with a disability must have been disadvantaged by unfair discrimination on the specific basis of race, gender, disability, sexual orientation, or religion *prior* to the commencement of South Africa's Constitution in 1996. It is unclear why

the Authority has created this additional qualification, as it suggests (for example) that anyone born after 1996 cannot, or does not, suffer any disadvantage or prejudice as a consequence of their race, gender, age, or disability. The inadvertent consequences and implications of this proposed new definition are highly concerning for MTN.

2.5 The qualification criteria proposed by ICASA perpetuates a grave indignity on those HDP's and HDG's who, in terms of the proposed regulations, now must *prove* and demonstrate their historical disadvantage to the Authority, without any form of guideline or framework, when such disadvantage is systemically patent. On a practical level, this type of regulation falls outside of the purpose, powers, and purview of the Authority.

2.6 The proposed amendments to the definition of HDPs disregard the fact that discrimination is systemic and did not (and has not) simply disappeared with the commencement of the South African Constitution. This is further evidenced by the fact and example that superior legislation; the Broad-Based Black Economic Empowerment Act 53 of 2003 (the "**BBBEE Act**") was assented to in 2004 (well after 1996). This BBBEE Act explicitly recognises that "*South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills; and South Africa's economy performs below its potential because of the low level of income earned and generated by the majority of its people*;[1]"

2.7 They arbitrarily discriminate against persons (who would otherwise qualify as HDP's or HDG's, based on their age, by excluding those who were youth (or who were born) after 1996. They further suggest that anyone born after 1996 does not suffer any disadvantage or prejudice as a consequence of their race, gender, age, or disability.

2.8 The proposed amendments exclude black persons, women and persons with disabilities and youth from the definition of HDPs if they are not able to demonstrate that they were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion prior to 1996, or if they were born after 1996.

2.9 MTN also notes that all South African citizens that are black people (Africans, Indians, and Coloureds), women, or people with disabilities presently qualify as HDPs/HDGs under the current definition of the HDP in the Process Regulations. These same people who already qualify, will be required to now demonstrate unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion before 1996 in

[1] Preamble to the Broad-Based Black Economic Empowerment Act 53 of 2003

terms of the additional qualification introduced in the Draft Regulations. Practically speaking, this requirement imposes an onerous burden on licensees to demonstrate evidence of discrimination by its qualifying shareholders on a case-by-case basis, and it is unclear how a licensee would, in practice, discharge this burden (more especially given the recent implementation of the Protection of Personal Information Act, 2013 ("**POPIA**")).

2.10 MTN is of the view that the proposed definition of HDP (or HDG) in the Draft Regulations is narrow, subjective and has the potential, for example, of excluding a large number of black persons, women, persons with disabilities and youth from the definition of HDPs if they cannot demonstrate that they were previously disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion prior to 1996. This is particularly problematic where black people are concerned as South African black people were by law historically disadvantaged on the basis of race. This has led to several measures being put in place by the government post 1994 (and post 1996) to redress this historical disadvantage. Accordingly, requiring a black person to demonstrate disadvantage by unfair discrimination (which is what is currently contemplated in the Draft Regulations) would fly in the face of what is commonly understood concerning race relations in South Africa. MTN cannot reconcile the proposed amendments to the Process Regulations with current South African jurisprudence concerning unfair discrimination and race.

2.11 On a further practical level, MTN is concerned that the Draft Regulations do not set out the criteria to be applied by licensees in determining whether a black person, woman, youth, or person with a disability was previously disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion prior to the commencement of South Africa's Constitution in 1996. As noted above, the current Process Regulations define HDPs as "*South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds.*" In terms of the Process Regulations, a person automatically falls within the category of an HDP where that person is a black person, a woman, or a person with disabilities. The current Process Regulations do not include a reference to these persons having been disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion prior to 1996.

2.12 Therefore, the additional qualification wording included in the Draft Regulations will exclude black people, women, youth, or people with disabilities from qualifying as a previously disadvantaged group unless they can prove that they were previously disadvantaged prior to 1996.

MTN is not able to determine, from the Draft Regulations, the manner, or criteria in which the Authority will assess whether a person was unfairly discriminated against on the basis of race, gender, disability, sexual orientation or religion vis-à-vis persons and groups who were not unfairly discriminated against before 1996.

