

ENSafrica telecoms and media in brief

Below, please find issue 22 of the **ENSafrica** telecoms and media in brief, a snapshot of the latest tax developments in South Africa.

Telecommunications

- **GG 44371: Draft Equipment Authorisation Regulations**
 - On 31 March 2021, the Independent Communications Authority of South Africa ("ICASA") published the **Draft Equipment Authorisation Regulations ("Draft Regulations")**.
 - The stated purposes of the Draft Regulations are to:
 - “streamline the Equipment Authorisation process in accordance with the Electronic Communications Act, 2005;
 - protect the integrity of the electronic communications networks;
 - ensure proper functioning of connected electronic communications equipment, electronic communications facilities and subscriber equipment;
 - ensure interoperability, interconnectability and harmonisation; and
 - avoid harmful interference with the electronic communications network by prescribing electronic communications equipment, electronic communications facilities and subscriber equipment conformance requirements.”
 - The Draft Regulations will repeal both the Type Approval Regulations, 2013 and the Labelling Regulations, 2013 in their entirety. However, regulation 26 of the Draft Regulations states that ICASA Type Approval Certificates issued prior to the Draft Regulations coming into force will remain valid, but that Type Approval Labels that were issued by the ICASA prior to the promulgation of the Draft Regulations will no longer be valid. It is unclear whether the intention in this regard is to require that all existing label would need to be replaced.
 - Unlike the Type Approval Regulations, the Draft Regulations set out a number of different types of equipment that are excluded from the application of the Draft Regulations. These include, for example, amateur radios, equipment used by government services (described as equipment which is used for the purposes of, inter alia, public safety and security) and cables (including undersea and land-based fibre optic cables used to carry telephone traffic or data communications traffic). In addition to the exclusions, the Draft Regulations also provides certain exemptions, these include, for example, equipment used for the production and distribution of

broadcast and content services, provided it was approved by the European Telecommunications Standards Associations; and certain satellite communications equipment, including earth stations and telescope receivers, and equipment for maritime or aeronautical operations (with the exemption of drones), provided it is used in a controlled environment and solely for development, demonstration of prototypes and testing.

- Another important change in respect of the Draft Regulations is the introduction of three classifications with regard to the approach to conformity assessments (as opposed to the standard type approval and simplified type approval process in the Type Approval Regulations), being classification 1 – Low Risk Equipment, classification 2 – Medium Risk Equipment and classification 3 – High Risk Equipment. In this regard, the Draft Regulations provide different approaches to be followed based on the classification category in which the equipment falls. As such, a risk-based approach appears to have been taken in the Draft Regulations.
 - Interested persons are invited to submit written representations regarding the Draft Regulations to ICASA within 30 business days from the date of publication of the notice, being 17 May 2021. Written submissions can be submitted electronically, by post or hand delivery marked for the attention of:
 - Mr Lumkile Qabaka, Project Leader
 - Address: 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion, Gauteng
 - Email: LQabaka@icasa.org.za
 - Tel: 012 568 4106
 - **GG44337: Draft Mobile Broadband Services Regulations**
 - On 26 March 2021, ICASA published the **draft regulations regarding Mobile Broadband Services** for comment.
 - The regulations aim to:
 - define relevant wholesale and retail markets or market segments for mobile broadband services;
 - determine whether there is effective competition in those relevant markets and market segments;
 - determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;
 - impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure;
 - specify details around ICASA's ability to conduct periodic reviews of the markets and market segments and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and
 - provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.
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- In the recent North Gauteng High Court ruling in terms of which Telkom obtained an interdict against ICASA (the case is discussed briefly below) in order to stop ICASA from proceeding with the IMT spectrum auction, one of the reasons the court found that the auction could not proceed was because ICASA had not completed its Chapter 10 enquiry into the “state of competition in the mobile market” in order to ensure that spectrum is allocated in a competitive manner. ICASA’s findings on its mobile broadband service inquiry has now been attached to the draft regulations in the Findings Document on Mobile Broadband Services Inquiry ("**Findings Document**").
- The Findings Document provides the following summary of the findings:
 - that competition is ineffective in the following markets:
 - retail market;
 - upstream market 1 (wholesale site infrastructure access in local and metropolitan municipalities);
 - upstream market 2 (wholesale national roaming services for coverage purposes; and
 - upstream market 3b (APN only).
 - ICASA also finds that Vodacom and MTN are dominant in the above three markets namely retail market, upstream market 1 and upstream market 2. In addition, ICASA has identified pro-competitive terms and conditions that should be imposed on licensees in order to address market failure in the relevant markets.
- ICASA is inviting written representations to the draft regulations to be submitted within 30 working days from 26 March 2021 (being 12 May 2021), which can be made by post, hand delivery or email to MarketInquiry2018@icasa.org.za.
- **GG 44832: Regulations in respect of the limitation of control and equity ownership by historically disadvantaged groups and the application of the ICT sector code**
 - On 31 March 2021, ICASA published the long awaited final regulations in respect of the limitation of control and equity ownership by historically disadvantaged groups (“**HDG**”) and the application of the ICT sector code (the “**Regulations**”). The purpose of the regulations is to promote equity ownership by HDGs and the promote Broad-Based Black Economic Empowerment (“**B-BBEE**”).
 - Section 9(2)(b) of the Electronic Communications Act, 2005 provides that when granting an individual licence, ICASA must include the percentage of equity ownership to be held by HDG, which must not be less than 30%. HDG historically includes black people (as defined in the B-BBEE Act), women, people with disabilities and youth (all of which must be South African citizens). The latter three could include white people.
 - The Regulations will impose not only 30% equity ownership held by HDGs, but also 30% equity ownership held by black people. In this regard, the Regulations state that individual licensees must comply with both the black equity requirement and the HDG equity requirement. The Regulations

