
Submission to the Independent Communications Authority of South Africa

Draft Amendment Regulations on the Processes and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences and Applications for Special Temporary Authorizations in terms of the Electronic Communications Act, 2005, as amended

EXECUTIVE SUMMARY

1. On 24 March 2022, the Independent Communications Authority of South Africa (“the Authority”) published draft amendment regulations on the Processes and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences and applications for Special Temporary Authorizations in terms of the Electronic Communications Act, 2005, as amended (the “draft Processes and Procedures regulations”) in Government Gazette 46084, Notice No. 901 of 2022. These regulations aim to amend the Processes and Procedures Regulations for Individual Licences, 2010, published in the Government Gazette on 14 June 2010 (Notice No. R. 522), as amended.
2. Telkom SA SOC Limited (“Telkom”) welcomes the opportunity to submit its written submission on the Draft Processes and Procedures Regulations. Telkom also indicates its availability for making oral submissions.
3. Telkom notes the intention of the Authority to provide clarity on the processes and procedures with regard to individual licences and ensuring overall compliance with relevant regulations and / or the Electronic Communications Act (“ECA”). We welcome the provision for online submissions and processes, as well as the extension of timelines for the provision of certain information by licensees.
4. However, Telkom foresees difficulties with respect to the requirement that a licensee must submit all proposed changes to its shareholding “however minute” to the Authority, and that a licensee then has to make an application for transfer of a licence if the Authority determines that the changes amount to changes in ownership/control. We point out in our submission that the abovementioned provision is not in alignment with the Authority’s Regulations in Respect of Limitation of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code, published in Government Gazette 44382 (“the 2021 HDG regulations”) dated 31 March 2021.
5. We further propose alignment of the definition of Historically Disadvantaged Persons with relevant provisions of the 2021 HDG regulations.

6. We set out our comments below.

COMMENTS ON PROPOSED AMENDMENTS

Definitions (Amendment of Regulation 1)

7. We note the amendment of the definition of “application” to include an application to not only transfer an individual licence, but also to “transfer control of an Individual Licence.” This is in line with section 13 of the ECA which prohibits the transfer or the transfer of control of an individual licence without prior written consent of the Authority and we do not have a difficulty with this amendment.
8. We further note the amendment of the definition for ‘historically disadvantaged persons’ to align it with the amended definition in the Class Licensing Processes and Procedures Regulations, 2021. The proposed definition read 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.
9. Telkom supports the alignment and harmonisation of the definitions in order to promote regulatory uniformity and thus certainty. However, it appears that the Draft Processes and Procedures Regulations are not aligned with the Authority’s 2021 HDG Regulations. In terms of the 2021 HDG regulations, the HDG equity requirement is not applicable to class licensees (as per section 3(1) of the 2021 HDG regulations), although class licensees have to comply with a minimum B-BBEE Contributor Status Level as referred to in the 2021 HDG regulations.
10. Further, in terms of the 2021 HDG regulations, in assessing Compliance with the HDG Equity Requirement contemplated in the regulations, the Authority will consider an individual licensee’s shareholding structure to ascertain whether a minimum of 30% of the total ownership equity in that licensee is held by Black People; women, who are citizens of South Africa; people with disabilities, who are

citizens of South Africa; and/or youth, who are citizens of South Africa.¹ Accordingly, the Authority may take into account shareholding by Black People when assessing the HDG Equity requirement, and it will be problematic if Black People are excluded from the definition of Historically Disadvantaged Persons as proposed in the Draft Processes and Procedures regulations.

11. We therefore propose that the definition of Historically Disadvantaged Persons in the current Processes and Procedures regulations, 2010 (as amended) be retained as below:

“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.”

