



Submission to the Independent Communications Authority of South Africa

THE DRAFT REGULATIONS FOR PROCESSES AND
PROCEDURES REGULATIONS - Published in
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A. Introduction

1. Telkom SA SOC Limited ("Telkom") welcomes the opportunity to submit its written submission on the Draft amended Processes and Procedures Regulations - Individual Licences ("Draft Regulations") as published under Government Gazette 38921, dated 26th June 2015 by the Independent Communications Authority of South Africa ("ICASA" or "the Authority").
2. Telkom also indicates its availability for making oral submissions to the Regulations.
3. Telkom hereby submits written comments with regard to the amendments relating to:
 - Electronic Communications Network Service Licence; and
 - Electronic Communications Service Licence.

These are the sections relevant to Telkom in relation to Telkom's operating licences.

4. Telkom has divided its comments into the following sections:
 - **Section B:** General Comments
 - **Section C:** Specific Comments
 - **Section D:** Conclusion

B. General Comments

5. Telkom generally welcomes the draft amendments to Processes and Procedures Regulations - Individual Licences insofar as they seek to align the Processes and Procedures Regulations with recent amendments to the Electronic Communications Act 36 Of 2005 (as amended) and other regulations.
6. We contend that the Regulations in their current form do not distinguish between the transfer of shares and the transfer of assets. This is an important distinction to make as the two concepts have different but sometimes overlapping consequences. The Authority needs to bear this in mind when considering transfer of control related amendments to the regulations.
7. The transfer of control with regards to these regulations must be transfer of control in relation to licenced entities. We contend that these regulations do not articulate that crucial point sufficiently. We address this further in our submission.
8. Telkom also contends that in order to clarify the processes and procedures in relation to the applications contemplated in these regulations, the Authority needs to set out its objective test for HDP ownership requirements as well its assessment of promotion of competition and interests of consumers. This will increase legal certainty for applicants and licensees.

C. Specific Comments

9. Amendment to the "Definitions"

Telkom welcomes the amendments to the definitions section.

"Transferee" means a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over 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;

"Control" is as contemplated in the Companies Act, Act No.71 of 2008, as amended;

"Transfer of Control" means transfer of shareholding in the issued licence to a new shareholder;

Telkom is concerned with the definition of "Transferee" in that it does not make the distinction that the assets involved must be sufficiently related to the licenced electronic communications services and / or electronic communications network services.

We also contend that the lack of the definition for "transaction" in terms of these regulations also leaves a lacuna which is open to exploitation. The Definition of transaction would have to encompass an agreement, an understanding or arrangement, written or otherwise, between licensees in order to be effective.

With regard to the transfer of control, the amendments in the definitions section further do not differentiate between a transfer of assets and a transfer of shares. It is Telkom's view that the transfer of assets does not necessarily amount to a transfer of control of a licence, and therefore a clear distinction should be drawn in the treatment of these scenarios.

We are further concerned with regards to the "Transfer of Control" definition in that it does not state that it refers to a transfer of shareholding amounting to "control" as defined in the Companies Act. Transfer of shareholding happens on a daily basis in a stock exchange listed entity such as Telkom as well as other listed licensees. This definition requires a better formulation in order to arrive at an effective amendment.

Further "Transfer of Control" definition does not cater for an existing shareholder acquiring control by merely increasing its current existing shareholding in the licensee and only refers to transfer to transfer of shareholding to a "new" shareholder.

We therefore contend that the amendments to the definitions section will require further consultation between the Authority and licensees in order to arrive at the adequate wording.

10. Amendment of regulation 5 of the Regulations

The insertion of sub regulation 1A is welcome as it provides clarity to the application requirements.

"(1A) applicants must submit at least five (5) hard copies when filing/ submitting an application or registration notice, and must further provide one (1) electronic copy of the documents submitted".

Telkom is also in agreement with the insertion of regulation 5A as it strengthens the application process.

"(5A) The Authority will not consider any application if the applicant is in arrears with respect to any fees prescribed by the Authority or legislated in terms of the Act".

The substitution of sub regulation 5 (6) is also welcome as it is a correction to the current regulations

"(6) The Authority will not consider any document where the applicant fails to comply with sub regulation (1), (1A), (2), (3) and (4)

11. The Amendment to regulation 8 of the Regulations

Telkom welcomes the insertion of sub-regulation (3A) of this regulation as it strengthens the application requirements licensees must adhere to.

"(3A) The Authority will not consider the application if the applicant is in arrears with respect to any fees prescribed by the Authority or legislated in terms of the Act."

