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31 August 2023

The Director-General, Department of Communications and Digital Technologies

For attention: Mr. A Wiltz, Chief Director, Telecommunications and IT Policy

Per email: ecabill@dcdt.gov.za

ISPA SUBMISSION 0N THE ELECTRONIC COMMUNICATIONS AMENDMENT BILL 2022

1. ISPA refers to the invitation to comment on the Electronic Communications Amendment Bill 2022 ("**the ECAB 2022**") and sets out its submissions below.

ISPA's interest in the ECAB 2022

2. ISPA is an industry representative body recognised by the Minister of Communications and Digital Technologies.
3. Members are primarily internet service providers providing internet access, voice and other services to South Africans over optical fibre or fixed wireless networks.
4. ISPA members are not as such providers of electronic communications facilities, but they are directly dependent on the underlying fixed and mobile networks made up of these facilities.
5. ISPA promotes competition at all levels of the South African electronic communications industry.
6. INX-ZA, an autonomous division of ISPA, operates community-run internet exchange points (IXPs) in Johannesburg (JINX), Cape Town (CINX), Durban (DINX) and Nelson Mandela Bay (NMBINX). These IXPs provide a neutral facility for ISPs and operators of IP networks to connect and exchange traffic in South Africa, effectively lowering the cost to communicate. Connecting to any of the INXs is easy, and open to any network that has its own IP address space and an autonomous system number.

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New licensing category: electronic communications facilities services

7. ISPA has a general concern that reverse engineering a licensing category into the existing licensing scheme and associated fabric of rights and obligations is a complicated exercise with potentially fundamental consequences for the operation of the ECA.

8. ISPA's overall impression is that the implications of introducing another licensing category for the balance of the ECA have not been comprehensively thought through.

Scope of application

9. ISPA understands that ECFS licensing would not apply to all persons making "electronic communications facilities" as defined in section 1 of the Act available to third parties for use in an electronic communications network.

    9.1. This understanding is based on the proposed subsections 5(3)(dA) and 5(5)(bB) which appear to require ICASA to prescribe which of the facilities listed will be subject to a licensing requirement within 18 months of the coming into force of an Amendment Act.

    9.2. If this is correct, then ISPA submits that greater guidance should be provided to ICASA on how it should undertake this process.

    9.3. The purpose of the new licensing category is to broaden application of the facilities leasing framework to remedy instances where access to facilities is being frustrated.

    9.4. This suggests that a market inquiry or inquiry under section 4B of the ICASA Act will be required to determine markets in which there is a failure of competition due to lack of access to specific electronic communications facilities, i.e. which parties are frustrating access to which electronic communications facilities.

Submission: ISPA submits that the Bill should make the following clear:

- That the ECFS licensing category will not apply to all persons that provide electronic communications facilities services. Rather it will only apply to electronic communications facilities services prescribed by ICASA.
- ISPA suggests that following amendment to the definition of "electronic communications facility service" to achieve this:

  "**electronic communications facility service**" means a service whereby a person makes available an electronic communications facility prescribed by ICASA, whether by sale, lease or otherwise for use in electronic communications network.
- Amendments should also be considered to subsections 5(3)(dA) and 5(5)(bB) to indicate the process to be followed by ICASA in determining and prescribing which electronic communications facilities will require some form of licensing when made available for commercial purposes.

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10. If ISPA's understanding as set out above is not correct and it is the intention of the Draft Bill to require providers of all electronic communications facilities to obtain licensing, ISPA submits that this would be a disproportionate and non-aligned response to the DSMI Final Report recommendations. It would also be completely unworkable.

10.1. The DSMI Final Report recommended legislative amendments to address a lack of access to facilities owned or controlled by incumbent licensees.

10.2. Introducing ECFS licensing across the board would impose obligations on a huge number of persons and entities, including:

10.2.1. Data centres

10.2.2. IXPs

10.2.3. Government, particularly municipalities in respect of co-location space on buildings and infrastructure such as poles, street furniture

10.2.4. Radio dealers (already subject to a licensing requirement) in respect of radio apparatus

10.2.5. Homeowners' Associations and bodies corporate in respect of co-location space and ducting

10.2.6. Business and individuals offering co-location space on rooftops.

10.3. The DSMI Final Report certainly did not intend to impose licensing obligations on all of the above and there is no evident justification for doing so.

