



By email

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5 May 2022

Dear Sir

**RAIN'S COMMENTS 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)**

**I Introduction**

1. On 16 March 2022, the Independent Communications Authority of South Africa (**ICASA**) published the Draft Regulations for consultation by way of a notice in Government Gazette 46050 setting out its intention to amend the current Regulations regarding Standard Terms and Conditions for Individual Licences under Chapter 3 of the Electronic Communications Act 36 of 2005, 2010 (the **Standard Terms and Conditions**).
2. Rain Proprietary Limited (**rain**) is grateful to ICASA for the opportunity to submit its views on the potential impact of the proposed changes in the Draft Regulations and ICASA's explanatory memorandum on (i) rain itself as a holder of individual service licences in terms of the Electronic Communications Act 36 of 2005 (the **ECA**); and (ii) on individual licensees generally.

**II The proposal to repeal regulation 2(1)(c) of the Standard Terms and Conditions**

3. A significant change in the Draft Regulations is the proposed deletion of regulation 2(1)(c) in Schedules 1, 2 and 3 of the Standard Terms and Conditions which currently require individual licensees to notify ICASA of any changes to their shareholding in the prescribed form. As the Draft



Regulations currently read, rain notes that ICASA has not yet included a proposed substitution and/or amendment of this requirement. As such, 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 rain, will not have to notify ICASA in terms of the Standard Terms and Conditions of any changes to their shareholding structures going forward. However, holders of individual licences will still need to notify ICASA of shareholding changes within 7 days in terms of regulation 14A(2)(c) of the Individual Licensing Processes and Procedures Regulations, 2010 (the **Processes and Procedures Regulations**), notwithstanding ICASA's proposal to extend the notification period to 14 days in respect of all other matters that must be notified to ICASA in terms of the Standard Terms and Conditions.

4. In addition, and although ICASA has not (yet) proposed to repeal the relevant requirement in the Processes and Procedures Regulations to notify ICASA of shareholding changes, ICASA appears to suggest, in its explanatory memorandum, that any changes whatsoever to an individual licensee's shareholding will instead be subject to ICASA's prior approval and that the Processes and Procedure Regulations will be amended to provide for this.
  
5. rain thinks that ICASA should clarify whether it intends to amend the Processes and Procedures Regulations in the future to:
  - 5.1. repeal the requirement to notify ICASA of any changes to an individual licensee's shareholding similar to what it has done in the Draft Regulations; and/or
  - 5.2. insert a requirement for individual licensees to obtain ICASA's approval for any changes to shareholding and, if so:
    - 5.2.1. whether such approval should be obtained beforehand (i.e. before any changes are implemented as opposed to ex post-facto as is currently the case with the notification process in terms of the Standard Terms and Conditions);
    - 5.2.2. whether the prescribed process that will need to be followed will be separate 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, or whether it is intended that the same or a similar process will apply.



6. rain's views on the above are set out further below. 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.
  
7. rain notes that direct or indirect changes to a licensee's shareholding structure pursuant to which a person acquires direct or indirect control of a licence-holder already require approval in terms of section 13(1) of the ECA read with regulation 11 of the Processes and Procedures Regulations. As ICASA has confirmed 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**), the transfer of control approval process will apply whenever someone acquires control rights in a licensee, irrespective of the size of the shareholding or ownership stake that is acquired. For example, where a person holds 49% of the shares (and associated voting rights) in a licence-holder, and then acquires 1.1% more it will move from a position of non-control to a position of control. As such, the transaction in terms of which the person acquires 1.1% of the shares in the entity will require ICASA's prior approval even though the percentage of shares acquired is so small.
  
8. It is not entirely clear whether ICASA now intends to extend the approval requirement that already applies to transfers of control to *any changes* to a licensee's shareholding structure. If this is the intention, this will have significant and detrimental implications for holders of individual licences such as rain. These include the following:
  - 8.1. It is **unclear** 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 simply interpose a special purpose vehicle (**SPV**) intermediary entity which will hold 100% of the shares in the licensee and in which the shareholders would hold shares. This would mean that the approval requirement would never be triggered as there would never be changes to the direct shareholding structure of a licensee as any changes would take place above the SPV level. If, on the other hand, the requirement will apply 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**.



