



11 August 2015

Independent Communications Authority of South Africa

Attention: Mr Peter Mailula

E-mail: pmailula@icasa.org.za

Dear Peter

ISPA SUBMISSIONS IN RESPECT OF THE DRAFT AMENDMENT INDIVIDUAL PROCESSES AND PROCEDURES REGULATIONS 2015

1. ISPA refers to the “Draft Amendment Individual Processes and Procedures Regulations 2015”, published as General Notice 662 in Government Gazette 38921 of 26 June 2015 (“**the Draft Regulations**”), and to the Authority’s invitation to comment thereon.
2. ISPA welcomes the intention to review the Individual Licensing Processes and Procedures Regulations (as amended) 2010¹ (“**the existing Regulations**”), currently applicable in respect of individual licences and licence exemptions.
3. ISPA notes that many of the proposed amendments are required by the coming into effect of the Electronic Communications Amendment Act 1 of 2014 (“**the ECAA 2014**”) on 21 May 2014. In much the same way as ISPA argues below for the delayed implementation of amendments to the existing Regulations, the Authority should in future take such steps as it can to ensure that new governing legislation or the amendment of existing governing legislation provides for a suitable period between publication and commencement so as to allow the Authority to ensure that the required processes and procedures are in place before commencement.
4. Not only does this allow the Authority an opportunity to amend its regulatory regime, it also serves to create greater certainty amongst licensees around the regulatory environment. If, for example, the ECAA 2014 had not commenced on publication, but rather provided that it would come into force twelve months after publication, it is likely that the legal difficulties attendant on the Neotel application for transfer of control over its service licences would not have materialised.

DEFINITIONS (S1)

5. Section 13 of the ECA, as amended by the ECAA, provides that an individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence

¹ Regulation 522 of 2010, GG 33293, 14 June 2010

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may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.²

6. The Draft Regulations propose definitions for ‘transferee’, ‘control’ and ‘transfer of control’. ISPA submits that these definitions are at odd with each other.

6.1. ‘Control’ is as set out in the Companies Act, 71 of 2008³ (“**the Companies Act**”) as follows:

a person controls a juristic person, or its business, if-

(a) in the case of a juristic person that is a company-

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or

(ii) that first person together with any related or inter-related person, is-

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;

(b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members’ interest, or controls directly, or has the right to control, the majority of members’ votes in the close corporation;

(c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

6.2. In the Draft Regulations, the Authority defines ‘transfer of control’ as “transfer of shareholding in the issued licence to a new shareholder”. This appears to indicate that the transfer of any shareholding would be a transfer of control, rather than a transfer of shareholding which would result in a change of control as set out in the definition of ‘control’. It is accordingly submitted that the Authority either delete the definition of ‘transfer of control’, alternatively that the definition be corrected to ensure that it does not contradict the definition of ‘control’.

6.3. It is submitted that the definition of ‘transferee’ is vague and unworkable. For example:

6.3.1. Section 13 of the ECA requires that the proposed assumption of control is subject to the Authority’s prior written approval.

6.3.2. The definition of ‘transferee’ includes a person who would acquire/establish “increased control” – it is uncertain whether the Authority intends to require that a minor change of shareholding, which would result in increased control by

² Section 13

³ Section 2(2)

a party which already controls the licensee, should also be submitted to the Authority for its prior written permission.

- 6.4. The definition of 'control' as contemplated in the Companies Act is clear, and the inclusion in the definition of 'transferee' of "all or the greater part of a licensee or company, or all or the greater part of the assets or undertaking of a licensee or company" is superfluous.

CONSIDERATION OF APPLICATIONS

7. The Draft Regulations indicate that the Authority will not consider applications if the applicant is in arrears on any fees prescribe by the Authority or legislated in terms of the Electronic Communications Act 36 of 2005 ("the ECA"). ISPA understands the rationale for this position but is concerned that the need for the Licensing Division to liaise with other Divisions of ICASA to establish whether there are fees outstanding will further slow the processing of applications related to individual licence matters.
8. ISPA wishes to be clear that a period of nine (9) months to process individual licence transfer and other applications is not acceptable to industry as it is commercially not feasible for deals to wait for such a long time for a regulatory approval.
9. The Authority should therefore ensure that - prior to the implementation of final amendments to the existing Regulations - efficient processes are in place to establish whether there are arrear fees outstanding.
10. ISPA has noted the increase in hard copies required to be included in a registration or application and wishes simply to lodge its objection in principle to the introduction of this requirement. ISPA submits that the cost of making such copies as the Authority requires should be subsumed in the registration or application fee payable. While the Authority has not produced a costing to show how the fees payable were arrived at, this costing presumably originally did include the internal reproduction of an application or registration by the Authority and it is not clear why this cost should now be borne by applicants and registrants. ISPA submits that an electronic copy together with the physical original should be sufficient.

