

## **The SACF's Written Comments on the Draft Regulations Regarding Standard Terms and Conditions for Individual Licences**

1. The SACF is an industry association that represents a broad group of members across the ICT ecosystem. Our members include licensees, prospective licensees, and other key players in the value chain.
2. The SACF welcomes the opportunity to submit comments on the draft regulations, and the attempt to enhance the regulations.
3. Our submission is limited to areas of agreement, however, as they are consensus views, they are unlikely to mirror the positions of any of our members. In instances where we are unable to achieve a consensus and members hold divergent views these will be addressed in the individual member submissions.
4. The SACF would like to place on record its interest to participate in any future processes in this regard.
5. The SACF's comments will focus on Schedules 2 and 3.

### **General Comments**

6. The SACF welcomes the inclusion of the applicable forms and information to be submitted by a licensee. It is a welcomed approach to include these in each regulation as it makes the reporting requirement more clear and simpler for licensees, particularly smaller licensees.
7. We note that ICASA published a Compliance Manual Regulation more than a decade ago. The Compliance Manual includes the reporting requirements derived from the regulations that were applicable at the time. The Compliance Manual requirements have not been in step with regulatory updates since. As the Compliance Manual was published as a regulation, it creates its own set of regulatory requirements that are often out of date. It also creates dual reporting requirements.
8. The SACF has raised this in previous submissions and would urge ICASA to repeal the Compliance Manual regulations as it is out of date and perhaps if it deems it necessary to republish the Compliance Manual as a reporting guideline rather than a regulation.

## **Headings of Schedules 2 and 3**

9. The headings in Schedule 2 and 3 appears to have been incorrectly reflected as Class ECNS and Class ECS. We understand this ought to have been Individual as the Title of the Regulations indicates that the regulations are the Amendment to Individual Licences.

## **Effective Date**

10. While we note ICASA's explanation on the definition of effective date, however, we are aware that licences are amended from time to time and historically has reflected the date of issue of the original licence. However, the amendment proposes present and future dates.
11. As we understand that licences are amended and reissued whenever amendments are effected. For example, when the contact person in the applicable licence is changed, this is included in the licence and the updated licence reissued.
12. The date of issue of the licence has historically remained the original date of issue, so as not to restart the clock on the licence term each time that an amendment has been effected. This approach is not specific to licences under the purview of ICASA. It applies in other sectors as well.
13. Therefore, it is unclear how the proposed definition of "Effective date" means the date specified in the licence which may be a present or future date from the date of signature;" will relate to the above instances.
14. What is the envisaged impact on the inclusion of the effective date as licences are amended over the 20-year period?

*Comments apply to Schedules 2 and 3*

## **Amendment of Period for Notifications**

### *Change of Notice Period*

15. The SACF welcomes the principle underpinning the amendment that that seeks to increase the number of days to improve compliance as it recognizes the challenges that licensees face. The increased days are likely to boost compliance. However, we are of the view that 20 days maybe more suitable than the proposed 20 business days.

*Comments apply to Schedules 2 and 3*

#### *Penalty Fee for Late Submissions*

16. While the SACF understands the rationale underpinning the proposed inclusion of a late fee for amendment notices submitted after the period. The inclusion of such a fee is a penalty and the ECA, in our view does not empower ICASA to standardly impose penalties in this manner.
17. Instead, the ECA provides for the tariffs and fees, and it does not include provisions for late penalties.
18. Instead, Section 17 of the ICASA Act provides for non-compliance and penalties. This would constitute an additional penalty where the application appears to fall outside the penalty framework prescribed in Section 17 of the ICASA Act.
19. Section 4(c) of the ICASA Act provides for the tariffs that ICASA may prescribe in regulations. It does not include a provision for tariff that would be applicable for late submissions. This would constitute a penalty and therefore, would be regulated in terms of Section 17 of the ICASA Act.

*Comments apply to Schedules 2 and 3*

#### *Change of name*

20. We note ICASA's proposal in respect of a licensee's name change. The regulation however does not go further to the next step that provides an updated database that maintains a current list of all licensees including trading names. This will assist licensees and contribute to ICASA's proposed changes to licensees' names.
21. All interested stakeholders should be able to have access to relevant and applicable information for licensees. However, ICASA would need to strike a delicate balance between making information available while protecting the information.