continue to state that compliance with the black equity requirement will also constitute compliance with HDG equity requirement. However, it is important to note the requirements to have 30% equity ownership held by black people are suspended until a future commencement date to be published by ICASA.

- Both the 30% HDG and black ownership requirement must be determined using the flow through principle as defined in the B-BBEE Act.
- The Regulations also requires an individual licensee to notify ICASA in writing of any transfer over a period of 24 months that results in a dilution of HDG or black ownership in a licensee, where such decrease amounts to 5% or more of the issued share capital of the licensee, or a dilution of voting rights attached to such shares.
- All licensees, individual and class, must have a minimum B-BBEE contributor status level of four.
- The Regulations also imposes certain reporting obligations on licensee to indicate their compliance with the Regulations.
- Transition periods for existing licensees to comply with the Regulations are stated as 48 months from promulgation of the Regulations for class and SMME licensees and 36 months for large individual licensees.
- During the transition, period licensees must achieve and comply with the B-BBEE targets set out in Appendix 2 to the Regulations and submit to ICASA annual process reports.
- Non-compliance with the Regulations may result in a fine whichever is the greater between an amount not exceeding of ZAR5-million or 10% of the licensee's annual turnover of its licensed services.
- **GG4434: Submission of annual forecast of licence fees and universal service and access fund contributions for 2020/2021**
 - On 29 March 2021, ICASA published a notice regarding the submission of annual forecast of licence fees and Universal Service and Access Fund contributions for 2020/2021 by broadcasting and electronic communication services (“ECS”) and electronic communications networks services (“ECNS”) licensees.
 - Every broadcasting licensee and ECS and ECNS licensee must submit their respective requisite information on or before 30 April 2021.
 - For broadcasting, submissions must be made to:
 - Attention: Ms Busi Mashigo
 - Manager: Broadcasting Compliance
 - By e-mail: BMashigo@icasa.org.za
 - For ECS/ECNS, submissions must be made to:
 - Attention: Ms Keitumetse Setshedi
 - Manager: ECS/ECNS Compliance
 - By e-mail: Ecsecns.compliance@icasa.org.za
- **GG 44328: Amendment to Standard Terms and Conditions Regulations for Class Licences under chapter 3 of the Electronic Communications Act, 2005**