12. Amendment of regulation 10 of the Regulations

The addition of sub-regulation (4) in regulation 10 is welcome as it is consistent with other additions we are already in support of.

"(4) The Authority will not consider an application if the applicant is in arrears with respect to any fees prescribed by the Authority or in terms of the Act."

13. Amendment of regulation 11 of the Regulations

The amendment to regulation 11 to add "transfer of control" aligns to

"Application to transfer or transfer control of an Individual Licence (Section 13 of the Act)."

The regulation is further amended by the addition of sub regulation 4 which should correctly be numbered sub regulation 3:

"(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*

Telkom welcomes the above amendment as it is in line with the ECA amendments and Radio Frequency Spectrum Regulations 2015.

Telkom is however concerned that no clear and measurable parameters are set out for "Promotion of competition and interests of consumers; and Equity ownership by HDP's."

The required percentage of equity by HDP's is sometimes stated to be 30%, this is done elsewhere in these regulations (FORM G) and in other ICASA regulations. We contend that the Authority must make a determination on this HDP standard and apply it consistently. The Authority therefore needs to develop an objective test for its HDP requirements for all licensees to be aware of and adhere to.

Telkom is further concerned that there is no clarity as to how the Authority will conduct the evaluation of "Promotion of competition and interests of consumers." The Authority needs to set out an objective and definitive process of how this assessment will occur.

Regulation 11 is further amended by the addition of sub-regulation (3) which is consistent with other amendments with respect to licensees or registrants who are in arrears with prescribed fees.

"(3) The Authority will not consider an application if the licensee or registrant is in arrears in respect of any fees prescribed by the Authority or legislated in terms of the Act.

Telkom supports the amendment above.

14. Amendment of regulation 12 of the Regulations

Telkom is in agreement with the addition of the words "transfer of control" to Regulation 12 to be consistent with the scope of this Regulations.

Telkom welcomes the amendment of Regulation 12 by the substitution of the word may with must to delimit the level of discretion in the restrictions on transfer or transfer of control and renewal of individual Licences. This amendment provides certainty in the mandatory requirements pertaining to this regulation.

"The Authority must refuse to renew, transfer or transfer of control of an individual Licence if the Licensee has not complied with one or more of the following:"

15. Amendment of regulation 14 of the Regulations

Telkom agrees with the addition of sub-regulation (3) which is consistent with other amendments with respect to licensees or registrants' fee payment status.

"(3) The Authority will not consider an application if the licensee or registrant is in arrears with respect to any fees prescribed by the Authority or legislated in terms of the Act."

16. The regulations are amended by the inclusion of Regulation 15

The inclusion of Regulation 15 is progressive considering the digital nature of the communications channels used today.

"The Authority may by means of a Notice in the Government Gazette allow applicants to lodge applications through an online application process on the date to be determined by the Authority."

17. Substitution of Form C of the Regulations

Form C of the Regulations is being substituted. The changes to the form include an indication that where amendments to a licence are with regard to programming, then research supporting the proposed amendment should be attached to the application. Telkom welcomes this amendment.

18. Substitution of Form O of the Regulations

Form O of the Regulations is being substituted. One of the areas that is changing is with regard to the information on the licensee's shareholding. A signed letter has to be submitted with a breakdown of the shareholding structure and be attached as Appendix 3.13 to the notice. The Form is now providing examples of matters which a licensee may view as requiring the Authority's consideration as including shareholding by HDI/HDG/HDP, women, youth and people with disabilities. Notifications of change of name must be accompanied by CIPC registration documents.

Telkom welcomes this amendment.

19. Substitution of Form G of the Regulations

Form G now provides for applications to sublet, cede, assign, transfer and transfer of control of an individual licence, as opposed to previously only providing for transfer of an individual licence.

Further the form provides that any application for the abovementioned, "with less than 30% of equity ownership held by historically disadvantaged groups will not be considered."

Telkom supports this addition as well as reiterates that the Legislative and Regulatory framework needs to be consistent in its HDP definition and requirement.

C. Conclusion

Telkom welcomes the regulations and the general contents thereof insofar as the Authority is aligning same with existing legislative prescriptions.

We submit that the Authority needs to further consult licensees on the amendments to the definitions section in relation to "transfer of control" in order to arrive at the effective and workable definitions and formulations.

We submit that we are concerned that the Authority has not set out objective tests for the HDP requirements as well as the promotion of competition and the interests of consumers.

We highlight that the amendments suggested need further consultation between the Authority and licensees in order to arrive the final versions thereof.

Lastly we commend the Authority's efforts in aligning the regulatory framework to the existing legislative prescripts and we thank the Authority for the opportunity to take part in this process.

END