*Comments apply to Schedules 2 and 3*

### **Amendment to Regulation 9**

22. We note ICASA's proposed amendment that it may refer the licensee to the CCC should a licensee fail to respond to three separate requests for information as this would constitute non-compliance.
  23. It would be useful to include a timeframe for the requests.
  24. While we understand the fines will be imposed after due process including after an appearance before the Complaints and Compliance Committee (CCC).
  25. Despite this, the penalty regime introduced in the draft regulations is extraordinarily high and tends toward being exceedingly punitive rather than encouraging compliance.
  26. It is imperative that licensees have regulatory certainty with a single regulatory framework for contraventions and penalties.
  27. Section 17H of the ICASA Act sets out a framework for offences and penalties, the provisions in the draft regulations on contraventions and penalties do not appear to be aligned to the ICASA Act. ICASA's powers to issue a fine of up to 10% of annual turnover is constrained by 17H (3) (i) and may only apply such a fine in very specific circumstances. Therefore, the proposed penalties are ultra vires.
  28. ICASA Act "17H(3)(h)(ii) of the ICASA Act (ii) in the case of an **offence contemplated in paragraph (b)** to a fine not exceeding the greater of R5 000 000 or 10% of the person or licensee's annual turnover for every day or part thereof during which the offence continued. ;"**Paragraph (b)**  
*"(b) provides a service without a licence or registering as required by this Act or the underlying statutes or fails to obtain the prior written permission of the Authority before transferring a licence;"* This is the only instance in which ICASA may fine a licensee up to 10% of annual turnover.
- ECA**
- :74. Offences and penalties*
- (1) Any natural person, juristic person or licensee who contravenes or fails to comply with any licence condition contained in the licence, is guilty of an offence and is liable on conviction to the penalties set out in subsection (2).*
- (2) Any natural person, juristic person or licensee who contravenes or fails to materially comply with any specific terms and conditions contained in the licence relating to construction or placing into service of electronic communications facilities or electronic communications networks, is guilty of an offence and upon conviction, such natural person, juristic person or licensee must outsource—*
- (a) the construction; or*
- (b) placing into service, of the electronic communications facilities or electronic communications networks, or parts thereof, that are the subject of the contravention or failure to comply, by entering into one or more agreements with a third-party engaging such person to build or operate the electronic communications facilities or electronic communications networks in accordance with the specific terms and conditions contained in the licence."*
29. Such misalignment creates regulatory uncertainty, which is undesirable.
  30. Accordingly, the SACF proposes that the section on the penalties should be aligned to Section 17H of the ICASA Act. There is no need to restate the provisions of the Act, instead we believe that this provision will be adequately

addressed by the following provision: “A contravention of these regulations will trigger sanctions in accordance with 17H of the ICASA Act.’

*Comments apply to Schedules 2 and 3*

### **Tariff Notifications**

31. The parameters of a regulation are determined by the founding legislative framework. The ECA provides for licensees submitting their tariffs for notification rather than approval. Clause 8 of the ECA provides for the elements to be included in the standard terms and conditions of licences. 8(2)(d) states that, “the protection of the interests of subscribers and end-users, ...” Clause 8(2)(d)(iii) indicates provides for tariff fillings to be done in the interest of transparency and does not empower ICASA to approve a tariff.
32. Therefore, ICASA is not empowered to approve or reject a tariff prior to implementation. Under the current legislative framework instead, ICASA is empowered to receive and review a tariff for informational purposes. It further publishes its tariff reviews which provide an analysis of tariffs implemented and determines patterns and trends observed.
33. Under the COVID regulatory framework ICASA took the bold approach to allow licensees to submit a tariff the day before implementation. This approach is aligned to the empowering legislative framework and appeared to work well.
34. We understand this amendment to follow the same logic by reducing the period from 7 days to 5 days. This is useful but has limited value as ICASA will simply be aware of the tariff 5 days ahead of implementation but cannot stop or delay its implementation. Instead, its role would be limited to attempting to understand the tariff which the rationale is offered in the explanatory memo. This could still be done after the tariff has been implemented.
35. Therefore, the SACF is of the view that the 5-day notification period does not materially provide additional consumer or public interest benefits over a one-day notification period.
36. Instead, it is our view that a shorter period is indeed more beneficial to the consumers and is the public interest as it promotes agility and would allow licensees to respond more quickly to competitor pricing. This is more likely to benefit consumers rather than the longer notification period, even at 5 days.

37. Therefore, the SACF would encourage ICASA to reduce the tariff notification period from 5 days to 1 day prior to implementation. The SACF is of the view that the evidence of implementation under the COVID regulations supports our proposal for one business day.