8.2. Such a requirement would introduce the potential for significant **delay** in licensees being able to implement shareholding changes. rain understands that ICASA's current timelines to approve applications for transfers and transfers of control in terms of section 13(1) of the ECA are generally between 6 and 18 months. It would not be **feasible** for shareholders in licensees to have to wait that long before implementing shareholding changes that do not in any way change the control structure of a licensee.

8.3. Some licensees undergo frequent shareholding changes. For example, the shareholder bases of listed companies change on a daily if not an hourly basis. The percentage shareholding of the various shareholders fluctuate frequently. It would not be practical or feasible for rain to have to obtain approval from ICASA before such changes are implemented. Similarly, licensees or their shareholders often undertake rights issues to raise additional funding. The changes to the licensee's effective shareholding structure may be very minor. It would not be practical or feasible for rain to have to obtain approval from ICASA before such changes are implemented, particularly given the potential for delay.

8.4. 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 ICASA and the relevant licensee. Licensees would have a significantly higher compliance burden, which would be costly. Applications take a long time for ICASA to consider, evaluate and approve. This will undoubtedly frustrate a licensee's business transactions and/or may possibly result in licensees unintentionally finding themselves in contravention of the proposed requirement.

8.5. In addition to the practical implications of a new shareholding approval requirement for licensees such as rain (as set out above), the inclusion of a requirement to get ICASA's approval for any shareholding change would not be in line with the ECA and likely would not achieve the stated objective of combatting abuse of the approval requirements that apply to changes to the control of a licensee. In this regard:

8.5.1. The rationale for the requirement in section 13(1) of the ECA that ICASA must approve a transfer of control of an individual licence is clear. Where a person acquires a controlling interest, including material influence, in an individual licensee, it makes sense that ICASA, as the regulator, should evaluate the suitability of the entity that will have control. A licence is a personal right and, just as ICASA evaluates the persons that control a licence applicant at the time that a licence is granted to ascertain whether the objectives and



requirements of the ECA are met, it is appropriate that ICASA has similar powers when someone acquires a controlling interest in an entity that already holds a licence. By contrast, there is no reason that minor shareholding changes, where the person acquiring or selling shares that have no impact on the control of the licensee, should require approval. The ECA does not require such approval, whereas approval is required for transfers of control of individual licences. Creating a requirement for ICASA to approve minor shareholding changes would therefore go beyond the intention and objectives of the ECA. For ICASA to involve itself in minor shareholding changes that will impede the ability of licensees to operate effectively and nimbly, is contrary to section 2(y) of the ECA which provides that ICASA must “...refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public”.

8.5.2. To the extent that it may intend to do so, ICASA cannot expand the scope of what is required by the ECA in terms of regulations. The ECA requires ICASA to approve transfers of control of individual licensees; the ECA does not require ICASA to approve shareholding changes that do not amount to transfers of control. There is a reason for this, as discussed above. ICASA cannot impose a requirement in regulations (which are delegated legislation) that goes beyond what the empowering legislation provides for. By imposing requirements that it is not empowered to impose or that are not in line with the empowering legislation, ICASA will be acting *ultra vires*.

8.5.3. The introduction of a new requirement that any and all shareholding changes must be approved is not likely to make licensees more compliant. Licensees that already flout the requirements and that do not come to ICASA for approval when they should are not likely to come to ICASA for approval simply because a new approval requirement is introduced. As such, there would be little point in introducing such a requirement, particularly given the harm that such a requirement is likely to cause. There are other ways to get licensees to comply with the requirement to get approval for transfers of control of individual licences, that are consistent with the ECA and far less damaging to the sector. These are addressed in Section III below.