- On 25 March 2021, ICASA published the Amendment to Standard Terms and Conditions Regulations for Class Licences under chapter 3 of the Electronic Communications Act, 2005 ("**Amendment Regulations**").
- In terms of a class broadcasting licence:
 - The most notable changes include increasing the duration of licences in respect of community sound broadcasting services, community television broadcasting services, community low power sound broadcasting services and commercial low power sound broadcasting services to being seven years. While special event community sound broadcasting service licences are valid for a maximum period not exceeding 45 days for community sound broadcasting and low power services, and temporary community television broadcasting service licences are valid for a maximum period not exceeding 12 months.
 - The Amendment Regulations have also introduced various definitions such as a "low power sound broadcasting service" which refers to a community, private or public sound broadcasting service that radiates power not exceeding one watt. A new regulation 10B is inserted in this regard and provides, amongst other things, that a low power sound broadcasting service licensee is not permitted to provide news and current affairs programming and must provide programmes intended for the specific coverage area, for example, shopping malls, sports grounds, show grounds, drive-in movie theatres, old age homes, places of worship, or any other like service. Interestingly, the Amendment Regulations goes on to state that "no foreign person or entity must directly or indirectly exercise control over a Low Power Sound Broadcasting Service licensee in any way whatsoever."
- In terms of Class ECNS and ECS:
 - A licensee now has 14 days (as opposed to seven) in which to notify ICASA of changes in its name and contact details. The requirement to inform ICASA of changes in its shareholding and financial year end has been omitted. However, change and or transfer of shares undertaken must comply with the Licensing Process and Procedures Regulations (as amended) 2010, and the ECA
 - An ECNS licensee now has 24 months (as opposed to 12) to commence operations and may request a further extension from ICASA. An ECS licensee has 12 months (as opposed to six) to commence operations and may request a further extension from ICASA.
 - Penalties for non-compliance has been amended to 10% of the licensee's annual turnover for licensed services.
- A copy of the Amendment Regulations is accessible [here](#).
- **GG44411: Invitation to Submit Written Submissions on the Proposed National Data and Cloud Policy**
 - On 1 April 2021, the Minister of Communications and Digital Technologies published the draft National Data and Cloud Policy for comment.

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- The policy is applicable to all three spheres of government (national, provincial, and local); organs of state and public enterprises, the private sector and the general public.
 - The policy recognises the value of data and that in today's economy, there is a growing need to develop infrastructure dedicated to storing and accessing data within South Africa. Furthermore, the data centres in South Africa are mostly located in the big metros and are foreign owned. As such, this policy aims to provide measures to distribute the data centres across the country. The policy states that it is against this background that there is a need to establish more data centres that will service various industry stakeholders within South Africa.
 - A High-Performance Computing and Data Processing Centre ("HPCDPC") will be established and all the existing data centres that are publicly funded will be consolidated under the HPCDPC.
 - The HPCDPC will provide on demand cloud services for state entities, national department, provinces, metros, municipalities, state-owned enterprises, universities, research centres, civil society organisations and businesses. In this regard the policy provides that cloud services that would be ideal would include infrastructure as a service, software as a service and platform as a service capabilities.
 - In respect of the hosting of data, the policy contemplates that the HPCDPC will host all non-sensitive government data (this is defined in the policy as data that is already a matter of public record or knowledge) which is in accordance with the policy objective of "open data" principles being data that will be made freely available to everyone for use, re-use and republishing as they wish, subject to ensuring the protection of privacy and confidentiality. The policy, just shy of imposing blanket data localisation requirement, provides that any data which has been classified as "critical information" will be processed and stored within the borders of South Africa. Further to this, if there is a cross border transfer of citizen data, a copy of such data will have to be stored in South Africa for the purposes of law enforcement. In this regard, the policy does not provide further details and it would appear that a copy of all citizen data transferred outside of South Africa would need to be stored in South Africa.
 - The State Information Technology Agency and the Council for Scientific and Industrial Research will partner with the HPCDPC to drive the adoption of digital government services, applications and solutions within government entities.
 - All public data, which is defined in the policy as "data and information held by government and its entities", will be captured in a digital format, and this will be the default method of capturing data. According to the policy, this will enable the sharing of data across all government levels for purposes of service delivery and informed policy making.
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- A model for localised data banks in the HPCDPC will be developed to enable big data analytics for the development of South African and Afrocentric solutions and innovations.
- The policy further makes provision for the new speciality of open big data brokers, who will take public data from multiple government sources, and analyse and exploit these data pools to create product and solutions for social and economic development. In this regard, it should be noted that the policy does also contemplate always ensuring the protection of privacy (including compliance with the Protection of Personal Information Act, 2013 ("POPIA")) and further to this sets out provisions requiring compliance with POPIA and ensuring that appropriate information security standards are maintained.
- The government has proposed the establishment of a Digital Transformation Centre, which will head up the coordinated efforts between its members and stakeholders in promoting digital transformation across all sectors of the economy.
- The government will have to accelerate the operationalisation of ICT Special Economic Zones, in line with implementing the Special Economic Zone Act, 2014, in order to support local and foreign investment in data centres.
- Multinational firms (the policy fails to identify who the multinational firms may be) will be required to provide skills and digital technology transfer to South Africans so that there are tangible benefits and gains from foreign direct investment in the country. Furthermore, the policy is silent on the mechanisms which will be used to enforce any such requirements, however, it is assumed that these requirements may be addressed at the procurement phase.
- Support and investment in data and cloud infrastructure will require secured connectivity and access to core network infrastructure, namely submarine cables, 5G, and fibre. State-owned Enterprises such as Sentech and Broadband Infraco will form part of a State Digital Infrastructure Company ("SDIC"), which will provide network connectivity.
- To ensure effective functioning, the SDIC will have access to the excess capacity of government funded ICT infrastructure of Eskom, SANRAL, Transnet, PRASA, and SANREN.
- A National Cybersecurity Policy framework will be developed and be used to implement best practices in cybersecurity and to ensure confidentiality, integrity, and availability of information. This will include a review of the Minimum Information Security Standards, 1996 (these standards make provision for the minimum information security measures that any institution must put in place for sensitive or classified information to protect national security) that is used as a guideline to classify all government information.
- To coordinate matters, and move away from the silo-based approach, the minister will establish an advisory council to advise on the data management