10.4. Facilities not under the control of incumbent licensees have transformed the local electronic communications market. Open access data centres and a proliferation of internet exchange points have in particular enabled ISPs to compete without the need for any regulatory intervention and at cost-effective rates.

Submission: if a new licensing category is introduced, provision should be made for licence exemptions relating to that category.

11. Section 7 of the ECA provides for ICASA to prescribe types of ECS, ECNS, electronic communications networks and radio frequency spectrum that may be provided or used without a licence.

12. ISPA submits that amendments are required to section 7 to allow ICASA to prescribe types of ECFS which may be provided or used without a licence. For example subsection 7(1) should be amended as follows:

7. ***Licence exemption***

(1) Subject to subsection (2), the Authority may prescribe the—

(a) type of electronic communications services that may be provided;

(b) type of electronic communications networks that may be operated;

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(c) type of electronic communications network services that may be provided;

(d) type of electronic communications facilities services that may be provided; and

(e) radio frequency spectrum that may be used, without a licence.

13. Subsection 7(2) would similarly require the insertion of a clause setting out the kind of ECFS that ICASA should consider exempting when exercising its discretion under this subsection.

Submission: The definition of "electronic communications facility" requires review.

14. ISPA acknowledges that the definition of "electronic communications facility" was reviewed the last time the ECA was amended in 2014 but submits that it would be beneficial to again review the list of facilities set out in the definition given the intention to create an ECFS licensing category.

15. If ICASA is to prescribe which facilities the making available of which would require licensing, this should be done against a current list of relevant facilities.

Submission: ECFS licensees need to be included in the Chapter 4 framework.

16. An ECFS licensee should enjoy the rights and be subject to the obligations set out in Chapter 4 of the ECA.

17. Section 22, for example, requires amendments as follows:

22. Entry upon and construction of lines across land and waterways

(1) An electronic communications network service licensee and electronic communications facilities service licensee may—

(a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic;

(b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic; and

(c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

(2) In taking any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic.

18. The introduction of an ECFS licensing category raises interesting questions.

18.1. Given that an electronic communications network is a system of electronic communications facilities, in practice nobody lays down an entire network as opposed to building a network facility by facility.

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18.2. Accordingly it seems that Chapter 4 rights sit more comfortably with an ECFS licensing category than they do with ECNS licensees.

Expropriation of rights

19. ISPA members have expressed a concern that the new licensing category may effectively diminish the rights of existing licensees to operate and make available electronic communications facilities.

20. This arises from a lack of clarity as to the interplay between existing licences and the proposed ECFS licence.

21. ISPA understands that existing licensees are already subject to the facilities leasing regulatory framework and therefore there is no purpose in requiring them to hold additional licensing.

22. If this is incorrect and existing licensees stand to lose existing rights unless they obtain ECFS licensing then this is a further basis for ISPA opposing the new licensing category.

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Rapid deployment

23. ISPA supports the proposed insertion of a new section 21A.

24. In particular, ISPA believes it will be useful to include the requirement that municipalities charge cost-based tariffs in the ECA, where it has greater force and effect than its current location in the National ICT Policy White Paper.

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Facilities leasing

25. ISPA understands the importance of an effective framework that enables facilities leasing and infrastructure sharing. The degree to which infrastructure can be shared is a fundamental driver of competition, choice and, ultimately, a lower cost to communicate.

Submission: Developments since the publication of the DSMI Report indicate that moving away from the current regime to "principles of access" will be counterproductive.

26. ISPA notes the proposal to replace the current reasonableness test with a set of principles of access to be developed by ICASA.

27. ISPA recognises the motivation for this proposal and its basis in the DSMI Final Report and agrees that the legal framework for facilities leasing contained in Chapter 8 of the ECA read with the Facilities Leasing Regulations 2010 ("**the ECFL Regulations**") has not facilitated access to facilities as intended.