APPLICATION TO TRANSFER OR TO TRANSFER CONTROL OF AN INDIVIDUAL LICENCE (S11)

11. It is not clear to ISPA why the Authority has not followed the wording of section 13 of the ECA⁴ in seeking to amend regulation 11 of the existing Regulations. This is at odds with the

⁴ **13. Transfer of individual licences or change of ownership**

- (1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.
- (2) An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner.
- (3) 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.

approach taken in the proposed amendments to the Class Licensing Process and Procedures Regulations 2010. It is also at odds with the title provided for Form G in the Draft Regulations. Section 13 appears to contemplate a number of distinct transactions, all of which need to be catered for in the final regulation 11 and corresponding form(s):

- 11.1. Letting of an individual licence
 - 11.2. Sub-letting of an individual licence
 - 11.3. Assignment of an individual licence
 - 11.4. Cession of an individual licence
 - 11.5. Any other form of transfer of an individual licence
 - 11.6. Assignment of control of an individual licence
 - 11.7. Cession of control of an individual licence
 - 11.8. Any other form of transfer of control of an individual licence
12. ISPA suggests that Regulation 11 should be headed:
- “Application to let, sub-let, assign, cede or transfer an individual licence or to assign, cede or transfer control of an individual Licence (Section 13 of the Act)”⁵
13. The Draft Regulations propose to amend regulation 11 of the existing Regulations through the insertion of the following sub-clause 11(4):
- (4) A licence transfer or licence transfer of control application will be evaluated on the basis of the following criteria:
- a) promotion of competition and interests of consumers; and
 - b) equity ownership by HDP's.
14. ISPA has no difficulty with the restriction relating to equity ownership by HDPs, noting that these are based on the explicit requirements of subsection 9(2)(b) of the ECA.
15. The provision relating to the promotion of competition and interests of consumers is too vague and does not provide sufficient certainty as to the criteria to be applied by the Authority in evaluating a transfer or a transfer of control (or any of the other forms of transaction contemplated in section 13 of the ECA).

(4) The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services in order to promote a diversity of views and opinions.

(5) 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.

⁵ Similar considerations apply in respect of:

- The definition of “application” in the existing Regulations
- The definition of “transfer” in the existing Regulations
- Sub-regulation 4(c) of the existing Regulations
- the proposed amendments to regulation 14 of the existing Regulations.

16. Moreover, there appears to ISPA to be a difficulty with the manner in which the Authority has interpreted subsections 13(3) and 13(5) of the ECA.
 - 16.1. Subsection (3) allows the Authority to pass regulations which limit or restrict ownership or control of an individual licence in order to promote transformation objectives or to promote competition in the ICT Sector.
 - 16.2. Subsection (5) makes it mandatory for the Authority to conduct a section 4B inquiry under the ICASA Act before it passes the regulations referred to in subsection (3).
 - 16.3. ISPA is not aware of the section 4B inquiry which the Authority is relying on in empowering it to make regulations under subsection (3).

FORM G

17. ISPA suggests that the heading of this Form should be:

APPLICATION TO SUB -LET, CEDE, ASSIGN OR TRANSFER AN INDIVIDUAL LICENCE OR TO ASSIGN, CEDE OR TRANSFER CONTROL OF AN INDIVIDUAL LICENCE

18. ISPA submits that the entire form should be reviewed to ensure that it provides for the full range of transactions contemplated in section 13 of the ECA.
19. The insertion in section 1.1 seems to be an internal note, and should be deleted prior to finalisation. For the record, we agree with the internal note.
20. ISPA submits the proposed amendments to Form G have the effect of over-complicating the completion and processing thereof.
 - 20.1. Section 1.3 requires a written undertaking to be attached to the application form, indicating whether this is an application for sub-letting, cession, transfer or transfer of control. It is submitted that it would be preferable to have this indication upfront on the application form itself, perhaps as a list where the applicant can check the relevant box; this would also enable the Authority to process the application more easily on receipt thereof.
 - 20.2. Sections 6.2 and 7.2 require a written undertaking signed by the Accounting Officer to confirm the shareholding set out in sections 6.1 and 7.1. It is uncertain why the Accounting Officer is required to confirm shareholding. Note that the Accounting Officer is likely to be unaware of the shareholding make-up of a company, so is unlikely to be in a position to confirm this. The company secretary may confirm these details, or the share register may be attached to confirm these details – it is recommended that the Authority consider these alternatives.
 - 20.3. Sections 6.6 and 7.8 (HDI ownership), 6.8 and 7.10 (foreign ownership), 6.10 and 7.12 (interest by any shareholder in any other licensees/licences), 6.12 and 7.14 (applicant/transferee interest in another licensee), 7.4 (stock exchange listing) and 8.1-8.5 (suitability of transferee) all also require a written undertaking by the Accounting Officer confirming same to be attached. As above, it is submitted that the Accounting Officer would have no way of confirming this information and thus cannot be expected to submit an undertaking relating to same; for example, the Accounting Officer would

not be aware of interests of shareholders in other licences. It is recommended that the Authority reconsider these requirements and how to seek confirmation of the specified information.