2.13 Given the uncertainty on the criteria that must be applied in demonstrating previous disadvantage pursuant to unfair discrimination, it is currently unclear how licensees such as MTN, would themselves be able to definitively establish which of its shareholders would constitute HDPs as defined in the Draft Regulations. As noted above, MTN believes that the verification required to determine whether its shareholders qualify as HDPs, would infringe on the dignity of shareholders, and would involve a significant infringement of the privacy of its shareholders, more especially given the recent commencement of POPIA and South Africa's constitutional right to privacy. Practically speaking, should a factual determination be required in respect of each individual shareholder, this would, in MTN's view, amount to an insurmountable administrative burden for licensees. The absence of clear criteria has the potential to create confusion and a multiplicity of decisions, as opposed to legal consistency.

2.14 MTN also notes that the additional qualification seems to suggest that unfair discrimination ceased following 1996. This is because the additional qualification (i.e., that persons must have been disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion before 1996) excludes every black person, woman, youth, and person with disabilities, who was disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion ***post*** 1996 from qualifying as HDPs. As mentioned above, this suggests that unfair discrimination on the basis of race, gender, disability, sexual orientation, or religion could have only occurred before 1996 and did not continue after 1996 since the current reading seems to presume that the said groups automatically became "advantaged post" 1996.

2.15 MTN is unable to reconcile this amendment or perspective with the objective of transforming the ICT sector, which recognises entrenched and systemic discrimination against HDP's, well after 1996. On the contrary, MTN believes that this amendment is exclusionary as it excludes persons who would otherwise have qualified, but for the exclusion of individuals that have been disadvantaged by unfair discrimination after 1996. MTN believes the reference to 1996 to be arbitrary, as it suggests that unfair discrimination and the effects of unfair discrimination ceased after 1996.

2.16 Summarily put, the proposed amendments essentially amount to a new form of "pencil testing".

2.17 In practice, the additional qualification contemplated in the Draft Regulations has the potential to reduce the HDP equity ownership of a licensee in two respects:

2.17.1 first - where a licensee's equity ownership structure comprises of black persons, women, persons with disabilities and youth, who were born before 1996 but who cannot prove disadvantage by unfair discrimination. This issue is also exacerbated by the fact that the proposed amendments do not contain or provide any guidelines or framework as to what would qualify as proof, or sufficient evidence of disadvantage prior to 1996 meaning that a person who has experienced significant disadvantage is at a loss as to how to satisfactorily prove it to the Authority; and.

2.17.2 second - where the licensee's HDP equity ownership structure comprises of black persons, women, persons with disabilities and youth, who were born or disadvantaged by unfair discrimination post 1996.

2.18 Somewhat ironically, given MTN's concerns set out above, the Draft Regulations also seem to have broadened the definition of HDPs by including persons that experienced unfair discrimination based on sexual orientation and religion as additional categories of people that can qualify as HDPs (subject to demonstrating disadvantage on the basis of unfair discrimination). In this regard, an argument can be made that the broadened definition allows certain persons that do not fall within the ambit of the definition of HDGs under the current Process Regulations, to be considered as HDGs under the Draft Regulations. This is because the Draft Regulations may also be interpreted to broaden the ambit of HDGs when contrasted against the current definitions under the Process Regulations.

2.19 MTN is concerned that broadening the definition of HDP in this fashion (and calculating HDP ownership on this basis) will prove immensely difficult for licensees, as licensees will be required to obtain private information from their shareholders pertaining to the sexual orientation and religion of that shareholders, together with disclosures relating to unfair discrimination experienced prior to 1996. MTN believes that these disclosures are overly invasive and undermine the privacy rights of shareholders (for example, a constitutional challenge may arise where a licensee requires details concerning the religion of its shareholders in order to disclose and utilise these details for purposes of calculating HDP equity ownership). In addition, the requirement to

process Special Personal Information as defined in section 26 of POPIA may go beyond the condition of process limitation[2]. In practice, this line of questioning runs the risk of echoing pre-democracy identity policing; the very damage of which transformation seeks to eliminate.

2.20 MTN notes that the explanatory memorandum issued by the Authority in conjunction with the Draft Regulations does not elaborate on the reasons necessitating the substantial amendments to the HDP definition, save to state that the aim is to align the definition with that contained in the Class Process and Procedures Regulations.[3] The need for alignment does not, in MTN's view, counteract the significant uncertainty and harm created by the amendments in the Draft Regulations.

2.21 MTN submits that the negative implications of the Draft Regulations, as identified above, will be significant and may result in consequences that have not been intended by the Authority. MTN urges the Authority to address these challenges prior to the publication of the final version of the Draft Regulations.