Applications and online publications

12. Telkom welcomes the provision for submission of applications electronically as proposed in the amended sub-regulation 5(1A). We have no difficulty with the Authority publishing a notice of an application to transfer a licence on its website as well as in a Government Gazette as contemplated in regulation 11(2)(a) or the publication of an ITA on the Authority’s website and the lodging of applications through an online process.
13. We have some concerns with regards to the amendment of sub-regulation 5(2) to provide that if a document is submitted after 16h00, the document will be considered to have been received on the next day. There are instances where a submission is made a few minutes late due to circumstances beyond the control of the licensee such as technical glitches which we may experience during submission. We propose that in these circumstances, the licensee be permitted to request the Authority to consider acceptance of the document as within the deadline. The

¹ Regulations in Respect of Limitation of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code, published in Government Gazette 44382 (“the 2021 HDG regulations”) dated 31 March 2021, Appendix 1, para 2.1.

Authority may then decide whether or not to grant the license an indulgence. We propose the addition of sub-regulation (3) below:

(3) Notwithstanding regulation 5(2) above, where any document required in terms of these Regulations is submitted after 16h00 due to circumstances beyond the control of the licensee, an Applicant shall be permitted to raise such circumstances to the Authority and the Authority shall decide whether to accept the submission as being filed timeously.

Restrictions on consideration of applications by the Authority

14. We note the proposed amendments in respect of regulations 11 and 12. In terms of the proposed subregulation 11(3), the Authority will not consider any application, “if the Applicant is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Act.” In terms of the proposed subregulation 12(b), the Authority may refuse to renew or transfer a licence if the licensee is in arrears with respect to any fees and/or is not compliant with any other applicable regulations or the Compliance Procedure manual Regulations or the Act.
15. We are of the view that subregulation 12(a), which states that the Authority may refuse to renew or transfer a licence if the licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of the ICASA Act, is sufficient. This clause provides legal certainty as it requires a finding of non-contravention by the CCC and an order by the Authority as contemplated under section 17 of the ICASA Act.
16. The insertion of subregulation 11(3) to afford the Authority the right to refuse an application relating to a licence if a licensee is in arrears with any fees, and/or is not compliant with any applicable regulations or the ECA is overly broad. The same argument applies to subregulation 12(b) which also cites non-compliance with the Compliance Procedure Manual Regulations as a basis for refusing an application relating to an individual licence.

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17. While Telkom does not have a difficulty that the Authority refused an application relating to a licence where the applicant is in arrears with fees due and payable to the Authority, we are of the view that the remainder of the proposed amendment should be deleted.
18. The proposed clauses provides only a general reference to a contravention without referring to a finding by a decision-maker such as ICASA or the CCC. While Telkom appreciates that the Authority intends to ensure compliance with all regulations under the ECA, non-compliance should be stipulated as being pursuant to findings of such non-compliance by the Authority and / or the Complaints and Compliance Committee.
19. Further, each regulation published by the Authority has its own clauses dealing with contraventions, and it is not conducive to legal certainty to tie the contravention of any other regulation or the ECA as a whole, not the right of ICASA to refuse an application to amend, transfer or renew a licence.
20. In addition to this, reference to the Compliance Procedure Regulations seem misplaced as the latter regulations prescribe reporting formats for other regulations, while the Draft Processes and Procedures Regulations already prescribe a reporting format specific to the regulations, in Schedule 1.
21. We therefore proposed the following amendments to subregulations 11(3) and 12(b).

11(3): The Authority will not consider any application if the Applicant is in arrears with respect to any fees ~~and/or is not compliance with any other applicable regulations or the Compliance Procedure Manual Regulations or the Act.~~"

12(b): The Authority may refuse to renew or transfer a Licence if the Licensee is in arrears with respect to any fees. ~~and/or is not compliance with any other applicable regulations or the Act.~~"

Application to transfer an individual licence

22. Telkom supports the amendment of sub-regulation 12(1)(c) which does attempt to align the Draft Processes and Procedures regulations with the 2021 HDG regulations. The sub-regulation provides that the Authority may refuse to renew or transfer a licence where the ownership and control of the Transferee (in a transfer application) or Applicant (in a renewal application), by HDPs is less than the percentage prescribed by the Act and 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.

