

SACF Comments on the Information Memorandum 2021

1. The SACF is an industry association that represents a broad group of members across the ICT ecosystem and are affected and impacted directly or indirectly by the licensing of high spectrum demand spectrum.
2. Our members are unanimous in our that spectrum must be licensed urgently, through a transparent, fair, and robust process that is capable of withstanding legal challenges that may arise. The consequences of licensing the high demand spectrum are high because of the potential economic value to be derived from access thereto.
3. While, ICASA has endured several false starts in this process that spans a decade, we are of the view that the challenges faced would have created a significant body of evidence and critical learnings of how to ensure a successful process. We cannot afford any further delays in the licensing of critical high demand spectrum as, access to the high demand spectrum is intrinsically linked to the country's economic growth.
4. The SACF submits our comments against this backdrop and would like to participate in all further processes in this regard.

The Process the Status of the ITA

5. The process is one of the most critical important aspects of the licensing of high demand spectrum. It must be fair and transparent. The rules must be explicit leaving little to interpretation. This in our view will give interested parties a fair opportunity to participate in the process.
6. The publication of the Information Memorandum (IM) has caused a considerable amount of confusion, as it consists of Annexures A and B to the Invitation To Apply(ITA). It is our understanding that Para 2 of the order of the High Court on 15 September 2021 stated that; "ICASA's decision to publish the invitation to apply for the licensing process for International Mobile Telecommunications in respect of mobile broadband wireless access services for urban and rural areas using complementary bands IMT700, IMT800, IMT2600 and IMT3500 spectrum frequency through an auction published as Government Notice 535 of 2020 in Government

Gazette No. 43768 of 2 October 2020 (“**the Auction ITA**”) is reviewed and set aside and the matter is referred back to ICASA for reconsideration.”

7. Because of the above paragraph, we understand that the ITA for the Licensing of High Demand Spectrum (“the Auction ITA”) was set aside and therefore no longer exists. Therefore, it is difficult to understand how ICASA was able to publish Annexures to a document that was set aside and effectively therefore no longer exists.
8. We further understand the High Court Order referred the licensing matter back to ICASA, to reconsider and then begin a licensing process afresh. We are of the view that ICASA could then republish the ITA that was withdrawn together with any Annexures and supporting documents. The SACF had anticipated that through the legal challenges, ICASA would have been acutely aware of the key concerns and attempted to remedy these before publication for comment.
9. The manner that the IM was published raises concerns about the soundness of the process. As the publication of an IM is not a legislated step instead an added step in the consultative process, there is still an opportunity to ensure the accuracy of the process.
10. We, therefore, urge ICASA to publish a comprehensive draft ITA for comment, giving all interested parties a reasonable opportunity to comment. It is equally important that ICASA has adequate time to thoroughly review and consider the commentary of stakeholders. The extra time and care taken and caution throughout the process, even if it required a little extra time is likely to be less challengeable. The licensing of high demand spectrum in the shortest reasonably possible time is the only option that we have.

Incomplete Set of Documents

11. The IM referenced documents published in previous rounds and left interested stakeholders scrambling to find the correct of documents on which to comment, for example the Competition Assessment was referenced but not published. This is undesirable. Should this approach be repeated, it has the potential of compromising the process.

Checks and balances

12. We would strongly urge ICASA to audit the process and compliance with the process to ensure its successful conclusion.

Truncated Process

13. We note that ICASA has published and gone on record indicating that it was embarking on a truncated licensing process. While we appreciate ICASA's sense of urgency in the licensing process, we are concerned about the self-imposed hurriedness, that could result in weaknesses that could result in the process again being halted.
14. It is in the interest of the sector and the country that spectrum is licensed urgently or as quickly as is practicably possible, it is important that the consultation is robust and the process sound enough to withstand potential legal challenges or discourage such.
15. The SACF is of the view that while it is imperative for ICASA to move with relative speed in the licensing of high demand spectrum, how that does not translate into a truncated process that appears to cut concerns.
16. While we appreciate ICASA's drive to expedite the licensing process, it must be cautious to not create a falsely truncated process that omits critical steps and unduly shortens a step to limit or inhibit effective participation in the public consultation.

The need for a Draft ITA

17. The truncated timetable in our view omits a critical step, it has omitted the publication of a draft ITA for comment.
18. The rationale behind our request for a draft ITA to form part of the consultation process is two-fold, so that interested parties can anticipate what will be in the ITA

and the second is that potential challenges could be rectified or clarified so that the licensing process has a more reasonable chance of success.

The Legislative Framework for a draft ITA

19. We recognize that there is no mandatory legal requirement that ICASA publish a draft ITA before publication of a final ITA. Equally, nothing precludes ICASA from publishing a draft ITA for comment. The ECA does not provide for the publication of an Information Memorandum, yet ICASA published an IM in the three most recent processes including this one.

Questions of clarity

20. While we welcomed the workshop on the IM, the SACF is of the view that it does not replace the role of questions submitted for clarity or the responses to questions of clarity in each round of the process.

