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11 October 2018

Portfolio Committee on Telecommunications and Postal Services

Attention: Ms Hajiera Salie

Per email: hsalie@parliament.co.za

ELECTRONIC COMMUNICATIONS AMENDMENT BILL [B31-2018]

1. ISPA refers to the Electronic Communications Amendment Bill [B31-2018] ("**the Bill**") and to the Portfolio Committee's ("**the Committee**") invitation to comment thereon.

ABOUT ISPA

2. ISPA is an Industry Representative Body recognised by the Minister as representing the interests of member Internet Services Providers and related entities. ISPA's membership consists largely of horizontal competitors in the Internet access and voice markets.

3. ISPA has been closely involved in telecommunications policy, legislation and regulation in South Africa for more than 20 years: we have a deep understanding of the legal framework and its history and the implementation challenges which at times have delayed progress in attaining policy objectives.

4. It follows that in making the submissions below, ISPA's point of departure is a commitment to service-based competition, which is an express intended outcome of the ICT Policy White Paper and the Bill.

5. ISPA also seeks to focus on the practicality of policy from an implementation perspective.

6. ISPA has a large body of members, the majority of whom hold electronic communications network services ("**ECNS**") and electronic communications services ("**ECS**") licences issued in terms of the Electronic Communications Act, No. 36 of 2005 ("**the Act**"). These members are directly affected by the provisions of the Bill and have a material interest in its provisions.

GENERAL SUBMISSIONS

7. ISPA wishes to raise the below general points for the consideration of the Committee.

Accommodate the practical realities of implementation

8. ISPA has placed on record on previous occasions its agreement with the sections of the ICT Policy White Paper which highlight a lack of effective regulation and the failure to implement key provisions of the ECA as being a core cause of the current market structure and the high cost to communicate in South Africa.

9. It is, for example, the failure of the regulator to further transformation and competition, allowing the perpetuation and strengthening of the current market structure, that is a direct cause of adopting the WOAN intervention set out in the Bill.

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10. Once the Bill has been finalised it will be in the hands of the Authority to complete the required processes in an efficient and procedurally-sound manner. It is, with respect, difficult to believe – based on the history of ICASA's implementation of the ECA – that this will happen.

11. It is also a truism that rights and obligations imposed without an effective enforcement mechanism to allow them to be enforced are worthless. As is further discussed below, the facilities leasing regime required by Chapter 8 of the ECA and imposed through the Electronic Communications Facilities Leasing Regulations 2010 is an example of legislative provisions and regulation which have proven to be practically ineffective in driving pro-competitive outcomes and infrastructure sharing in South Africa.

12. ISPA appreciates the difficulty faced: on the one hand it is clear that the sector regulator is in urgent need of reform and recapacitating, and on the other such an exercise is by its nature a lengthy one and it is doubtful whether we can afford the delays occasioned by waiting for this process to be completed before enabling the establishment of the WOAN and ensuring that high-demand spectrum is put to efficient use.

13. ISPA therefore supports the decision to proceed with amendments to the ECA prior to undertaking the replacement of the regulator contemplated in the ICT Policy White Paper.

14. It does not follow, however, that nothing should be done to ensure that the Authority is able to discharge the tasks falling to it. The Committee is requested to consider:

    14.1. Whether a discrete additional budget can be allocated to ICASA relating to implementation of an amended ECA.

    14.2. Engaging with the Authority to undertake a gap analysis aimed at identifying competencies and additional resources which will be required to ensure effective implementation of the Amended ECA.

    14.3. Engaging with the Authority to ensure that there is a shared clarity on the implementation steps to be taken and the deadlines by which this must be done, and thereafter holding the Authority to account based on this shared understanding.

    14.4. The desirability of providing for a period between the gazetting of the Amendment Act and the coming into force thereof. Such period - which will allow ICASA to undertake the review of regulations and other steps required to align the current regulatory framework with the provisions of the Amendment Act – should be determined in consultation with ICASA and based on its experience in July 2006 when the ECA first came into force. The approach adopted with the Protection of Personal Information Act 4 of 2013 should be considered.