28. ISPA supports the expressed intention to make facilities leasing easier.

29. However, ISPA submits that the decision of the Gauteng Division of the High Court in the matter of Telkom SA SOC Limited v Chairperson of ICASA and others delivered on 15 August 2020 ("**the Telkom ECFL judgement**")[1] sets out a practical basis for the operation of the facilities leasing framework and obviates the need to make the proposed amendments.

The Telkom ECFL Judgement

30. In this matter Vodacom requested access to ducts and subducts belonging to Telkom in fifteen estates on 6 August 2015 to deploy a fibre network. The ducts were partially utilised by Telkom, but it was common cause that there was space in them for further deployment.

31. After Telkom resisted this request, Vodacom requested that ICASA make a determination on whether the request was reasonable. After conducting its processes, ICASA concluded that Vodacom's request:

    31.1. was "generally technically feasible" in respect of 13 out of 15 estates;

    31.2. was economically feasible taking into account the growth in demand for data; and

    31.3. would promote the efficient use of electronic communications infrastructure.

32. Telkom took ICASA's decision on review to the High Court.

33. The High Court firstly characterised the facilities leasing process as involving:

    "a speedy two stage process: first a determination of whether a lease ought in principle to be given (the reasonableness phase or stage; and then, once established, what the terms and conditions of the lease ought to be (the negotiation phase or stage)"[2].

[1] Telkom SA SOC Limited v Chairperson of ICASA, ICASA & Vodacom SA (Proprietary) Limited, Case No.: 38332/18, available from https://www.ellipsis.co.za/wp-content/uploads/2020/08/Telkom-v-ICASA-others-28332_18.pdf
[2] @ para 6

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34. The Court noted that section 43 of the ECA compels ECNS licensees to share infrastructure for the greater public good, even where this may be contrary to their own interests. The Court refers to the effect of the facilities leasing regime as being similar to "use it or lose it" principles found in other areas of law[3].

35. The following arguments raised before and dealt with by the Court:

    35.1. Telkom argued that it itself had plans to utilise the available capacity, i.e. that this capacity was not available to third parties. The Court, however, found that the fact that Telkom had such plans implied that Vodacom's plans – and its facilities leasing request – were feasible.

    35.2. Further the argument that Telkom would be deprived of the future use of its own infrastructure failed because the purpose of the facilities leasing regime involves depriving "a licensee with capacity as yet unused in favour of a requesting party"[4].

    35.3. The Court rejected the argument that it would be more efficient and more advantageous to consumers for Vodacom not to deploy a network at all but rather to resell services provided by a Telkom associated company.

    35.4. The Court found that the argument that ICASA in reaching its conclusions had not considered the adverse financial impact on Telkom was misplaced: this was properly part of phase 2 of the facilities leasing process, the negotiation phase. As such this was not a consideration in establishing economic feasibility.

    "Once the question can be adequately addressed by way of term or condition in the lease, it would be inappropriate for ICASA to make rulings at the reasonableness stage"[5].

    35.5. Similarly, it was not necessary to establish at this stage a reasonable rental as this is a term of the agreement to be canvassed in the negotiation phase.

36. The Court outlined the following considerations in determining technical feasibility:

    36.1. The question is not whether the lease is optimal, only whether it is feasible.

    36.2. Each case must be determined on its own facts, i.e. will what is proposed work?

37. The Court outlined the following considerations in determining economic feasibility:

    37.1. Do the parties have sufficient economic resources to make the proposal work?

    37.2. Is there demand for the product?

38. In determining whether a facilities lease would promote efficient use of electronic communications infrastructure, the Court considered the following:

    38.1. Is there anything in the proposal that will lead to inefficient or wasteful uses of networks or resources?

[3] @ para 35
[4] @ para 62
[5] @ para 61

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38.2. The inquiry turns on efficiency, not whether the requested use is perfect.

38.3. A cost/benefit analysis should be undertaken when determining this issue.

39. The review was dismissed.

Other matters before the courts

40. ISPA is aware of at least one other matter currently before the High Court relating to a facilities leasing dispute. This is a review application against the May 2022 decision of the ICASA Complaints and Compliance Committee (ICASA-CCC) in a complaint lodged by Telkom against two other fibre network operators (FNOs).

