

## **ISPA SUBMISSION**

# **DRAFT .ZA REGISTRY AND REGISTRAR LICENSING REGULATIONS AND PROCEDURES**

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6 June 2022

## ZADNA

**Attention: Advocate Lerato Seema**

Per e-mail: [rlsubmissions@zadna.org.za](mailto:rlsubmissions@zadna.org.za)

Dear Advocate Seema

### **Draft .ZA Registry and Registrar Licensing Regulations and Procedures**

1. ISPA refers to the Draft .ZA Registry and Registrar Licensing Regulations and Procedures published by ZADNA for comment (“**the draft regulations**”) and sets out below its submissions.
2. Should ZADNA choose to conduct public hearings or any further process, ISPA gives notice of its intention to participate.

### **Executive Summary**

3. The draft regulations as proposed would have a deleterious effect on the .ZA namespace. Domain names are particularly subject to marketing and trust issues. This is the main differentiator between the various TLDs and ccTLDs available out there. Goodwill is an essential factor in the use and adoption of the .ZA brand. A heavy handed, top-down approach as indicated by the draft regulations would lead to brand owners shifting their focus to other more stable, less cumbersome, cheaper and more welcoming TLDs.
4. The lack of a regulatory impact assessment to inform the development of the draft regulations and the failure to provide interested parties with an explanatory document setting out ZADNA’s reasoning is both an impediment to understanding and a material procedural flaw. This is at the root of the problems with the draft regulations as set out in the submissions below.
5. ISPA’s firm view is that the draft regulations as they are proposed need serious reworking based on a comprehensive understanding of the domain name ecosystem if they are to contribute to the continued success of the .ZA namespace.

### **ISPA’s interest in the process**

6. A considerable number of ISPA members provide registrar and registry services. The vast majority of these are SMEs.
7. ISPA has an active domain name working group as the focal structure for these members. The membership of this working group represents an exceptional collection of expertise and experience across all aspects of the domain name ecosystem.

8. ISPA – through the working group – has an active and constructive relationship with ZADNA, which it greatly values.
9. ISPA has received considerable input from its members in response to the publication of the draft regulations. The domain name working group held a number of extraordinary meetings to discuss the draft regulations and inform this document.
10. Given the content of the draft regulations, ISPA and its members have a clear and direct interest in this process.

#### **Statements of support for the ISPA submission**

11. Support for ISPA's submission has been indicated from e-Schools' Network, NOM.ZA and TENET.

- 11.1. NOM.ZA:

*"I'm quite happy with ISPA taking the lead on this and would certainly add my thoughts (based on the community we serve) to the submission. In general, it seems ZADNA forgets that .nom.za is a 100% free registry that is run on the good-will of multiple players when drafting policy; especially surrounding the financial obligations, which we clearly cannot meet."*

- 11.2. e-Schools' Network:

*"We are happy to support ISPA's submission."*

- 11.3. TENET:

*"TENET wishes to record that we endorse the separate submission of the Internet Service Providers Association (ISPA) which covers more general issues that are of concern to the domain name industry as a whole."*

- 11.4. SITA:

*"Our concern is that the proposed policy is unclear on how closed, moderated domains are to be handled and only considers the commercial domains. The policy seems amenable to those operating models but in our opinion should not be applied to gov.za or mil.za as these are strictly restricted domains. The policy is unsupportable by us in its current form as a result of these uncertainties."*

## GENERAL SUBMISSIONS

12. This section of the document sets out some of ISPA's overriding concerns regarding the draft regulations.

### **The lack of a regulatory impact assessment**

13. ISPA views the failure of ZADNA to undertake a regulatory impact assessment as a material procedural flaw.
14. The failure of ZADNA to provide a reasons document or explanatory memorandum – summarising the outcomes of the regulatory impact assessment – to accompany the draft regulations is a material procedural flaw which prevents those responding to the draft regulations from evaluating the evidence collected by ZADNA and the conclusions drawn which inform the content of the draft regulations.
15. For clarity: the FAQ document published by ZADNA on 1 June 2022 is not a reasons document or a statement of the evidence considered by ZADNA in the drafting process.
16. ISPA acknowledges the public engagements held by ZADNA, but these cannot be substitutes for a reasoned written statement of the motivations and considerations at play in the drafting of the draft regulations.
17. The failure to provide a reasoned foundation for the draft regulations at the commencement of this process indicates that ZADNA is unaware of the potentially disastrous consequences of implementing the draft regulations in their current form.
18. ISPA's submission should be understood in this context.

### **Legislative basis for the draft regulations**

19. Section 65(1) of the ECT Act states that ZADNA must license and regulate registries and must license and regulate registrars for the respective registries. Section 68(a) provides that ZADNA may make regulations regarding, inter alia, the requirements which registries and registrars must meet in order to be licensed, including objective standards relating to operational accuracy, stability, robustness and efficiency.
20. The fundamental difficulty which ZADNA faces in formulating the contemplated regulations is that the ECT Act was drafted twenty years ago. The domain name ecosystem in South Africa and internationally in 2022 is vastly different from that facing the drafters of the ECT Act. For example:
  - 20.1. In 2002 consumers could choose only between .com and .co.za, obtainable through a limited number of providers. The ecosystem is now highly competitive, both in terms of the variety of

domain names available and the number of local and international entities active in providing domain name services in South Africa.