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14.5. Whether there are opportunities to simplify and/or reduce the number of actions to be completed by the Authority? There are, for example, instances in the Bill where ICASA is required to take action without there being any clear justification therefore and in the face of an efficiently-functioning market. The principle should be reduce and stagger the workload of the Authority so as to make it realistically manageable.

15. It is no overstatement to claim that the success of the policy direction process and the implementation of an amended ECA is directly and essentially linked to the ability of the regulator to perform its functions within the time-periods prescribed and without procedural irregularity. A cost-benefit analysis – where the cost is relatively trivial in terms of support to be given to ICASA and the benefit which exists in the achievement of policy objectives is potentially incalculable – indicates that some form of intervention or support must be provided to the Authority.

Relationship between the Bill and the policy direction process

16. ISPA appreciates the reasons for the Department initiating the policy direction process. After significant delays, it is difficult not to embrace any process which offers the prospect of ending the wasteful underutilisation of radio frequency spectrum in South Africa. However, there are significant risks in taking a "short cut", which in effect amounts to a piecemeal implementation of a set of interventions contemplated in the ICT Policy White Paper.

17. ISPA's primary concern with the policy direction process is that high-demand spectrum will be assigned without the associated obligations and regulatory framework contemplated in the ICT Policy White Paper and the Electronic Communications Amendment Bill.

18. A danger of engaging in the parallel process envisioned is that amendments to the Electronic Communications Amendment Bill effected through the Parliamentary process and the subsequent review of the regulatory framework will be in conflict to the terms and conditions on which the licences contemplated in the Proposed Policy Directions will be issued.

19. The potential for such conflicts introduces an immediate element of uncertainty on the part of applicants for these licences. It also introduces scope for loopholes and tensions which can be used to resist and delay observance of obligations to be imposed.

20. There are already numerous instances in the proposed Chapter 3A and amendments to provisions relating to high-demand spectrum where the provisions of the Bill require immediate redrafting as a result of the policy direction process.

Situating the Bill in the White Paper implementation process

21. With the launch of the policy direction process and the haste to finalise the Bill, it is difficult to have a clear idea of where we are in the process of implementing the White Paper. While numerous bills were to be prepared and presented to the Committee this has not happened and – due to broader political

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and economic developments – there is now significant pressure to release high demand spectrum and generally "get things done".

22. In the circumstances ISPA requests that the Committee request clarity on the updated plans and timelines of the Department in implementing the provisions of the White Paper.

We need a detailed process and milestones

23. What is really required to provide certainty is a roadmap setting out the various processes required before:

    23.1. The issuing of an individual electronic communications network service (IECNS) licence and assignment of radio frequency spectrum licences to the WOAN is completed.

    23.2. The assignment of radio frequency spectrum licences through a competitive process is completed.

    23.3. The finalisation of detailed pro-competitive and open-access regulations is completed.

24. We request that the Committee engage with the Department with a view to providing stakeholders with a clear roadmap towards the finalisation of the processes contemplated in policy direction process and the Bill and how these two sets of processes will coexist and interact.

SUBMISSIONS ON PROPOSED AMENDMENTS TO CHAPTER 4 OF THE ACT

25. ISPA supports in general the amendments proposed but wishes to raise the below specific submissions.

26. The reference to the Promotion of Access to Information Act 2 of 2002 in the proposed subsection 20(2) is not necessary as it applies *ex lege*. The drafters may further wish to take this opportunity to clarify the application of the Promotion of Administrative Justice Act 3 of 2000 in the light of recent judgements of the Constitutional Court and Supreme Court of Appeal.

27. Industry representatives should be provided for in the composition of the Rapid Deployment Steering Committee and this should not be left to the discretion of the Minister. The Minister should further be empowered to draft and publish a governance framework for this Committee.

28. The Committee is requested to consider carefully whether it is competent in law for the Authority to prescribe regulations which may be seen as affecting the rights of and imposing obligations on third parties who are not licensees and who therefore do not fall under ICASA's jurisdiction. This may be particularly problematic when taking into account the position of municipalities as an autonomous branch of government deriving its powers and functions directly from the Constitution.

