

27 November 2015

**Independent Communications Authority of South Africa**

Attention: Peter Mailula

Per e-mail: [PMailula@icasa.org.za](mailto:PMailula@icasa.org.za)

Dear Peter

**ISPA AND WAPA RESPONSES TO QUESTIONS RAISED DURING PUBLIC HEARING ON DRAFT AMENDMENTS TO CLASS & INDIVIDUAL PROCESS AND PROCEDURE, STANDARD TERMS AND CONDITIONS REGULATIONS**

We refer to the public hearings held on 18 November 2015 at which ISPA and WAPA made joint oral representations regarding their earlier written submissions in respect of the draft amendments.

Following our oral submissions, the panel raised several questions. We set out ISPA and WAPA members' responses in this regard below.

**Question 1:**

**Clarification as to why the 9-month Individual licence transfer process was unacceptable to both ISPA and WAPA's memberships and a request for the formulation of an alternative timeframe (mindful of varying scopes and the need in some cases for confidentiality).**

From experience and discussions with the Licensing Division, our understanding is that the IECNS/IECS licence transfer application follows the following steps:

Step	Estimated time (days)	Time from submission (days)
Form G and supporting documentation submitted to ICASA	0	0
Licensing Division confirms receipt of application after initial consideration	±7	7
Licensing Division considers requests for confidentiality, and responds to applicant/transferee on request	±14	21
Licensing Division prepares Government Gazette Notice, and sends for approval and signature; to be approved, in order, by General Manager, Senior Manager, COO, CEO and Chairperson, before signature by Chairperson (and if anyone is not available, this could be delayed)	±14	35
Licensing Division receives signed Notice, and starts logistics to print in Government Gazette, including contacting Government Gazette to insert Notice, including proofreading	±21	56
Waiting for comments to the Notice	±21	77

The rest of the process as set out herein is where no comment is received following publication of the Notice; the process if comments are received will differ, and it is assumed that this process will then take longer than the process set out below due to the involvement in Council and hearings that might need to take place		
Licensing Division prepares memo on transfer application	±21	98
Compliance & Finance Divisions report back to Licensing Division on whether licensee has satisfied compliance and financial obligations	±14	112
We are aware that if the Licensing Division requests anything from the applicant/transferee, for example where the Compliance/Finance Division has indicated any outstanding obligations, then the internal process is placed on hold until the applicant/transferee has provided the relevant information to the satisfaction of the relevant division, after which the process and timeline resumes		
Licensing Division prepares Report and Recommendations, to send to Exco	±7	119
Exco to provide approval on the transfer application, based on Report/Recommendations from Licensing Division; these timelines are variable, as it depends on when Exco meets and/or whether they have quorum when meeting	Uncertain	Uncertain
If Exco raises any issues, the process goes back to the beginning and follows the various steps again		
Council to provide approval on transfer application; these timelines are variable, as it depends on when Council meets and/or whether they have quorum when meeting	Uncertain	Uncertain
Council to approve Minutes of meeting wherein they approved transfer application; these timelines are variable, as it depends on when Council meets and/or whether they have quorum when meeting	Uncertain	Uncertain
Licensing Division receives notification from Council of approval of transfer	±7	Uncertain
Licensing Division notifies applicant of approval of transfer		±180
Licensing Division prepares transferred licences; transferred licence are signed; Licensing Division notifies transferee that licences are ready for collection	±21	±201
Licensing Division drafts reasons document, which is run past the Legal Division before release		

The times taken by the Licensing, Compliance and Finance Divisions for the assessment of the licence and transfer application, as well as the steps required in terms of the Act (publication of transfer application in the Government Gazette; waiting for comments on transfer application) as set out above are all acceptable for an application of this nature.