Principles of access vs reasonableness

41. There is nothing intrinsically wrong with the proposed principles of access, although it will not be clear until ICASA has finalised these principles whether they will be more effective than the reasonableness test.

42. However, it would seem counterproductive to change the framework for the facilities leasing obligation when useful precedent has become available to guide more effective implementation of the current approach.

Obligation to provide national roaming and MVNO services

43. ISPA has long argued that opening up effective wholesale opportunities for the resale of mobile voice and data is the biggest intervention that can be made to lower the cost to communicate for the most South Africans.

44. Accordingly, ISPA strongly supports the introduction into the ECA of an obligation to provide access to MVNO services upon request, together with a legislative framework to inform the development of a set of regulations by ICASA.

45. The submissions below are offered within this context of support.

46. They are also offered within the context of ISPA's two decades of experience in introducing competition to Telkom in the fixed line ISP environment.

MVNOs and the ECA licensing framework

Submission: MVNOs need to be understood within the context of the service licensing framework created by the ECA.

47. The MNO industry likes to complicate MVNOs and surround them with jargon. **There is no magic in MVNOs: they are simply ISPs in a mobile environment.**

    47.1. A mobile network operator (MNO) such as Vodacom or MTN acts as both an IECNS licensee and as an IECS licensee.

    47.2. It acts as an IECNS licensee when it uses its network and spectrum to make network capacity available that connects subscribers to base stations and connects base stations to its core network.

    47.3. It acts as an IECS licensee when it uses this network capacity to offer internet access (i.e. "data") and voice services to subscribers. Here it acts as an ISP: when we buy data from an MNO we are buying internet access.

    47.4. Vodacom and MTN are far and away the biggest ISPs in South Africa.

    47.5. MVNOs are also ISPs, and they compete with MNOs and other MVNOs for retail subscribers.

48. How do MVNOs map onto the ECA service licensing framework?

    48.1. MVNOs involve – as discussed below – a range of potential business models and retail services.

    48.2. A common model of MVNO involves the MVNO obtaining bulk discount on voice minutes, SMS and gigabytes from the host MNO which involves the resale of electronic communications services (ECS).

    48.3. This model of MVNO involves the relationship between an individual ECS licensee (the host MNO) and a licence-exempt reseller of ECS (the MVNO).

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48.4. Under another model of MVNO – the "full MVNO" – the MVNO partner has its own numbering, SIMs and network elements such as a Home Location Register (HLR). Here there are two licensing relationships:

48.4.1. The MVNO – acting as an IECS licensee - obtains ECNS from the host MNO.

48.4.2. The MVNO interconnects with the host MNO - both acting the host MNO as IECS licensees.

Defining "MVNO services"

Submission: MVNO is an umbrella term. if this intervention is to have its intended impact, the Bill must be clear about:

- the meaning of "MVNO services" and
- the scope of the obligation to offer MVNO services

49. There has been significant growth in the number of MVNOs operating in South Africa as a result of the regulatory intervention undertaken by ICASA to impose an obligation to offer an MVNO platform on licensees awarded spectrum pursuant to the March 2022 high demand spectrum auction.

50. An important context for the intervention proposed in the ECAB 2022 is that – while Cell C was an early mover for commercial reasons - Vodacom and MTN only started offering MVNO services once they were effectively forced to. This is similar to Telkom's opposition to offering a platform for third party ISP services two decades ago.

51. The obligation imposed by ICASA through spectrum licensing lacks any detail as to what constitutes offering MVNO services and does not provide any regulatory framework for the relationship between host MNO and MVNO.

52. MVNOs launched under the spectrum licence obligation are positioned as "branded resellers": this is the form of MVNO which is lowest on the value chain, receiving a bulk discount on services provided by the host MNO and reselling this. As noted above, this is a relationship between the MNO as an IECS licensee and the MVNO as a licence-exempt reseller.

53. MNOs are not offering other forms of MVNO, such as full MVNOs.

Submission: The forms of MVNO active in the South African market will determine the extent to which MVNOs have the scope to compete through innovation and reducing the cost to communicate in South Africa.