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29. ISPA submits that empowering ICASA to prescribe wholesale rates applicable to licensees providing ECNS in an "adequately served" premises is practically impossible given the variety of types of networks and conditions under which they are deployed. In ISPA's experience pricing on open access fibre networks being deployed in South Africa is, with some exceptions, competitive and managed through commercial negotiation and contract. The imposition of pro-competitive pricing remedies should be the exception and not the rule. As a general departure point, prescribed wholesale rates should only apply to deemed entities in accordance with the proposed section 43(1B) to be inserted into Chapter 8 of the ECA.

SUBMISSIONS ON PROPOSED AMENDMENTS TO CHAPTER 8 OF THE ACT (WHOLESALE OPEN ACCESS)

30. ISPA welcomes the clear focus on open access and the promotion of service-based competition to be introduced into the Act through the amendments proposed to Chapter 8.

31. The Committee is requested to consider the following anomaly:

    31.1. ICASA can only make regulations that apply to licensees and licence-exempt parties.

    31.2. Owning and/or operating an electronic communications facility does not require a licence issued by ICASA.

    31.3. Infrastructure falling within the definition of "electronic communications facilities" is owned and operated by both licensees / licence-exempt persons as well as by entities with no relationship with ICASA such as municipalities and private landowners.

    31.4. It follows that the same piece of equipment – such as a telecommunications mast – can be regulated under the Act when in the hands of one party (the licensee), but not regulated when in the hands of a non-licensee.

    31.5. It is also conceivable that a licensee could simply transfer all its facilities to a non-licensee, who will not be subjected to the obligations relating to access to electronic communications facilities.

32. It may be worth considering whether some form of registration of entities which have as their primary business the operation of electronic communications facilities would be constructive and desirable.

33. What is the rationale for excluding - in section 43(1) - ECNS licensees providing "broadcasting signal distribution or multi-channel distribution services" from the general obligation to provide wholesale open access? How are ECNS licences used for this purpose different from other ECNS licences?

34. ISPA seeks clarity on the nature of and relationship between "technical inability", "environmental inability" and "technological inability".

35. ISPA submits that the amendments to the ECA should include provision for prohibiting agreements entered into between licensees and property owners which are not open access contrary to the provisions of the proposed Chapter 8. This could be based on sections 43(9) and (10).

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36. ISPA submits that it is incorrect to refer to the leasing of an electronic communications network. This is more properly a relationship between:

    36.1. An ECNS and an ECS licensee in terms of which network capacity is made available to the ECS licensee; or

    36.2. An ECNS and an ECNS licensees in terms of which capacity is made available for resale.

37. This is simply the provision of ECNS as opposed to the leasing of an electronic communications facility which is a component of an electronic communications network. ISPA suggests that the words "lease its electronic communications network" be replaced with "provide ECNS".

SUBMISSIONS ON PROPOSED INSERTION OF CHAPTER 3A INTO THE ACT (LICENSING FRAMEWORK FOR WIRELESS OPEN ACCESS NETWORK SERVICE)

38. Given the pursuit of the policy direction process, it is not clear whether these provisions will be retained as part of the Bill. The language of the Draft Policy Direction is clearly taken from the proposed Chapter 3A, although it is not identical and certain provisions in the Bill did not find there way into the Draft Policy Direction.

39. ISPA notes and supports the requirements relating to functional separation for members of the WOAN operating entity that also provide ECS set out in the proposed sections 19A(3) and (4). We note that subsection (4) did not find expression in the Draft Policy Direction.

40. The proposed section 19A(6) falls to be deleted as this event has already occurred.

41. It is ISPA's view that the Bill fails to take into account adequately that the WOAN will be a new entrant into a mature industry with entrenched incumbent operators. The struggles of Cell C and Telkom Mobile to gain market share at the expense of Vodacom and MTN are highly instructive as to the challenges which the WOAN will face in establishing itself as a viable commercial proposition.