20.2. .ZA domains compete with hundreds of other domains to attract registrants. In this environment, any additional burden on potential registrants will discourage use of the .za SLD and encourage registrants and registrars to choose domains with less burdensome registration requirements.

21. Current national policy on the .ZA namespace is set out in the 2016 National ICT White Paper. The White Paper:

21.1. Recognises the degree to which the .ZA namespace had evolved between 2002 and 2016:

*South Africa has a vibrant Internet management regime consisting of a secure and stable .ZA domain namespace with a little more than one million registered names. There is also a steadily growing Internet service provider (ISP) community in South Africa. For example, of the 429 ISPs accredited to register .ZA domain names (as of 2 February 2016), 84 per cent (359 ISPs) are South African. The allocation of IP addresses is normally the business of ISPs, and the healthy state of the local ISP community indicates that there is ready access to IP addressing.*

*There is no restriction requiring local ISPs to only sell .ZA domain names services. In fact, most local ISPs also sell domain name registration of other (non-South African) namespaces. Likewise, there are a number of leading international ISPs that are actively selling .ZA domain name registration services, and are able to provide such services to South Africans.<sup>1</sup>*

21.2. Emphasises the need to grow .ZA as the unique South African online identity and to reduce the cost of South African domain names.

22. ZADNA has not disclosed any specific motivation for developing the draft regulations now, two decades after the ECT Act came into force.

23. What is clear is that there is no urgency attached to the development of regulations. The existing framework – borne out of pragmatism – has undoubtedly served the local domain name ecosystem well. Section 68 is not prescriptive: ZADNA has a choice as to whether to issue regulations.

24. ISPA has taken note of recent announcements regarding the review of the White Paper and the preparation of a bill to reform legislation governing the sector.

25. ISPA submits that the development of regulations of this nature should only take place within a policy context which considers current reality and future developments, and which is reflected in an amended ECT Act.

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<sup>1</sup> ICT White Paper, para. 8.12

### The need for light touch regulation

26. The departure point for the development of a regulatory framework should be light touch regulation, informed by a regulatory impact assessment which specifically considers the regulatory burden on registrars and registries.
27. The President in his 2022 State of the Nation Address made it clear that reducing the regulatory burden for SMEs is a government priority:  
*“This year, we are undertaking far-reaching measures to unleash the potential of small businesses, micro businesses and informal businesses.*  
*These are the businesses that create the most jobs and provide the most opportunities for poor people to earn a living.*  
  
....  
*There are too many regulations in this country that are unduly complicated, costly and difficult to comply with. This prevents companies from growing and creating jobs.”*
28. Increasing the regulatory burden increases the cost of providing registry and registrar services, leading to pressure on providers to increase prices or reduce margins. In a competitive ecosystem this disincentivises new entry. Stated differently: increased regulatory obligations are a barrier to entry.
29. There is no evidence that ZADNA has considered these matters in developing the draft regulations.
30. In formulating regulations ZADNA should:
  - 30.1. Expressly consider the manner in which it can reduce the regulatory compliance burden for SME licensees.
  - 30.2. Carefully consider any regulatory compliance obligation placed on licensees with specific reference to the relationship between the purpose of the obligation, the cost of compliance and the implications for the cost of .ZA names.

### Applicability of these regulations to all sub-domains

31. The draft regulations seem to have been drafted with only one registry/registrar model and only the current operational processes for the open second-level domains in mind.
32. ZADNA itself distinguishes between moderated and unmoderated domains. Unmoderated domains are domains which are open to general registration (such as .co.za and .web.za), while moderated domains have specific eligibility requirements (such as .gov.za and .ac.za). While a registry/registrar model is in place for the majority of the unmoderated domains, most of the moderated domains do not have a registry/registrar model. Instead, the entity to which the administration of the second-level domain has

been delegated handles registrations and maintains the zone file for that second-level domain (i.e. '*vertical integration*'). The proposed licensing model set out in these regulations falls apart when applied to such situations.

33. It also cannot be assumed that a registry/registrar model applies to all unmoderated domains, since .nom.za is a clear example of an unmoderated domain where this is not the case.
34. Here is a partial list of inherent problems caused by ZADNA's drafting approach:
  - 34.1. The draft regulations assume that there are separate registries and registrars in place for all second-level domains and that there exists a contractual relationship between a registry and its registrars as well as one between those registrars and registrants. This is not the case for many second-level domains.
  - 34.2. The draft regulations assume that assigned SLD administrators have the ability to compel registrants to provide identifying information or to update their recorded details retrospectively. Such requirements do not exist in the ZADNA-approved Charters for many second-level domains.
  - 34.3. The draft regulations assume that all second-level domains have a renewal process and that there are specific renewal dates for all domain registrations. This is not the case.
  - 34.4. The draft regulations assume that all domain registrations are paid for. This is not true for almost all moderated domains under .ZA. It is not even true for all unmoderated domains.
  - 34.5. The draft regulations seem to imply that a licensed registrar must register domains in all second-level domains upon request by a registrant. This is not possible. A registrar can only register domains where that registrar has a relationship with the registry operator for a subdomain. In some cases, a registry also requires accreditation of registrars in respect of specific SLDs.
  - 34.6. The draft regulations assume that the registry data held by unmoderated domain administrators is the same as the registry data held for moderated domains. This is not the case.
  - 34.7. The draft regulations fail entirely to address closed second-level domains, such as .alt.za, which no longer accept new registrations.
  - 34.8. The draft regulations assume that the alternative dispute resolution process applies to all .ZA subdomains. It does not. The Minister has only approved the ADR process for a limited number of second-level domains.
  - 34.9. The draft regulations use "non-commercial" in reference to registries and registrars, but this term is not defined and does not seem to have a clear relationship to unmoderated and