54. As a general rule: the more control an MVNO has over its service offering, the more it can compete and the more the benefits of that competition will translate into a lower cost to communicate.

55. ISPA has direct experience of this process in the fixed market. In South Africa there are ISPs acting as pure or branded resellers but also ISPs which have far greater control over the services they offer to consumers.

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56. ISPA submits that it is therefore important for amendments to the ECA to provide ICASA with a legislative basis that allows it to include in its regulatory framework:

    56.1. A definition of the term "mobile virtual network operator" taking into account that this is an umbrella term for a wide variety of business models.

    56.2. A provision allowing ICASA to determine that affected licensees have reference MVNO offers that cover different business models (at a minimum, branded resellers and full MVNOs).

57. ISPA suggests the following amendments to the proposed section 42B:

42B. National roaming and mobile virtual network operator services regulations

(1) The Authority must ~~prescribe~~ commence public consultation on national roaming and mobile virtual network operator services regulations within ~~18~~ 12 months of the coming into operation of the Electronic Communications Amendment Act, 2022.

(2) The national roaming and mobile virtual network operator services regulations must address the requirements of national roaming and mobile virtual network operator service agreements, including, but not limited to—

(a) a definition of the term "mobile virtual network operator" taking into account the various business models falling within the term and stipulating which of such models are subject to the obligation to provide MVNO services set out in section 42B;

(b) reference offers containing model terms and conditions in respect of different MVNO models;

(c) the minimum quality, performance and level of service to be provided;

(d) the mobile technology generations to which access is mandated;

(e) maximum average wholesale rates, as contemplated in section 47;

(f) contractual dispute-resolution procedures;

(g) the framework for determining the feasibility of providing national roaming and mobile virtual network operator services access and principles of access; and

(h) the determination of access providers as contemplated in section 42A(1).

Who bears the obligation to providing national roaming and MVNO services?

Submission: The obligation to provide national roaming and MVNO services should only apply to licensees assigned IMT spectrum and which utilise that spectrum to provide 90& national population coverage.

58. Section 42A of the ECAB 2022 imposes the obligation to provide national roaming services and MVNO services on "access providers", being ECNS licensees with access to IMT spectrum that have 90% national population coverage.

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59. While section 42A sets a threshold for the operation of the obligation, it remains ICASA's function to make a determination on which ECNS licensees meet this threshold and will be designated as access providers.

60. Subsection 42A(5) requires access providers to retain separate accounts for their radio access network, core network and retail operations.

61. ISPA's view is that the legislative threshold in section 42A should expressly link the holding of assignments of IMT spectrum to 90% national population coverage. It should be explicit that the licensee uses the IMT spectrum assigned to it to achieve the coverage.

    61.1. The current wording – "an ECNS licensee with access to" IMT spectrum – is ambiguous.

    61.2. Does this cover a party "accessing" spectrum through a national roaming agreement which then has 90% population coverage? This would not make sense in context as this party – which may not itself hold any IMT spectrum assignments - would then be obliged to "resell" the national roaming service it is receiving.

62. ISPA suggests the following amendments to subsection 42A(1) to achieve the required clarity:

    42A.

    (1) An electronic communications network service licensee ~~with access to~~ assigned International Mobile Telecommunications radio frequency spectrum, ~~that has~~ which it utilises to have national network coverage of 90% of the population, must provide national roaming and mobile virtual network operator services, and is hereinafter referred to as an access provider.

International roaming

63. ISPA members are not providers of international roaming services but support measures to reduce international roaming tariffs.

64. Members have made the following observations:

    64.1. It would be useful to define the term "international roaming" and to list the essential elements of this service (i.e. a roaming arrangement between a South African mobile service provider and a mobile service provider in a different country allowing foreign provider's subscribers to use their SIMs on the local provider's (SA) network).

    64.2. This would help to distinguish "international roaming" from "national roaming" as well as from wholesale voice call termination (where ICASA currently intends to apply a similar reciprocal rate arrangement in respect of termination of internationally originated voice calls to a South African destination.

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Conclusion

65. ISPA hopes that the above submissions are helpful to the Department and looks forward to the speedy conclusion of this process.

Regards

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