42. Where progress has been made, for example, in the voice call termination market, this has been realised through asymmetrical regulation specifically designed to benefit new entrants.

43. The Bill, however, with references to pricing and access obligations to be imposed on the WOAN, gives the impression that the WOAN is to be regulated as an incumbent rather than a new entrant.

44. ISPA does not understand why the WOAN as a new entrant would be subject to prescribed rates. This remedy is usually employed to counter dominance in a market or control of an essential facility and is only used where justified through the conducting of a market inquiry and investigation under Chapter 10 of the Act.

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45. Reference is made to concerns about the WOAN being a monopoly. ISPA cannot see how this is the case in the current context. Should future developments around the assignment of "5G" spectrum alter this position so that the WOAN is in a de facto monopoly provider then this form of remedy would be appropriate.

46. ISPA requests that the Committee consider whether the remedies set out in section 19A(5)(b) requiring the WOAN licensee to engage in active infrastructure sharing, comply with prescribed wholesale pricing and comply with roll-out obligations are appropriate in the context of the WOAN intervention.

47. In other words: is the WOAN as a new entrant to be treated as a deemed entity?

48. ISPA supports the restriction of the WOAN to the provision of wholesale services. This is in keeping with the core nature of the intervention as it has always been conceived.

49. The ECA defines "wholesale" as:

the sale, lease or otherwise making available an electronic communications network service or an electronic communications service by an electronic communications network service licensee or an electronic communications service licensee, to another licensee or person providing a service pursuant to a licence exemption[1]

50. Under this definition wholesale services means:

50.1. making capacity available over an electronic communications network by an ECNS licensee to an ECS licensee (which could include itself);

50.2. the making of capacity available over an electronic communications network by an ECNS licensee to another ECNS licensee for resale of that capacity; and

50.3. the making of ECS available to another ECS licensee or a person holding a licence exemption for the resale of such ECS.

SUBMISSIONS ON PROPOSED INSERTION OF SECTION 69A INTO THE ACT (QUALITY OF SERVICE)

51. The obligation to be imposed on ICASA in the proposed section 69A(7) to monitor and evaluate the national broadband policy targets in SA Connect seems out of place within the context of a section relating primarily to the power of ICASA to make regulations prescribing quality of service standards.

[1] ECA section 1

52. ISPA is moreover not convinced that it is appropriate to impose this obligation on ICASA or that ICASA is the best-placed entity to monitor and evaluate progress in meeting SA Connect targets. We suggest that the Department – which is project-managing the SA Connect roll out and which reports to the Committee on its progress in doing so – is the correct body to impose this obligation on.

OMISSIONS FROM THE BILL

53. ISPA submits that the opportunities to effect legislative amendments are rare and urges the Committee to consider including the Bill provisions relating to the following issues:

    53.1. The insertion into the Act of a definition of the term "control". This is required to make sense of the provisions of the Act requiring ICASA to approve transfer of ownership of licences and transfer of control of licences. Currently this is causing confusion and delays and legal challenges in the processing of these applications and greater certainty would significantly assist industry.

    53.2. The insertion into the ECA of deeming provisions applicable to the time periods applied to the processing of applications, registrations and notifications to ICASA where appropriate. Where a deeming provision currently exists – as with registration of class licences – ICASA is able to meet and exceed the specified timeframe. Where a process does not a have a deeming provision turnaround times are at odds with commercial reality. Applications for transfers of Individual licences take up to 14 months, and ISPA members report that the applications for type approval of equipment are routinely delayed past three months.

    53.3. Suitable and realistic deeming provisions create certainty for licensees and new entrants.

    53.4. The reversal of the amendment of the limitation of the scope of class ECS licences to a geographic area constituted by a district or metropolitan municipality. This distinction is nonsensical and ignored in practice.

CONCLUSION

54. ISPA requests the opportunity to present at public hearings held by the Committee.

55. ISPA notes that the it has had limited time to consult with its members and make written submissions on the Bill. It would therefore seek to expand on the submissions raised above in public hearings.

56. We thank the Committee for its consideration of the above.

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