moderated domains. To ISPA's knowledge, none of the current second-level domains are administered by a for-profit entity. All of them are administered by non-profit or parastatal organisations of some form.

35. ISPA believes that these issues are of themselves significant enough for ZADNA to either significantly review the draft regulations so as to clearly address the different models in place for different second-level domains, or alternatively, limit the applicability of these draft regulations only to those second-level domains for which they make sense.

**Requirement for registrants to provide identity documents / identity document information**

36. It cannot be overemphasised that any attempt by ZADNA to introduce a new requirement for registrants to provide "identity document details" in order to register a domain or to renew a domain has potentially catastrophic consequences for the future of the .ZA namespace.
37. Critically the term "identification document details" has not been defined and there is no explanatory document providing answers to the questions raised by ISPA members.
- 37.1. Am I required to collect an identity document/passport number? If so, am I required to verify this document and store a copy?
- 37.2. Am I required to collect an identity number/passport number? If so, am I required to verify that this number is valid / is valid for the registrant?
- 37.3. If verification is required what verification procedures are acceptable?
- 37.4. Can the development costs and the costs of storage and/or verification be recovered? Is this a deduction from any proposed licence fee?
- 37.5. Is the sharing of this personal information allowed under POPIA?
38. ISPA and its members have a wealth of experience in the implementation of the know-your-customer (KYC) provisions set out in the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 ("RICA"). ZADNA is requested to note the dramatic fall in the number of MSISDNs registered on local mobile networks following the introduction of the RICA KYC requirements, including the requirement that KYC be undertaken for existing subscribers.

### Impact on the namespace

39. While there are some examples of domains which require registrants to provide some form of proof of identity<sup>2</sup>, it is clear that such a requirement is a strong indicator of a failed domain, being one which is stagnant and exhibits no growth in the number of registrations.
40. ISPA is unable to assess any comparative studies undertaken by ZADNA to inform its position. ISPA submits that the introduction of such a measure is in conflict with the Authority's obligation to comply with international best practice in the administration of the .ZA domain name space, as set out in section 65(1)(d) of the ECT Act.
41. Domain registrants have choice. No .co.za registrant is obliged to register their domain under .co.za. They can choose to make use of one of hundreds of other alternatives. Indeed, ZADNA itself has, throughout its existence, invested significant resources in projects designed to encourage registrants to use .ZA domains instead of alternatives. It has done this because such marketing is critical to ensure that .ZA continues to grow. For .ZA to continue to thrive, it is essential that such marketing initiatives continue.
42. Perhaps more importantly, registrars also have a choice. Domain registrars do not only offer .co.za domains to their customers, but present .ZA domains as one of many possible options. Nothing obliges any existing registrar to continue offering .ZA domain registrations if it stops being in their best interest to do so. If ZADNA, through unwieldy regulation, places requirements on registrars that are more onerous than the requirements for other domains, then those registrars will either stop offering .ZA domains to their customers or give preferential treatment to competing domains with less problematic registration requirements. It must be emphasised that while ZADNA needs registrars in order to sell .ZA domains, those registrars do not need ZADNA in order to sell other domains to their customers.
43. When given the choice between providing identification documents or "identity document information" to register a .ZA domain, or registering a domain which has no such requirements, an overwhelming number of new registrants will choose the easiest option for them. New registrations for .ZA domains will immediately plummet.
44. As noted above, it is not clear from the draft regulations whether registrars will be expected to verify the information provided by registrants (i.e. cross-referencing it with a supplied identity document). If this was a requirement it would be wholly impractical and would create unsustainable additional costs and delays in registering domain names.
45. Alternatively, if verification is not required, this begs the question: how much can we then rely on the

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<sup>2</sup> ISPA has identified that the .ru (Russia) and .cn (China) ccTLDs require this and it may be required by a few specialised gTLDs (where the requirement is akin to a form of moderation).

accuracy of the information collected and will it still serve its intended purpose?

#### Lack of any rational basis for the requirement

46. Given the overwhelmingly negative impact this requirement will have on the .ZA namespace, one might assume that ZADNA must have a clear and urgent reason for seeking to impose such a radical requirement on domain registrants. Regrettably, that does not seem to be the case.
47. In the recently published FAQ, ZADNA provides the following answer to the question “Why does the Authority need the identity document details of Registrants?”:

*The Authority will need the Identification document details of the registrants as an additional step to keep a record of the legitimacy of the registrant upon registration. This information shall be collected by the registrars upon registration and shall be used only for the purpose of collecting it use (sic) as prescribed by law.*

48. A statement that ZADNA intends to use the provided identification document “as an additional step to keep a record of the legitimacy of the registrant upon registration” is hardly a persuasive reason. Why does ZADNA need to keep a record of the legitimacy of a registrant? What purpose does such a record serve? What evidence is there that requiring the provision of identification documents will serve that purpose? Why must this be required for .ZA domains when it isn’t a requirement for thousands of other domains a registrant can choose from?

