

28 February 2023

Independent Communications Authority of South Africa

Attention: Mr. Peter Mailula

Per email: PMailula@icasa.org.za

Dear Sir

RE: REPRESENTATIONS BY ISPA IN RESPONSE TO THE DRAFT AMENDMENT REGULATIONS REGARDING PROCESS AND PROCEDURES IN RESPECT OF APPLICATIONS, AMENDMENTS, RENEWALS, SURRENDER AND TRANSFER OF INDIVIDUAL LICENCES

1. ISPA refers to the correspondence received from the Authority dated 20 February 2023 relating to the above and welcomes further consultation on what is an important issue for ISPA members and licensees generally.
2. In its written submission on the draft amendments ISPA argued that the Authority was not offering clear guidelines on what constitutes a transfer of control over a licence and that this was at the core of confusion as to when a notification or application procedure may be appropriate.
3. The proposal to utilise an amended version of the definition of “control” found in the Competition Act is therefore – in principle – welcome and supported. ISPA’s view is that licensees and markets will benefit from the increased certainty which a clear definition will bring.
4. ISPA has no suggested amendments to the proposed definition.
5. ISPA has concerns about the lawfulness of inserting such a definition in a regulatory instrument but makes no submissions in this regard other than to request that the Authority explicitly consider whether its proposal can be lawfully implemented.
6. The best way to address the issue remains the insertion of an appropriate definition in the Electronic Communications Act 2005 (“the ECA”). ISPA assumes that this has been or will be raised with the Department of Communications and Digital Technologies.
7. ISPA has noted precedent delivered by the Competition Tribunal and Competition Appeal Court relating to the interpretation of the Competition Act definition which will be helpful to licensees in understanding the approach taken by the Authority.
8. The proposed definition must however be applied and interpreted within the context of the ECA. A major contextual difference is that the Competition Act and regulations thereunder provide for notification thresholds. It is explicitly recognised that mergers and acquisitions involving smaller players

generally do not trigger the jurisdiction of the competition authorities because such transactions have a limited impact on competition with an industry or industries.

9. No such mechanism exists in the ECA. Again this is an amendment to the ECA which the Authority may wish to consider for future implementation. In the interim, ISPA cautions the Authority against adopting an over-wide mandate in respect of transactions affecting the equity of licensees.
10. A final concern relates to the difference between control over a licensee and control over a licence, which ISPA has raised in prior submissions.

Conclusion

11. ISPA trusts that the above is of assistance.