A mock auction

21. All spectrum in South Africa to date has been licensed administratively to date and as a result the auctioning of spectrum is a new and complex licensing method. As a result, the mock auction included in the previous licensing process which has not been included in the truncated process. The SACF is of the view that the mock auction should be included to enable a smooth auction.

Explanatory Memorandum to Accompany the ITA

22. The SACF is of the view that a comprehensive explanatory memorandum would be a useful tool to mitigate a lack of clarity and varied interpretations of the ITA. We therefore urge ICASA to publish an explanatory memorandum together with the ITA. . These two documents should be read together to provide all interested stakeholders with as much information as clearly as is possible ahead of the compilation of bids.

Shortened timeframes

23. Key among our concerns are some of the significantly shortened timeframes for public consultation which has the potential of making it a tick box exercise rather than allowing for meaningful consultation. For example, stakeholders are given a

month to comment on the draft IM in the first round even though this is a significantly incomplete document. ICASA published the IM for commentary on 1 October 2021 with a submission deadline of 2 November 2021 because of the initial submission deadline being set for a public holiday.

24. According to the timetable published on 1 October 2021, will then publish the 2nd IM for comment on 15 November 2021. Stakeholders then have 14 calendar days in which to submit commentary on the 2nd IM.

25. It does not appear that ICASA has given itself a reasonable time to review, analyze and incorporate commentary from stakeholders into the 2nd IM. This is especially concerning considering the complexity of the submissions in this regard. Inadequate time for consultation has the potential to compromise the process.

26. During the workshop on IM, the Committee Chairperson, had indicated that the 2nd IM will be a more comprehensive document, yet stakeholders will only be given 14 calendar days to review, analyze and comment. This will not allow stakeholders to even review the commentary of other stakeholders in this process. This does not appear to be a reasonable and fair period for consultation. We would urge ICASA to consider a more reasonable period for it to consider and review the commentary from stakeholders and for the review and commentary of the 2nd IM. The SACF is of the view that the publication of a draft ITA, may be more helpful than another version of the IM which as we understand it is equivalent to a discussion document. We would further suggest that ICASA publish the Draft ITA for public comment for 30 days instead of 14 calendar days. Taking a little longer in getting the process going may indeed be more prudent and efficient in the long run.

Rollout Obligations

27. It is important to recognize that the cost of all obligations including rollout obligations contribute to total cost of the spectrum. All obligations must be fair and transparent to promote the rollout of infrastructure, as must be the process in developing the obligations.
28. Rollout and coverage obligations should only be linked to the bands being licensed, although licensees must be able to use a combination of bands to provide appropriate and equitable levels of coverage nationally to meet prescribed targets.
29. Rollout targets should be fair to encourage and promote the widest population coverage without, prejudicing some licensing over others.
30. The IM references the rollout obligations contained in the withdrawn ITA, which is questionable and leads to a flawed process. Therefore, we would urge ICASA to include the obligations for comment in a comprehensive document as it cannot rely on elements of a withdrawn document.

Pricing Of Spectrum

31. The cost of access to spectrum must be viewed collectively and must be proportionate to access to the spectrum granted. The pricing of spectrum must be viewed against the backdrop of national priorities which includes extending networks across the country including to rural areas at the same levels of quality and speed as urban and metropolitan areas. A dual national priority is reducing the cost to communicate, which when combined is intended to ensure effective economic participation.

Licensing of IMT 700 AND IMT 800

32. During the recent hearings on the National Frequency Plan, Broadcasters had indicated their lack of readiness to migrate by the March 2022, the deadline declared by the Minister of Communications and Digital Technologies. The lack of readiness to migrate from these bands could be attributed to the lack of funding and devices to migrate the poorest households.

33. IMT 700 and IMT 800 are critical coverage bands that are imperative to achieve efficient and effective national rollouts. It is therefore critical for all licensees especially entrants to have access to these critical coverage bands.
34. Despite Government's intention to expedite the digital migration the free to air broadcasters have indicated their lack of progress in digital migration which is further exacerbated by the global critical shortage of chipsets. This will further impact the manufacture and distribution of devices to poor households to enable digital migration.
35. Therefore, it is unlikely that the IMT 700 and IMT 800 bands will be available at the point of licensing. Nevertheless, nothing in our view precludes ICASA from licensing these bands if the process is fair, transparent, and not prejudicial.
36. Accordingly, the SACF is of the view that IMT 700 and IMT 800 must be included in the current round of the licensing of spectrum although payment terms must be deferred until licensees can meaningfully use the spectrum.
37. We are of the view that this may be achieved through the following approach. Evaluation of the spectrum towards determining the value of the spectrum must be fair and transparent. ICASA must be circumspect especially as this evaluation is essentially a future evaluation. Despite, this the SACF is of the view that ICASA must progress to license these bands. However, it must defer payment until the point that 80% of the spectrum is available and has been restacked. The licence date and duration of the licence should begin at the point that 80% of the spectrum is made available to the successful licensees.
38. In addition, we would urge ICASA in the interim to allow licensees access to IMT700 and IMT800 on the same basis as broadcasters currently have access to these bands, i.e., at no cost. This will at least enable some level of economic value to be derived rather than the critical resource laying dormant unnecessarily.
39. Government has expressly indicated over the past several years that establishing is a deliberate intention and priority. It has also devised measures which are considered beneficial to the WOAN's sustainability. Most of the global examples on which the WOAN has been fashioned have folded highlighting the precarious sustainability of the WOAN. Access to critical coverage bands including IMT 700