#### Wrong tool to deal with domain name abuse

49. One might assume that ZADNA believes that requiring registrants to provide identification information will assist in combating domain name abuse. Domain name abuse is undoubtedly an issue which requires efforts to combat. However, assuming that requiring registrants to provide copies of identification documents is the correct way to address domain name abuse is fundamentally flawed for many reasons.
- 49.1. Fraudulent domains are used by criminals. Criminals do not provide valid identification documents when required to do so in order to conduct criminal activity. As well as being a common-sense observation, ISPA has evidence of this through the take-down notice process. Overwhelmingly, when the owner of a website that is engaging in fraudulent or criminal behaviour is investigated, any identification records that the service provider has on record for that person are also fraudulent, or worse, stolen from an innocent party.
- 49.2. Criminals also have a choice. Like any other registrant, a criminal wishing to avoid providing identification documents will simply use a different domain. A “fakeorg-za.info” website will be almost as effective when used for tender fraud as a “fakeorg.co.za” website.

- 49.3. It follows from the above that it is counterproductive to put in place measures that will discourage criminals from using the .ZA namespace. While this may seem like a strange statement to make, having a fraudster use a .ZA domain for a phishing site may be preferential to having that fraudster use a .com domain for a phishing site. A .ZA domain falls under ZADNA's jurisdiction, and once detected, a registry can be instructed to deactivate the site and the registrar instructed to retain any evidence that may be useful for law enforcement purposes. For a .com domain, the public's ability to combat abusive domains—even when targeted at South African users—is substantially more limited.
- 49.4. The fraction of .ZA domain names used for fraud is a miniscule portion of the total number of registered domains. Imposing a burdensome requirement on 99.99% of legitimate registrants in order to restrict 0.01% of corrupt registrants is an extremely poor trade-off.
50. If ZADNA is serious about combatting domain abuse within the .ZA namespace, instead of introducing radical new registration requirements, it should focus on putting in place a more streamlined way of disabling and removing .ZA domains that are being abused. Both ISPA and the ZA Central Registry already have procedures in place to combat problem websites and problem domains, but these processes are somewhat constrained by legislative and commercial considerations. ZADNA should be coordinating initiatives between law enforcement, registries and registrars and publishing regulations that ensure that a domain which has been unambiguously connected to abusive activity can be deactivated in the shortest possible time.
51. There is a growing global practice toward policing a broader range of DNS abuses<sup>3</sup>. This also recognises the reality that abuses happen across SLDs and TLDs and that more international and local collaboration is required. ZADNA should seek to participate in these initiatives rather than attempting to act in isolation.

#### Failure to meet POPIA requirements for minimality

52. The .ZA namespace has thrived for more than three decades without any requirement for registrants to provide identity document information. It follows that it is quite possible to operate the namespace successfully without such a requirement being imposed. Given this, the requirements in the draft regulations for registrants to now provide additional personal information in order to register a domain do not meet the POPIA requirements for minimality.
53. Clause 10 of POPIA specifies: "Personal information may only be processed if, given the purpose for

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<sup>3</sup> See for example the ICANN DAAR (Domain Abuse Activity Reporting) function: (see <https://www.icann.org/resources/pages/daar-cctld-2021-05-11-en>)

which it is processed, it is adequate, relevant and not excessive.” ISPA contends that the information requirements in the draft regulations are irrelevant and excessive and that ZADNA has failed to demonstrate any reasonable requirement for additional personal information to be provided by registrants.

54. There is no evidence that ZADNA has considered the implications of POPIA in this specific regard or more generally. Nor is there evidence that the implications of requirements to share personal information under POPIA and GDPR – where a database contains records of EU data subjects – have been considered.
55. ISPA suggests that ZADNA consult with the Information Regulator in this regard.

#### Lack of consideration of the technical impact

56. ISPA notes that the existing technical systems used by registrars and registries in South Africa, and indeed globally, do not support the inclusion of an identity document or “identity document information” in the registration process. Further, such a requirement is not supported in the Extensible Provisioning Protocols (EPP) used by the domain industry. Adding such a requirement would require all registry operators, all registrars and all resellers of domain names to replace or sufficiently change their existing technical systems, customer support, data security and compliance systems, with the associated costs.
57. ISPA contends that ZADNA has failed to consider international best practice, failed to conduct any sort of impact study, failed to consider the technical impact on registry/registrar systems, and—crucially—failed to provide any rational basis for the requirement for registrants to provide identification documents or “identity document information” when registering a domain. The inclusion of this requirement in the draft regulations is thus fatally flawed.