centres, cloud services, frameworks, and standards recommended within the Data and Cloud Policy.

- Interested persons are invited to submit written comments on the policy within 30 working days from the date when it was published, being Tuesday 18 May 2021. The written comments can be sent to the Department of Communications and Digital Technologies using an online form, email via DataCloudpolicy@dtps.gov.za, or via post at:
 - The Director-General, Department of Communications and Digital Technologies
 - For attention: Ms C Lesufi, Director, Telecommunications Policy
 - First Floor, Block A3, iParioli Office Park, 1166 Park Street, Hatfield, Pretoria
 - Private Bag X860, Pretoria, 001.
- **GG 44374: Amendment of Information and Communications Technology ("ICT") COVID-19 National Disaster Regulations**
 - On 31 March 2021, ICASA published the Amendment of the ICT COVID-19 National Disaster Regulations.
 - Notably, the amending regulations provide that the payment of radio frequency spectrum licence fees will be pro-rated for the period 1 April 2021 to 31 May 2021 (in relation to specified bands) and that the payment of all fees must be made by 15 April 2021.
 - The amending regulations came into force as of 1 April 2021.
- **GG 443868: Notice Regarding Suspension of the Closing Date for the Submission of Applications for an Individual Electronic Communications Network Service ("I-ECNS") Licence And Radio Frequency Spectrum ("RFS") Licence For The Wireless Open Access Network ("WOAN")**
 - On 31 March 2021, ICASA published a notice notifying all interested parties that the closing date of 30 March 2021, for the submission of applications for the I-ECNS licence and RFS licence for the WOAN, stated in the Invitation to Apply published under *Government Gazette* No. 43767 (Notice 534 of 2020) dated 2 October 2020, has been suspended until further notice, pursuant to the order handed down on 8 March 2021 by the North Gauteng High Court under case number: 66778/2020 (we briefly discuss the case below).