3. Part B: Notification of licensee shareholding changes

3.1 The Draft Regulations propose to amend subsections (2) and (3) of regulation 14A of the Process Regulations to read as follows:

"*(2) A licensee must submit the notice within fourteen (14) working days of the change occurring where:*

(a) name, and/or trading name or contact details of the licensee changes;

(b) type of the service/s provided in terms of the licence (only applicable to ECS and ECNS);

(c) <u>shareholding (Refer to 14 (C) below);</u>

(d) Principal place of business; and

(e) Postal address.

[2] Condition 2, section 9 of POPIA

[3] Class Licensing Processes and Procedures Amendment Regulations, 2021, Government Notice No. 144, Government Gazette No. 44336 of 26 March 2021

(3) A notice submitted to the Authority in terms of sub-section (2), outside the prescribed 14 days, must be accompanied by a fee as may be determined by the Authority from time to time" (our emphasis).

3.2 Regulation 14C of the Process Regulations is amended by the Draft Regulations to read as follows:

(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)."

3.3 The effect of the proposed amendments in the Draft Regulations is to require every licensee to notify the Authority of every change of shareholding, ***however minute***, and thereafter to suspend such a change until such time as the Authority either:

3.3.1 indicates that the change in shareholding does not amount to a change of control; or

3.3.2 indicates that the change in shareholding does amount to a change of control, and thereafter considers the matter as an application for a change of control.

3.4 MTN notes that the Authority has not prescribed any timelines which will be applicable to its consideration of whether the change in shareholding communicated to the Authority amounts to a change in ownership or control, or not. This means that the Authority is under no obligation to communicate its decision in this regard within certain timeframes. Consequentially, the absence of clearly communicated or prescribed timeframes has the potential to place changes in the ownership of shareholders in limbo. This makes the regulation, in its current form, undesirable, as it promotes regulatory uncertainty. In order to cure this defect, MTN proposes that the regulation should include timeframes in

which the Authority will communicate its decision to Licensees, such timeframes should not exceed a period of two weeks from receipt of change notification.

3.5 MTN has a number of additional concerns in respect of the proposals made by the Authority regarding a change of shareholding (and the subsequent decision process), which we summarise as follows:

3.5.1 unless the transaction constitutes a change of control of the licensee, the ECA contains no empowering provision that would allow the Authority to involve itself in transactions between shareholders of a Licensee and third parties, which therefore make such draft regulations susceptible to judicial review.

3.5.1 there is no internal mechanism or remedy by which a licensee may readily query or challenge a decision by the Authority, that a change in shareholding amounts to a change of control (in instances where the licensee disputes that a change of shareholding amounts to a change of control of a licensee). The absence of such an internal mechanism infringes on a number of administrative rights as well as eroding legal and administrative consistency and predictability, which is a necessary component for the development of the ICT sector. This would result in judicial review becoming the only remedy available to a licensee or shareholder. This intervention is unnecessary as it would add to the cost of doing business and inhibit investment in the ICT sector.

3.6 We turn now to address each of the aforementioned concerns below.

3.7 It is trite that section 13(1) of the ECA regulates the transfer of control of an individual licence and that control may be transferred through the change in shareholding of a licensee. Specifically, section 13(1) of the ECA states that:

"*An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, <u>and the control of an individual licence may not be assigned, ceded or in any way transferred</u>, to any other person without the prior written permission of the Authority*."

Section 13(3) of the ECA prescribes the Authority's power to create regulations concerning the ownership or control of individual licensees. Specifically, section 13(3) of the ECA states that:

"*The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to –*

(a) *promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment; or*

(b) *promote competition in the ICT sector*."

3.8 Section 13(5) of the ECA guides the Authority as to the manner in which it may exercise its regulation-making power for the purposes of section 13(3), stating:

"*Regulations contemplated in subsection (3) and (4) must be made –*

(a) *with due regard to the objectives of this Act, the related legislation and where applicable, any other relevant legislation; and*

(b) *after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to, a market study*."

3.9 Section 13(3), read with section 13(5), of the ECA does not contemplate that the Authority may seek to regulate the manner in which the shareholding of licensees may change in the absence of the change of control of a licensee (which is then regulated by section 13(1)). Consequently, it is unclear on which empowering provision the Authority relies on to exercise its' power, to approve (or consider) every share transaction concluded by the shareholders of licensees. The absence of such an empowering provision leaves the Draft Regulations susceptible to judicial review.