#### **Absence of transitional provisions**

58. .ZA has existed for 32 years; some registrars and registries have been in operation for more than 10 years under the current operating regime, or longer if you consider the “de-facto” registrar setup under the previous regime. Some moderated domains have been servicing registrants for more than 30 years.
59. There are no transitional provisions in these regulations. What happens to all of the current registrars (>680) who are not granted licences? What happens to those domains? Should domain holders whose registrars elect not to apply for a licence or who are not granted a licence for some reason expect that their domains should stop working?
60. Has ZADNA considered the potentially devastating impact of non-compliance with these regulations? If so, has ZADNA invested sufficiently in liability insurance for the flurry of litigation it will face from unhappy domain registrants?

61. How are all of the other requirements in the regulations going to be policed for existing domains (for example the requirement to provide identification documents). Transitional provisions will also be needed to deal with registry data for the 1.3+ million existing registrations.

**Relationship between regulations and annexures/forms**

62. The forms attached to the draft regulations include many requirements not covered in the body of the draft regulations. Additional regulations cannot be introduced via appended forms, rather the forms should reflect the requirements already set out in the draft regulations.
63. ISPA notes that there are numerous drafting problems and questionable fields included in these forms, and a failure to point each of these out in the specific submissions below does not indicate acceptance of the proposed forms.

**Fees**

64. When reviewing the draft regulations, it is difficult to escape the conclusion that a primary objective of developing the draft regulations is to allow for new revenue streams to flow to ZADNA.
65. In the highly competitive domain name ecosystem, any fees and tariffs imposed by ZADNA translate into increased costs to administer .ZA domains, which in turn leads to increased costs to registrants. Increased costs to registrants makes .ZA domains less competitive, leading to the .ZA namespace shrinking. This is counterproductive.
66. An example is the requirement that the full “Accreditation Fee” for the first year must be paid up front. This has obvious commercial implications for the applicant while ISPA cannot think of any cost which ZADNA would incur justifying such an approach.

**The nature of the framework being introduced – by licence or by agreement?**

67. ZADNA is requested to clarify the regime which it intends to introduce through the draft regulations.
68. In particular there is confusion between a licensing regime – where ZADNA issues a licence embodying the terms and conditions applicable to it – and the current practice where a commercial agreement has performed the function of a licence. The draft regulations seem to propose a hybrid approach.
69. When ZADNA issues a licence this cannot be subject to further negotiation around an agreement to be entered into between ZADNA and the licensee. The licence then effectively becomes an agreement to agree.

## SPECIFIC SUBMISSIONS

### Regulation 1: Definitions

*“registrant agreement” means the agreement Registrars are obliged to conclude with their Registrants to ensure Registrant compliance with these Regulations, policies and Charters*

70. The requirement for registrars to have an agreement with their registrants requiring those registrants to comply with the finalised Regulations, policies and Charters is unusual in the domain name ecosystem. Could this “agreement” be covered in the terms and conditions that the registrant accedes to when registering a domain as they currently are?

*“registrar fees” means the per-domain-name fees collected by Registrars from Registrants, and payable to Registries in accordance with Domain Name price determinations of the Authority;*

71. Not all domains have fees associated with them. For example, government departments do not pay SITA in order to register a .gov.za domain. This definition seems to assume that there are registrar fees applicable for all SLDs, which is not the case.
72. Even for an SLD such as co.za, it is not a given that every registrar will collect a fee from a registrant for a domain name. In some instances, domain names are simply bundled into a package or subscription deal.

*“registrar services” means the services to be performed by the Registrar in terms of these Regulations which services allow the registration and management of Domain Names in SLDs;*

73. This definition needs to be limited to “specific SLDs”. It does not apply to services which a registrar provides for SLDs that aren’t covered by these regulations. (The ECTA definition of SLD is not limited to .ZA SLDs.) Currently this definition would extend to services a registrar performs for, say, domain.co.uk if that registrar also happened to register .co.uk domains.

*“registry data” means all data maintained in the Registry Database by a Registry, including without limitation—*

- (a) Domain Names;*
- (b) Registrant name and contact information;*
- (c) Registrar name and contact information;*
- (d) zone records;*
- (e) registration and renewal dates; and*
- (f) all other data submitted by the Registrars concerning particular Domain Names, as may be prescribed in the Registrar Agreement;*



74. The term “zone records” is an ambiguous term and is not defined in the draft regulations. The intention here seems to be to cover the term “delegation records”.
75. Further, “registration and renewal dates” are system generated and registrars do not manually change these, so they cannot be “maintained” by the registrar.

*“registry services” means the services to be performed by the Registry in terms of these Regulations, which services allow the generation of either DNS resource records that are published authoritatively, or responses to Domain Name availability lookup, or Whois requests from some or all of the Domain Names;*

76. This definition is vague and opens the door for a registry to also provide services usually offered by a registrar. It also prevents the registry from potentially offering services that should be offered by a registrar. The definition needs some work to be useful.
77. As a general issue, the draft regulations assume throughout that the registry and registrar(s) will be separate entities for all SLDs. This is not the case for most/all moderated SLDs, where the registry and registrar are a single entity.