and IMT 800 are essential to ensure a reasonable spectrum mix to enable efficient network deployment. We are of the view that denying the WOAN access to these bands would be detrimental and compromise the sustainability of the WOAN, further demonstrating why IMT 700 and IMT 800 cannot be removed from the auction.

Opt-In

40. The licensing process and all elements thereof must be clear, fair, and transparent to allow all interested stakeholders a fair opportunity to participate in the auction. Accordingly, the rules for all aspects of the licensing process should be clear and explicit. This is especially important for the opt-in round as it seeks to exclude some licensees and give others an advantage which makes this aspect of the of the auction especially contentious.
41. The SACF therefore humbly urges ICASA to be explicit in the formulation of the rules and for it to provide the context and rationale for those licensees that will be eligible to participate and those who would be excluded. Therefore, at a minimum the following must be explicit:
 - Eligibility criteria in the ITA
 - Disqualification criteria for the OPT-IN in the ITA
 - Applicable bands for the OPT-IN round should be included in the draft ITA and ITA.
42. ICASA has said that it may include the OPT-IN round or it may not. However, it appears that this will only be known during the auction. We recommend that this is instead made known in advance to promote transparency and fairness.

Spectrum Caps

43. ICASA has indicated that the caps will include all IMT spectrum as a mechanism to ensure equitable assignments to the desired number of licensees. The rules surrounding the application of the caps must be fair, transparent, and consistent.
44. The inclusion of the IMT spectrum in the spectrum cap is explicit, however the consultation includes the consideration of spectrum assigned for the broadband fixed wireless access ICASA is clear about the inclusion of all IMT spectrum in the spectrum cap but is consulting on the inclusion of fixed broadband spectrum. The

SACF is of the view that inclusion of this spectrum depends on ICASA's treatment in respect of access to spectrum.

45. ICASA has adopted two distinctly different approaches to spectrum when the allocation of the band changed. For example, broadcasters are required to migrate from the IMT 700 and 800 bands. Hence, ICASA is reclaiming the spectrum to migrate and relicense through a competitive process.
46. In other instances, licensees who were granted access to IMT spectrum before it was reallocated for IMT use have been able to retain the spectrum. This is even though the spectrum was previously licensed for the fixed wireless access.
47. These two approaches are varied and does not create regulatory certainty.
48. The SACF reiterates its position advanced in previous submissions where we advocated for and continue to advocate for the reclaim and relicensing of any band once the allocation changes.
49. Key bands such as 3600MHz – 3800 MHz have already been earmarked for IMT and has already been allocated for secondary use. As a result, it is only a matter of time before these bands are allocated for primary IMT usage. Accordingly, these bands should be included in the spectrum caps so as not to give licensees an unfair advantage.
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Roaming Arrangements

52. ICASA has indicated that roaming arrangements would be excluded from the calculation of spectrum caps.

53. The SACF supports this approach because:

- 1) Roaming arrangements result in licensees leasing capacity from other operators without being to control the use of the spectrum.
- 2) Roaming arrangements are commercial agreements for limited periods, which may be extended by agreement between the parties.
- 3) It is not an exclusive arrangement as is evidenced by the various arrangements and changes in roaming partners.
- 4) Roaming agreements are by no means permanent.

54. The SACF agrees with and supports ICASA's view that roaming agreements are separate and transient.

Questions of Clarity

55. It is the SACF's understanding that the ITA for the auction was set aside and referred back to ICASA for reconsideration. Therefore, as we understand it, the effect is that the ITA no longer exists. The SACF would appreciate confirmation of the status of the ITA.

56. If the SACF's understanding is correct on the withdrawal of the ITA, then it is difficult to understand how ICASA has published two Annexures in relation to the auctioning of high demand spectrum and the licensing of the WOAN?

57. The IM refers to a Competition Assessment but failed to publish such, as a result stakeholder are required to attempt to find the correct document and offer commentary on a document that has not been published as part of this process. We would appreciate it if ICASA would clarify how it sees the process and how it would remedy such procedural flaws.

58. During the last rounding of licensing of the high demand spectrum that was halted, bidders were required to pay a non-refundable deposit of R3million when the bids were submitted. Will that deposit be returned to the 6 bidders who had submitted bids in the previous round?

- a. Will all bidders including, bidders from the previous round be required to pay a deposit?

- b. What would happen to a deposit that is paid by a bidder in this round, should the licensing process again be halted because of a legal challenge?