The delays occasioned by requiring the approval of the senior levels of the Authority do however, in our view, extend the timelines unnecessarily. Specifically, the following:

- The General Manager, Senior Manager, COO, CEO and Chairperson are all required to approve the Government Gazette Notice prepared by the Licensing Division, and the Chairperson is required to sign the Notice thereafter. This process could lead to several delays before the Notice can be sent to the Government Gazette for printing, depending on the availability and work-load of each person.
- Exco is required to provide approval on the transfer application before it goes to Exco, based on Report/Recommendations from Licensing Division. This step in the process could lead to delays, as it depends on when Exco meets and/or whether they have quorum when meeting
- Council is required to provide approval on the transfer application and to approve the minutes of the meeting wherein it has approved the transfer application, before notifying the Licensing Division of this approval so that it may advise the applicant. This step in the process could lead to delays, as it depends on when Council meets and/or whether they have quorum when meeting

It is proposed that these delays can be avoided by amending the process as follows:

- Approval and signature of Government Gazette Notice: It seems unnecessary for the various levels of approval required here, as the information contained in the Notice is basic and standard. It is proposed that only the approval of the General Manager or Senior Manager of the Licensing Division be required before signature.
- Approval by Exco: Where no comments are received following publication of the Notice, and where there are no outstanding obligations on the licences, and where the Licensing Division has recommended the approval of the transfer application, the transfer is a fairly simple and straightforward one. It is proposed that, in this case, Exco should be given a deadline for providing its approval of 7 days; this approval can also be reached by round-robin voting on email if Exco is not able to meet/reach quorum within that timeline. It is understood that where comments have been received, this is no longer a simple and straightforward application and Exco will need to meet and discuss the application.
- Approval by Council: Where no comments are received following publication of the Notice, and where there are no outstanding obligations on the licences, and where the Licensing Division has recommended the approval of the transfer application, the transfer is a fairly simple and straightforward one. It is proposed that, in this case, Council should be given a deadline for providing its approval of 7 days; this approval can also be reached by round-robin voting on email if Council is not able to meet/reach quorum within that timeline. It is understood that where comments have been received, this is no longer a simple and straightforward application and Council will need to meet and discuss the application.

With these proposed changes, the process would likely be reduced to 120 days at the most, which is a far more acceptable timeline.

Whether the process is shortened as proposed, or whether the process remains as it presently runs, a major issue is the lack of adequate communication from the Licensing Division as to the progress of the application. It is our understanding that the Licensing Division has been constrained from advising the applicant/transferee of where in the process the transfer application is at any given moment, even where the applicant/transferee requests same.

This is generally viewed as unacceptable by applicants due to the timelines involved, the need for commercial certainty and the large application fee paid. We accordingly propose that the Authority allow the Licensing Division to revert on the status of the application (ie where in the process the application is) when requested to do so; we note that the Licensing Division cannot provide any undertakings as to timelines as it cannot be sure of these either, and an indication of the status of the application would be sufficient.

Having paid a substantial, non-refundable fee and under commercial pressure to conclude transactions involving a transfer, applicants are understandably anxious as regards the progress of their application and we submit that this should be accommodated by the Authority.

**Question 2:**

**Clarification on how ISPA and WAPA reached its decision regarding delayed implementation of the regulations and further clarification of the timeframes envisaged in their written submissions.**

Our submissions in this regard were informed by the difficulties experienced with the implementation of the Electronic Communications Amendment Act 1 of 2014, with specific reference to the legal lacuna created by the absence of a regulatory framework for the implementation of a legislative obligation which led directly to the difficulties experienced with the Neotel application for transfer of control over its licences. These difficulties could have been avoided if the Amendment Act had been published for general information with a date to be proclaimed in a year or other suitable period, allowing the Authority to go through the process of implementing the required regulatory framework.

As noted in the submissions, it is likely that some licensees may not be able to meet the terms of the regulations and that would place them in immediate contravention of the regulations. Delayed implementation of the regulations would allow licensees to familiarise themselves with the regulations and ensure that they are in compliance therewith by a known deadline. This approach also allows licensees to effect the necessary changes to their internal compliance reporting structures.

As also noted in the submissions, the Authority's divisions should have processes in place to deal with the changes brought about by these regulations. Delayed implementation of the regulations would allow the Authority's divisions to familiarise themselves with the regulations and ensure that they have time to implement processes to deal with the requirements appropriately and efficiently.