#### **Regulation 4: Functions and responsibilities of Registries**

78. Sub-regulation 4(2)(a) states that:

*(2) A licenced Registry must—*

*(a) Implement decisions relating to Domain Names, registered in a SLD which it is licenced to operate, that arise out of the .ZA Domain Name dispute resolutions process;*

79. ISPA notes that the Minister has only gazetted notices making the ADR process applicable to a limited number of SLDs. It does not apply to all of them.
80. This is another instance where the draft regulations make unwarranted assumptions that all domains are unmoderated, paid for domains covered by the same dispute resolution process.

#### **Regulation 5: Functions and responsibilities of Registrars**

81. Sub-regulation 5(1) states that:

*5. (1) The Registrar must, on behalf of its Registrants, register Domain Names for all SLDs if the Registrant has complied with the requirements in these Regulations and any relevant SLD Charter and Registrar Agreement.*

82. As written, this clause forces a registrar to register a domain whether or not the registrant has complied with the registrar’s commercial or legal requirements, for example, paying for that domain. A registrar cannot be compelled to offer a service to a registrant who meets the requirements, since



such registration is a service that is subject to a (private) commercial agreement between the registrar and registrant. “The Registrar must” should be replaced with “The Registrar may”.

83. Requiring registrars to register domain names for all SLDs also does not make sense. A registrar can only register domains for SLDs for which it is a licensed registrar and for which it has actually been activated on the registry system (i.e. obtained live credentials). Further, “all SLDs” creates the impression that the registrar should register the registrant’s domain in all SLDs instead of the specific SLD that the registrant wishes to register in.

#### **Regulation 6: General terms and conditions**

84. Why is a registry licence only valid for five years? This seems inappropriate for the scale of investment required to build and maintain critical registry infrastructure. ISPA recommends that this should be at least 20 years, which would be comparable to the licence duration for individual ECNS licences issued by ICASA.
85. ISPA cannot understand why a registry licence would be issued for a shorter term than a registrar licence.
86. Limiting this licence duration to five years will force licence applicants to increase pricing for the registry services significantly in order for it to remain financially viable to operate the registry which will result in higher domain costs for registrants.
87. The period of renewal of a registry licence must be specified in the regulations to promote commercial certainty. This should not be a matter for later determination by ZADNA.
88. The notice period to be observed by a registry wishing to discontinue registry services authorised by a licence should be longer than three months to allow a proper transfer of services to a third party.
89. Sub-regulation 6(4) imposes an obligation to provide continuous registry services unless ZADNA appoints an alternative registry or requires the registry to cease services.
- 89.1. This is the only provision in the draft regulations contemplating the appointment of an alternative registry to provide registry services during the term of an already issued licence. No further detail is provided about what would be an extraordinary measure which undermines commercial certainty and the business case for the existing registry.
- 89.2. In ISPA’s understanding the only basis on which ZADNA could require the cessation of registry services would be through the revocation of a licence. If this is ZADNA’s intention this should be clearly stated.
90. Sub-regulations 11(8) and 11(9) are repetitions of sub-regulations 11(3) and 11(4).

91. As noted in the general comments section, the term “non-commercial Registry” as used in sub-regulation 11(10) is not defined in the draft regulations.
- 91.1. A period of three business days as a baseline period appears impractically short. The reference to “or any other period determined” should be amended to read “or any other longer period determined” to make it clear that ZADNA cannot specify a period shorter than the baseline period. The same consideration applies in respect of sub-regulation 11(11).
- 91.2. In the absence of a reasons document it is not possible to determine whether ZADNA has considered the intellectual property considerations relating to rights in a database of domain name holders.

#### **Regulation 7: Specific terms and conditions for Registries**

92. With regard to sub-regulation 7(1)(d)(ii):
- 92.1. There is and should be no need for an already licensed registrar to provide its identity and technical contact details for every domain name registration.
- 92.2. Most registrars will be corporate entities: the reference to identification document details is inappropriate.
93. ISPA refers to its comments above regarding “zone records”.
94. Sub-regulation 7(2) requires a registry to provide, free of charge, “reasonable online access to the Registry Database”. “Reasonable online access” is a vague requirement that needs to be specified.
95. Sub-regulation 7(3) should simply reflect that registries must ensure compliance with POPIA and ZADNA should not seek to introduce any regulations or other provisions purporting to govern the processing of personal information in South Africa. ISPA suggests that ZADNA consult with the Information Regulator in this regard and with specific reference to whether a discrete code of conduct under POPIA is warranted for the processing of personal information by registries.
96. Sub-regulation 7(5) requires that a Registrar and Registrant Agreement must “contain the specific terms and conditions of the relationship between the Registry and the Registrar when accessing the Registry Database”.
97. Under sub-regulation 7(6) these terms and conditions must include a registry’s “specific licence conditions applicable to the Registrars use, in terms of these Regulations, of any licenced products and software”.

- 97.1. This is an unnecessary requirement. The requirement should be limited to ensuring that the registrar complies with any technical requirements of being a registrar. This constitutes undue interference in the registry/registrar relationship by the Authority.