Broadcasting

- **GG 44328: Amendment to Standard Terms and Conditions Regulations for Class Broadcasting Licences under chapter 3 of the Electronic Communications Act, 2005**
 - Refer to summary above
 - **GG44372: Sports Broadcasting Services Amendment Regulations, 2021**
 - On 31 March 2021, ICASA published the Sports Broadcasting Services Amendment Regulations, 2021 to amend the Sports Broadcasting Services Regulations, 2010.
 - The Amendment Regulations have mostly retained the listed national sporting events, however they now include the following as national sporting events:
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- FIFA Women's World Cup;
 - IAAF World Athletics Championships;
 - ICC Women's Cricket World Cup;
 - Netball World Cup; and
 - TAFISA World Sport for All Games,
- Excluded from the list of national sporting events are the Comrades Marathon, Two Oceans Marathon, Telkom Knockout and International Boxing Federations.
 - The Amendment Regulations also contemplate a different review of listed events process. In the first instance, the a national sporting event may be removed or added to the list following publication of a list for public comments, an application by an interested stakeholder or following a review of the Regulations. The criteria used for listing a national sporting event will now be reviewed after every five years, as opposed to four years.
- **GG44333: Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials And Programme Sponsorship) Regulations, 1999**
 - On 26 March 2021, ICASA published the **Discussion Document on the Review of the Independent Broadcasting Authority (Advertising, Infomercials And Programme Sponsorship) Regulations, 1999**.
 - Interested persons are invited to submit their written representations on the Discussion Document by no later than 7 June 2021. Representations may be made by post or electronically (in Microsoft Word or PDF) and should be marked specifically for attention: Mamedupe Kgatshe.
 - address: 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion, (Ground Floor at Block B).
 - Where possible, written representations should also be e-mailed to mkgatshe@icasa.org.za and rarc@icasa.org.za.
 - ICASA states in the Discussion Document that it acknowledges the rapid evolution of the broadcasting sector; which is a catalyst for starting the process to review the Advertising Regulations and has conducted an international study, comprising six countries. ICASA has concluded that the study has signified the importance of distinguishing advertising, infomercials and programme sponsorship from normal programming and highlights the broadcasters' responsibility to maintain editorial independence. Further, ICASA concludes that the rules serve to protect viewers from both excessive commercial references in programming and from surreptitious advertising In conducting its review, ICASA will seek to ensure:
 - the protection of viewers from excessive advertising;
 - that advertising, infomercial and programme sponsorship is clearly distinguishable from normal programming;
 - that broadcasters adhere to the limits on advertising and infomercials; and
 - that broadcasters maintain editorial independence and control over programming.
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- The Discussion Documents also contains a section relating to certain questions which it seeks stakeholders to provide their views and comments on.
 - **GG 44373: Notice to Enforce the Regulations on the Use of Television Whitespaces 2018**
 - On 31 March 2021, ICASA issued a notice to declare that the Regulations on the Use of Television White Spaces, 2018 are in force.
 - Therefore, interested Wireless Internet Service Providers and users of Television White Spaces who meet minimum requirements may contact the qualified S-GLSD service prover for subscription to use the S-GSLD service.
 - 3. A list of certified S-GLSD service providers may be obtained here: <https://tvwhitespaces.icasa.org.za/public/sghsd/certified/list>
 - **GG 44370: Municipal Elections Broadcasts and Political Advertisements Amendment Regulations, 2021**
 - On 31 March 2021, ICASA published the amendment of the Municipal Elections Broadcasts and Political Advertisements Regulations, 2011.
 - ICASA had initiated a process to review the Municipal Elections Broadcasts and Political Advertisements Regulations, 2011 as amended. South Africa is gearing up for the municipal elections of 2021 to elect councils for all district, metropolitan and local municipalities in each of the country's nine provinces and it is in light of this that the review was initiated. ICASA has indicated in its reasons document that the review process was aimed at improving the regulations to ensure their relevance during each election period.
 - The amending regulations commenced on publication thereof, being 31 March 2021.

In the news

- **Telkom v ICASA**
 - On 8 March 2021, the North Gauteng High Court ordered ICASA to suspend the auctioning of radio frequency spectrum licences pending the final determination of the order sought under Part C of Telkom's application (Part C is seeking an order that ICASA's decision to issue the ITA was unlawful).
 - The court found that:
 - ICASA did not complete its Chapter 10 enquiry into the "state of competition in the mobile market" (to ensure that spectrum is allocated in a competitive manner) – it is therefore irrational to start the auction before the enquiry is completed;
 - The digital migration process has not been completed (in other words, the 700 / 800 Mhz bands are still in use by broadcasters and are therefore not available for use);
 - ICASA changed its mind and said mobile providers will be allowed to use the 700 / 800 Mhz bands while the digital migration is underway – ICASA cannot change the rules of the game midway, that makes the process unlawful. Also such decision will impact on broadcaster's
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- rights to use spectrum still allocated to them (also technical evidence why it is not possible to “co-use”)
- In summary, the court ordered:
 - That ICASA be interdicted from assessing or adjudicating any application received in the ITM auction;
 - suspension of the closing date for submission for the WOAN;
 - that ICASA pay costs.
 - ICASA initially indicated that they will appeal the ruling. However, ICASA has now published their findings document on the state of competition in the mobile market (discussed above) and has also published a notice suspending the closing date for submission of the WOAN (discussed above).

For more information, please contact:

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