From the point of view of licensees we suggest that a three-month period between Gazetting and commencement would be sufficient (although this is also a function of the nature and complexity of the regulation in question). The Authority should consider the time period it will require to ensure that its internal processes are aligned with the new regulation.

**Question 3:**

**Clarification of ISPA's and WAPA's concerns regarding transfer of control and changes in shareholding.**

The concerns are a function of our appreciation of the complexity of the law applicable to the concept of the transfer of control of a licence. We acknowledge that we are not experts in company law but have set out below some considerations which we submit that the Authority should bear in mind.

- The term “control” is not defined in the ECA. Where section 13(1) provides that “the control of an individual licence may not be ... transferred to any other person” without the approval of the Authority, what is the meaning to be assigned to the term “control of a licence” and transfer of such control?
- In the Draft Regulations, the Authority defines ‘transfer of control’ as “transfer of shareholding in the issued licence to a new shareholder”. But, in our view, the Authority cannot simply provide a definition of “control” in the Draft Regulation: it is well-established principle of administrative law that subordinate legislation may not expand, restrict or alter definitions in empowering legislation.
- Rather, ordinary principles of statutory construction taking into account the purpose of the provision, would have to be applied in order to determine the meaning to be given to “control” in the ECA.
- Guidance can be sought from the Companies Act 71 of 2008, but it is important to note that the definition of “control” in the Companies Act cannot be used without further enquiry to determine the meaning to be ascribed to the term in the ECA: terms defined in other legislation do not create definitions for the term as defined in the ECA.

Our view is that “control of a licence” refers to the person, persons or entity capable of directing the ultimate destiny of the licence. It does not refer to the person, persons or entity responsible for the day-to-day management or administration of the affairs of the licence. Where a transaction involves the transfer of the power to direct a majority of votes either on the board or at a general meeting of the licensee, whether directly or indirectly, from one entity to another, even if both the transferor and the transferee entity are ultimately controlled by the same other entity, then ICASA approval would be required in terms of section 13(1). Ultimately we submit that these are highly complex questions of law on which the Authority should seek expert advice.

**Question 4:**

**A request by Counsellor Pillay regarding acceptance of certain preconditions for consideration of licence registrations/transfers within the mandated 30 day period (i.e. whether ISPA/WAPA could accept that this process could only begin once all initial financial checks had been made).**

All financial checks can be done within the mandated 30-day period for licence registrations/transfers, as the Licensing Division can raise the query with the Compliance and Finance Divisions on receipt of the application, and the Compliance and Finance Divisions should (in our experience) be able to provide an indication of the financial status of the registrant/applicant relatively quickly. This process can be run simultaneously with the consideration of the registration/application by the Licensing Division.

It is accepted that, if the Compliance/Finance Division were to indicate that there is anything outstanding and same is communicated to the registrant/applicant, then this will place a hold on the timeline until the registrant/applicant has provided the outstanding information/documentation to the satisfaction of the relevant division.

**Question 5:**

**Clarification of submissions made in regard of S16 (6) of the Electronic Communications Act.**

Section 16(6) of the ECA specified that “No class licence may be ceded, let, sub-let or transferred without the prior written approval of the Authority, provided that if the Authority has not refused or denied the cession, let, sublet or transfer within 30 days after notice has been given to the Authority, approval shall be considered to have been given.”

We note that while this section does require that the Authority approve the cession, letting or sub-letting of a Class licence, it does not require the prior approval of the Authority where there is transfer of control of a Class licence.

Form H in the Process and Procedure Regulations erroneously reflects that it is also to apply to transfers of control, and it is submitted that this should be corrected before finalisation of the regulations.

We trust that the above has adequately addressed the questions raised by the panel. Please do not hesitate to request additional information to supplement the above should you require same.

Regards,

Sumaiyah Makda  
Ellipsis Regulatory Solutions, ISPA & WAPA Regulatory Advisors