#### **Regulation 8: Specific terms and conditions for Registrars**

98. ISPA refers to its comments above in respect of registries and incorporates in this section such of those comments that are relevant.
99. Sub-regulation 8(1)(b) requires a registrar to “pay any applicable licence and registrar fees to the Registry”.
- 99.1. If ZADNA intends issuing licences to registrars, then ZADNA as the licensing authority must collect any licensing fees payable by registrars.
- 99.2. If the term “licence” is intended to refer to software licence fees, ISPA refers to its comments above about the inappropriateness of such a requirement in a regulatory document.
100. Sub-regulation 8(2) requires that a “Registrar Licence agreement” contain a provision indemnifying ZADNA against liabilities incurred by the registrar when dealing with registries and registrants.
- 100.1. What is a “Registrar Licence agreement”? This term is not used elsewhere in the draft regulations.
- 100.2. The function of an indemnity in a commercial agreement is for an indemnifying party to indemnify an indemnified party against claims from third parties arising as a result of the breach of the agreement by the indemnifying party. The parties to a “Registrar Licence agreement” cannot extend an indemnity to a third party (i.e. ZADNA).

#### **Regulation 9: Monitoring**

101. ZADNA proposes that it may “from time to time” conduct audits and “perform tests” on the infrastructure and processes of a licensee for the purpose of evaluating licensee compliance with ZADNA regulation and “any other technical, operational and other regulations, standards and procedures of the Authority”.
102. This requirement is deeply problematic. The infrastructure and processes maintained by registrars incorporate proprietary know-how and customer information that goes beyond the .ZA domain name space, or indeed domain names in general. Registrars tend to support a wide variety of Internet-related services and domain name products for clients both locally and internationally. A nominal and (potentially) inseparable part of this may relate to the .ZA registrar environment.

103. Further, the reason for developing Application Programming Interfaces (APIs) is precisely to obviate the requirement to know the internals of systems whilst still allowing interaction. Business rules should be built into the API, to prevent callers of that API from performing incompatible operations. EPP is the public API for DNS, and the only interaction across entity boundaries.
104. As a result, registrars will not give ZADNA access to their systems in order to be able to offer .ZA domains to registrants. The benefits of being able to offer those domains to registrants are not significant enough to outweigh the risks and inconvenience of providing a third party with access to proprietary commercial systems.
105. In ISPA's view compliance is baked into the current model, as a registrar's infrastructure and processes, as they relate to an SLD, must remain 'compliant' with the SLD Registry system's rules and policies. No additional external monitoring from a compliance perspective is required.

#### **Regulation 10: Investigation**

106. As a general comment the complaints resolution procedure set out in the proposed regulation 10 lacks particularity and an appropriate level of procedural complexity given the potential consequences of an adverse finding made against a licensee. At a minimum such a procedure should:
  - 106.1. Require that the specific section(s) and or regulation(s) alleged to have been breached are clearly identified in the complaint notice. There is no provision in the proposed complaints form for this information to be specified. This is a critical element of observing the *audi alteram partem* rule.
  - 106.2. Provide procedures to accommodate information requests to allow a licensee to understand in full the case it is required to meet.
  - 106.3. Provide procedures for ZADNA to allow extensions of time for response by a licensee where this is warranted by the circumstances of the matter, such as technical complexity.
  - 106.4. Specify the time period in which ZADNA must complete an investigation into whether it will pursue a complaint.
  - 106.5. Specify the time period after receipt of a final response from a licensee in which ZADNA must provide its decision in respect of a complaint.
  - 106.6. Specify that a decision made by ZADNA in respect of a complaint must be in writing and must be accompanied by written reasons.
  - 106.7. Provide for confidentiality obligations attaching to the parties to a complaint, including ZADNA.

107. ISPA submits that the proposed regulation appears to conflate different processes.
- 107.1. A complaint lodged by a person (which includes licensees themselves, i.e. a registrar could lodge a complaint against a licensee), captured in a complaint form.
- 107.2. The investigation of a suspected breach by ZADNA potentially resulting in the issuing of a notice setting out the nature of the alleged breach. This notice would require either the remedy of the alleged breach within ten business days or the provision of a written response within ten business days.
108. These are very different processes which should be separately provided for.
109. In making reference to potential consequences or sanctions ISPA notes that the only applicable competent sanction is the revocation of a licence.
- 109.1. Is it ZADNA's position that revocation of a licence will be the applicable sanction irrespective of the nature or severity of a breach of the proposed regulations or the ECT Act determined to have occurred by ZADNA?
- 109.2. The FAQ notes that a failure to collect "identity document details" will result in ZADNA enforcing remedial action. ISPA seeks clarity from ZADNA on possible remedial actions and the legal basis for these.
110. ISPA has extensive experience of managing a complaints resolution process and would happily share its experience and learnings with ZADNA if requested.

**Regulation 11: Revocation of Licence**

111. The reference in sub-regulation 11(1) to "regulation 18" should be to "regulation 10".
112. Sub-regulations 11(3), 11(4) and 11(5) are contradictory.
113. Under the proposed sub-regulation 11(3) a registrar or registry whose licence has been revoked has 20 business days post revocation within which to make arrangements to ensure the continued use of domain names by registrants.
- 113.1. This requirement is overly optimistic in respect of timeframes, given the commercial and technical complexity of such arrangements.
- 113.2. It is further unlikely that a registry or registrar will self-regulate the transitioning of their business to a third party. ZADNA will need to design and implement some sort of independent service continuity process in the event that a registry or registrar ceases business (for whatever reason).