- 20.4. Section 8.6 requires details of the transferee's 5-year business plan. As the comprehensive business plan (in terms of section 8.7) is to be attached, it is uncertain why details are also required in this section. If the Authority is requesting an executive summary of the business plan in this section, it is recommended that the section wording be amended to reflect this request.
 - 20.5. Section 8.9 requires the provision of a detailed network architecture layout plan and roll-out plans, including timeframes and roll-out targets. It is uncertain why the Authority requires this separately from the comprehensive business plan required in section 8.7. If this is to form part of the business plan, perhaps the Authority should indicate that information relating to this is required therein.
 - 20.6. Section 8.10 requires detailed proposed commercial agreements to be made available in terms of roaming, interconnection, facilities leasing. It is uncertain why the Authority would require this at this point in the process. Most parties will not engage with the transferee until they have the licences, and such parties also have standard agreements which they would require the transferee to sign; it is uncertain how the Authority expects the transferee to obtain these at this stage of the process. If the Authority had intended for the transferee to supply details of its intentions with regard to roaming, interconnection and facilities leasing, this would be better contained in the business plan required in section 8.6, and the Authority should specify that this should form part of the business plan instead.
 - 20.7. Section 9 requires details of ownership and control to be held by historically disadvantaged groups. The current application form requires an indication of HDG shareholding in this section. This amendment seems to require something that might be better included in the business plan. In any event, if the transferee meets the minimum requirement in this regard (which it needs to do in terms of the draft regulations or the application will be rejected), it is uncertain why it would also need to include details of ownership and control (the latter is not queried elsewhere) to be held (one presumes in the future) by historically disadvantaged groups.
21. ISPA requests that the Authority bear in mind that Form H in its entirety must be submitted in the form of an affidavit sworn to by both the applicant and the transferee. Both of these parties are accordingly subject to the criminal offence of perjury in the event that there is a false statement in the application. The high number of confirmations and undertakings required is without benefit and simply increases the cost of making the application and the time taken to process it.

FORM O

22. Proposed sub-regulation 5.b requires the person designated as the contact person on a class licence to sign the notice. ISPA - noting that the entire form to be submitted is already to be in the form of a sworn affidavit – does not understand the rationale for this requirement. The contact person listed on a licence is often an administrative contact rather than an executive

contact and it may not always be possible or desirable to have this person sign the required resolution.

23. Proposed sub-regulation 5.c requires CIPC registration documents to accompany notifications of changes of name. ISPA submits that CIPC confirmation certificates in respect of changes of name would be more appropriate for this purpose.
24. In practise the Authority requires CIPC confirmation certificates where the licensee has changed entity type, e.g. converted from CC to (Pty) Ltd and ISPA submits that it would preferable to specify this requirement explicitly in the final regulations.

SHORT TITLE

25. No short title is specified in the existing Regulations.
26. The Draft Regulations propose the short title “Amendment Individual Processes and Procedures Regulations 2015”.
27. ISPA suggests that – following convention and the need for clarity and consistency with related sets of regulations – the short title should be “Individual Licensing Processes and Procedures Amendment Regulations 2015”.

DELAYED IMPLEMENTATION

28. ISPA has observed over time that difficulties experienced in the implementation of new law and regulations can be greatly reduced by allowing for staggered implementation of provisions which require the Authority to design and incorporate an internal process or which industry need to be made aware of so that they have an opportunity to comply.
29. ISPA submits that it would be prudent and helpful to all parties to delay the commencement of the finalised Draft Regulations until one month after their publication in the Government Gazette. ISPA cannot identify any prejudice to the Authority or any other party flowing from such an approach.
30. This would require only a small adjustment to the proposed amendment to regulation 10:

10. Short Title and Commencement

These regulations are called the ~~Amendment Individual Processes and Procedures Regulations 2015~~ Individual Licensing Processes and Procedures Amendment Regulations 2015 and will come into operation one calendar month after publication in the Government Gazette.

ADDITIONAL COMMENTS

31. The interpretation of regulations of this nature and the completion and submission of the forms provided is already a relatively complex administrative task. This is complicated by incorrect clause numbering and references, particularly as regards the forms provided.
32. ISPA requests that the Authority take steps to publish a full set of regulations incorporating all amendments so that these are set out in a single document. Providing a simple, single set of regulations which are easy to follow will assist licensees and registrants to comply with the Authority’s requirements.
33. ISPA submits that the Authority should:

- 33.1. Host a workshop for licensees subsequent to the finalisation of the Draft Regulations on the implementation of the amended existing Regulations. The agenda for such workshop should include providing clarity on the queries raised in this and other submissions.
- 33.2. Develop and publish a practise note on the implementation of the amendments to the existing Regulations, informed by the outcomes of the workshop.
- 33.3. This would be facilitated by delayed implementation of the amendments.

CONCLUSION

34. ISPA thanks the Authority for its efforts herein, and confirms that it wishes to participate in any further proceedings undertaken pursuant to the finalisation of the Draft Regulations.

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ISPA REGULATORY ADVISORS