### III Alternative to requiring individual licensees to get ICASA's approval for any shareholding changes

9. In its explanatory memorandum, ICASA notes that the notification requirement has been subject to abuse and has been incorrectly applied by some licensees in cases where it alters ownership. As a result of this, ICASA has not been able to adequately monitor changes in shareholding in individual licensees, particularly in relation to changes of ownership and control over time. In ICASA's view, this is because the changes in a licensee's ownership has the effect of changing the licensee's shareholding structure. If ICASA is concerned that licensees that should be approaching it in terms of section 13(1) of the ECA for prior approval of transactions that constitute transfers of control are not complying with the requirement, there are other ways to address this that would be more proportionate to the harm that ICASA is trying to address. For example:

9.1. ICASA should clarify (ideally following a consultation process and in line with the principles in Annexure A to the Ownership and Control Regulations) what types of transactions are transfers of control that require its approval. If licensees are aware of rules that are clear in relation to transfer of control, they should comply with them and be subject to a penalty if they fail to do so. Accordingly, ICASA should be clear about what, in its view, constitutes a transfer of control. As discussed above, the size of the ownership stake that is acquired is not determinative of whether approval for a transfer of control in terms of section 13(1) of the ECA is required or not. Currently under the existing regime a licensee will need to come and get ICASA's approval when someone acquires *control* of the licensee. (This is clear from the explanation of ICASA's understanding of control in Annexure A to the Ownership and Control Regulations.) It does not matter how big or small the stake is that is acquired or the period over which a person increases its shareholding. What matters is whether and when the person acquires *control*. As discussed in the example above, a person could acquire a 1.1% shareholding interest in a licensee and the licensee would need to come to ICASA for approval, because the acquisition takes the person from a position of no-control to a position of control.

9.2. rain is aware that there have been debates between ICASA and industry stakeholders on whether a particular transaction amounts to a transfer of control or not. For example, in the context of a matter involving rain (specifically in the matter of Neology Proprietary Limited (**Neology**) before the Complaints and Compliance Committee, case no: 299/2018)<sup>1</sup>, ICASA has previously argued that the acquisition of shares by Multisource Critical Communications

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<sup>1</sup> Accessible at <https://www.icasa.org.za/uploads/files/Neology-299-2018-12June2019.pdf>.



Proprietary Limited (**MCC**) that resulted in MCC holding more than 50% of the shares in Neology, an individual licensee, required ICASA's approval in terms of section 13(1) of the ECA, even though MCC already had control of the licensee and, at the time it acquired control prior to the amendment of the ECA in 2014, ICASA's approval was not required. Neology had a different view and did not think that ICASA's approval was required. Neology did not try to abuse the approval requirement; it had a different view on what required approval. For this reason, rain submits that ICASA should initiate an inquiry to get input on what transactions are transfers of control and what are not and should develop clear guidelines on this to guide the industry.

9.3. ICASA should impose a different sanction where licensees fail to comply with the transfer of control requirements. The sanctions that have been proposed by the Complaints and Compliance Committee and (we assume) imposed by ICASA where a transfer of control has been found to have taken place without ICASA's prior approval, have simply been to require the unwinding of the transaction. This is generally not practically feasible. ICASA should consider instead imposing sanctions similar to the sanctions imposed by the Competition Tribunal where there is prior implementation of a merger. In general, a fine is imposed and licensees are required to apply for merger approval. Only if the approval is not granted must the transaction be unwound. The threat of a fine is likely to compel better compliance.

9.4. Under the current regime, changes to shareholding structures that happen over time already need to be approved by ICASA in terms of section 13(1) of the ECA as soon as a particular shareholder will acquire a controlling stake (including a negative controlling stake as described in Annexure A to the Ownership and Control Regulations). As such, it is not entirely clear what ICASA means by the statement that it wants to monitor and manage changes in shareholding "specifically to the extent that it changes ownership and control over time". ICASA already has this power.

#### **IV General proposals in the Draft Regulations**

10. We are of the view that it is not necessary for ICASA to include a definition of "days", as it has done in the Draft Regulations. This is because the Standard Terms and Conditions (regulation 1 in Schedules 1, 2 and 3) already provides: "*unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the [ECA] has the meaning so assigned*" and "days" is defined in section 1 of the ECA to mean working days.



11. In addition, and to further reflect ICASA's rationale as explained in its explanatory memorandum, we think that the definition of "Effective Date" in Schedules 1, 2 and 3 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".

## **V Conclusion**

rain thanks ICASA for the opportunity to make submissions on the Draft Regulations and hopes that the Authority will take rain's views and concerns into account when finalising the Draft Regulations.

Yours faithfully

**Rain Proprietary Limited**

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Chief Regulatory Officer