- 113.3. Registries and registrars cannot be treated equally in this regard: the provision of registry services is orders of magnitude more complex than the provision of registrar services.
- 113.4. ISPA notes that registries are also often subject to an escrow obligation which facilitates continuity.
114. Sub-regulation 11(4) states further that the registrar or registry “whose licence is revoked” must ensure continued service provision.
- 114.1. When a regulatory or contractual relationship ceases (i.e. is terminated or revoked) on what basis can ZADNA insist that services continue to be provided? What are the consequences if the registry or registrar simply ignores this requirement outright?
- 114.2. Once a licence has been revoked the legal nexus between ZADNA and the former licensee no longer exists.
115. Sub-regulation 11(5), however, holds that a licence may only be revoked when arrangements have been made to ensure the continued use of domain names by registrants.
116. ZADNA is requested to clarify the process attendant on the revocation of a licence.

#### **Regulation 12: Liability of Authority**

117. ISPA has reservations about whether a limitation of liability as proposed is legally enforceable, particularly in respect of a decision taken by ZADNA to revoke a licence, taking into account the lack of procedural and substantive detail contained in the draft regulations relating to revocations.

#### **Annexure A: Registry Accreditation and Licensing Application Form**

118. ISPA suggests that table 2 of this form provides for the collection of the details of a technical contact and an abuse contact.
119. Table 3 of Annexure A relates to legislative compliance:
- 119.1. This table requires an applicant to indicate whether that applicant is bound by any suretyship agreements. This is not related to legislative compliance nor is it in any way clear why this information is required or what its relevance is to the evaluation of an application. In ISPA’s view this is applicable to the entire section on “default status” and this should be deleted from the form.
- 119.2. SARS no longer issues tax clearance certificates: proof of tax compliance status should be requested.

119.3. There is no definition of the term HDI as it appears in this table. There is no uniform interpretation of this term in SA law, noting that the terms historically disadvantaged individuals (HDIs), historically disadvantaged persons (HDPs) and historically disadvantaged groups (HDGs) are all used interchangeably and with differing definitions.

120. Table 5 is headlined “contractual compliance” but deals with compliance with the terms and conditions of a licence and with ZADNA’s policies.

121. As a general comment this form should provide for technical information to be supplied as annexures.

#### **Annexure B: Registrar Licensing Application Form**

122. ISPA suggests that table 2 of this form provides for the collection of the details of a technical contact and an abuse contact.

123. Table 3 of Annexure B relates to legislative compliance:

123.1. This table requires an applicant to indicate whether that applicant is bound by any suretyship agreements. This is not related to legislative compliance nor is it in any way clear why this information is required or what its relevance is to the evaluation of an application. In ISPA’s view this is applicable to the entire section on “default status” and this should be deleted from the form.

123.2. SARS no longer issues tax clearance certificates: proof of tax compliance status should be requested.

123.3. There is no definition of the term HDI as it appears in this table. There is no uniform interpretation of this term in SA law, noting that the terms historically disadvantaged individuals (HDIs), historically disadvantaged persons (HDPs) and historically disadvantaged groups (HDGs) are all used interchangeably and with differing definitions.

124. Section 3.4 of Annexures A and B to the draft regulations require registries and registrars to submit BEE / HDI information as part of the application process. This is not dealt with within the body of the draft regulations themselves.

125. ZADNA is required to provide for this request as part of the draft regulations and to stipulate whether it anticipates in future establishing eligibility requirements linked to transformation for obtaining a licence.

126. Table 5 is headlined “contractual compliance” but deals with compliance with the terms and conditions of a licence and with ZADNA’s policies.

### **Annexure C: Complaint Form**

127. ISPA refers to its submissions in respect of the proposed regulation 10 above.
128. This form appears to assume a corporate complainant: it should also provide for natural person complainants.
129. Table 1 in Annexure C requires spurious information that is not necessary in a complaints process, such as the complainant's income tax number.
130. Table 2 in Annexure C refers to an "Applicant for a Complaint" and an "Application Fee", which is not correct.
131. This table further contemplates the payment of a fee by a complainant to be paid by the complainant as part of lodging the complaint.
- 131.1. This fee is not referenced in the proposed regulation 10.
- 131.2. There is no clarity on the detailed investigation and determination process to be followed by ZADNA pursuant to receiving a complaint. It follows that ISPA cannot determine what this fee is meant to cover.
- 131.3. It is not clear to ISPA why ZADNA is of the view that a fee should be paid to lodge a complaint against a registry or registrar. To the best of ISPA's knowledge no other similarly situated government regulator levies such a fee as an acknowledgement that this would disincentivise the laying of complaints.
- 131.4. In ISPA's view ZADNA as a regulatory body which receives revenue derived from payments for .ZA domain names should provide a complaints procedure funded out of that revenue and not seek to levy additional fees on registrants.
132. Table 4 in Annexure C appears to be a cut-and-paste error: it requires that a complainant undertake that "the information submitted here is true and correct to the best of his/her knowledge, and that should any information be found to be false, the Authority may reject the Application or may subsequently revoke the Licence".
- 132.1. The reference to "the Application" should be to "the complaint".
- 132.2. Revoking a licence is not an appropriate remedy against a complainant and this reference should be deleted.
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