3.10 It is of course trite that the Authority must act in a manner that protects and advances the objects of the ECA, and furthermore, that it cannot act in a manner contradictory to any other law. Section 2 of the ECA sets out the object of the ECA, which include (among others):

(c) *encourage investment, including strategic infrastructure investment, and innovation in the communications sector; ...*

(y) *refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public.*"

3.11 MTN submits that the proposed amendments to the Process Regulations which require the Authority to approve (or at least consider) every share transaction of a licensee, prior to its implementation, conflicts with the above-stated objects of the ECA, because:

3.11.1 given the additional regulatory hurdles that must be overcome in every transaction, the proposed amendments create a bureaucratic obstacle course, and discourage investment in the ICT sector. Regulatory delays are antithetical to a fast-paced innovative environment which seeks to welcome investment. MTN submits that increases to the time required by the Authority to make any decisions concerning licensees will be devastating to the ICT sector as a whole; and

3.11.2 the proposed amendments interfere with the ability of licensees to issue shares to raise working capital, notwithstanding that the licensees may not undergo a change of control as a result of such an issuance.

3.12 Taken to their logical conclusion, the proposed amendments in the Draft Regulations would be overly burdensome on all licensees that are public companies. Public companies (whose shares are freely tradeable by members of the public), would be required to notify the Authority of every share transaction, which is an onerous and impossible administrative burden. Moreover, there is no means by which such a licensee's shares would be freely tradeable by the public, without placing the licensee in breach of its obligations to notify the Authority in advance of any such transfer.

3.13 It is MTN's intention to at all times remain compliant with the laws and regulations of South Africa, however the proposed amendments create a situation where licensees may be found to be non-compliant as it will be impossible for a licensee to perform in compliance with the proposed amendments. MTN is of the view that the Authority may not be aware of these unintended outcomes of the amendments to the Process Regulations and hopes that the Authority will heed calls to reconsider its proposed amendment to ensure that the transformation of the ICT sector is as smooth, practicable, and efficient as possible. It is submitted that two solutions to this issue could be that there be (i) an exemption for licensees that are public companies, or (ii) including a *de minimis* or similar qualification.

3.14 MTN also submits that the mechanisms by which the Authority seeks to "consider" all changes of licensee shareholding are so unclear and vague. Where a licensee undergoes a change of control, it is afforded an opportunity to provide the Authority with context as to the reason for the change of control and to make submissions to the Authority. The Authority may call for further reasons from the licensee and consider these submissions prior to reaching a decision. This does not hold true for the shareholding change considerations contemplated in the Draft

Regulations. Where a licensee notifies the Authority of a change of shareholding:

3.14.1 the licensee is prohibited from permitting such a change of shareholding from occurring until such time that the Authority provides its approval;

3.14.2 there is no timeframe provided by the Authority to respond to the licensee's notification;

3.14.3 the Authority is not required to consider submissions by the licensee (or the current and/or prospective shareholders); and

3.14.4 the Draft Regulations do not set out the framework of factors that will be taken into account by the Authority in determining whether a change in shareholding amounts to a change in ownership/control.

3.15 MTN is of the view that the ECA's provisions concerning changes of control (and the subsequent jurisprudence that has developed on this matter) are clear. If a licensee flouts these provisions, the consequences for such non-compliance are clear. The Authority's attempts to impose/insert itself as an adjudicator in respect of every share transaction that occurs concerning a Licensee, is not only unnecessary but it goes beyond the powers granted to the Authority under the ECA and related legislation. Moreover, these proposals (which in effect amount to further administration by the Authority) will have the effect of making the ICT sector less attractive to investors thus reducing investment and innovation in the ICT sector. This will consequently be prejudicial to the commercial activities of licensees, and ultimately to the detriment of subscribers and customers. It can therefore not be said that these proposals made by the Authority adhere to the fundamental principles of South African administrative and constitutional law.

3.16 For the reasons set out above, MTN submits that the amendments to regulation 14A and 14C, as set out in the Draft Regulations, should be removed, alternatively amended taking into consideration our submissions.

4. Conclusion

4.1 MTN's observations in the draft regulation are critical and are of concern to MTN as they will have adverse impact on the commercial security of our operation, and the industry as a whole. MTN pleads with the Authority to reconsider its proposals in the draft amendment to avoid the unintended consequences as outlined in our submission. Ultimately, the fundamental goal of any regulation should be to provide

regulatory certainty and reduce regulatory burden to licensees in order to make the South African ICT sector an investment haven. The proposed amendments do the opposite, and it should be avoided.