Surrender of an individual licence (regulation 13)

23. Telkom does not have a difficulty with the addition to provide that a licensee that intends to surrender its licence must take appropriate steps to inform its end-users/listeners/viewers of its intention to cease providing its services two (2) months prior to the cessation of such services.

Notice of change of information (Amendment of regulation 14A)

24. We note the additional time for submission of a change of information, lengthened from 7 to 14 days. As to the prescribed fee that will apply if a submission is made outside the period, we propose guidelines as to how the fee will be determined and that licensees have the opportunity to make submissions regarding late submissions outside of their control.

25. We note that reference is made to sub-regulation 14C regarding notification of changes in shareholding in regulation 14A. Please see our comments below in this regard.

Changes in shareholding (regulation 14C)

26. Telkom is concerned regarding the amended sub-regulation 14C(1) which provides that a licensee must, in the event that it proposes changes to its shareholding, however minute, submit to the Authority, prior to implementing the proposed changes, a letter detailing current shareholding; proposed changes in shareholding; and past shareholding changes since the issuance of the licence.

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27. Telkom as a publicly listed company trades shares on a daily basis held by minor shareholders in the free float and by major shareholders such as institutional investors. As publicly listed JSE companies undergo changes to their shareholding on a daily basis, such notification would not only be cumbersome but also practically impossible.
28. With regards to a change in the free float stock (shares traded daily), we propose that only significant reductions be notifiable. With regards to shareholding held by institutional investors, we propose that notification should be aligned with JSE Stock Exchange rules, so that only significant share movements triggering SENS announcements should be noted to the Authority to for example assess changes to HDG equity, not movements in normal course of trade.
29. We further note that the proposed amendment to sub-regulation 14C(2) provides that if the Authority determines that the submitted changes amount to changes in ownership/transfer of control, a licensee will be instructed to make a submission in line with the application of transfer of an individual licence as contemplated in amended regulations 11 and 12. If the Authority determines that the submitted changes do not amount to changes in ownership/transfer of control, the licensee will be instructed to submit an application for change of information.
30. There are no timelines for the Authority to revert as to whether it considers a change in shareholding a transfer of control/ownership. It is also unclear whether this transfer of control/ownership is aimed at a change in HDG and / or B-BBEE equity as referred to in the 2021 HDG regulations. The Explanatory Memorandum offers no explanation for the proposed changes but simply repeats the proposed amendment.
31. The 2021 HDG regulations provides that the licensee shall notify the Authority where a transfer or multiple transfers over 24 months results in a decrease of the number of shares held by HDGs or Black People of 5% or more of the issued share capital of a licensee and / or dilution of rights attaching to those shares. We propose

that the Processes and Procedures regulations align with the 2021 HDG regulations and that licensees are only obliged to report a transfer or multiple transfers over 24 months which result/s in a decrease of the number of shares held by HDGs or Black People of 5% or more of the issued share capital of a licensee, and that any other change in shareholding does not require notification.

32. Further, in terms of the Threshold for Major B-BBEE Transactions gazetted by the Minister of Trade and Industry in Government Gazette 40898 of 9 June 2017, the threshold for major B-BBEE deals to be registered with the B-BBEE Commission is R25 million. This illustrates the necessity for thresholds to ensure that reporting by licensees is aligned with the intended purpose of relevant legislation and regulations.
33. With regards to prior approval for changes in shareholding, a distinction should further be made between a change in the free float stock and a change in the shareholding held by institutional investors. Only significant reductions in BEE equity due to changes in free float while with regards to institutional shareholding, while any changes in institutional shareholding resulting in a reduction of BEE equity should be aligned with JSE Stock Exchange rules.
34. Government ownership should also be taken into account when determining HDG equity ownership. Telkom submits that Government shareholding is different from private sector shareholding or individual equity ownership, as dividends earned by government are paid into the National Revenue Fund towards the support of government objectives, including promotion of BBBEE and HDGs.

Conclusion

35. Telkom trusts the Authority finds our submission in order. Should hearings be held concerning the Processes and Procedures regulations, we reiterate our request to make oral submissions.