

Summary of the ICASA Discussion Document on transformation, ownership and control over ECS and ECNS licences (April 2017)

ICASA is conducting an inquiry in terms of section 4B of the ICASA Act to determine how it should implement ownership and control requirements under the Electronic Communications Act (ECA) and the BEE ICT Sector Code (“the Code”).

Why is this important?

What is being discussed are requirements relating to ownership and control of licences, which may have direct implications for your business. The question of how to align the requirements of the ECA – 30% equity ownership – with the broad-based voluntary requirements of the Code needs to be resolved:

ECA	Code
HDGs	Black people
Mandatory equity ownership requirement, enforced when individual licensee transfers ownership or control of a licence, renews or amends a licence. Also applies to new applications.	Voluntary compliance with 5 elements of balanced scorecard

How can you get involved?

By making a submission responding to the questions set out in Annexure A.

The closing date for written submissions on the Discussion Document is 8 June 2017.

Timelines

This is the first stage of a process which will take up to a year to finalise. The outcome of the first phase of the process will be a findings document, which will set out the next steps.

Current position

The ECA requires individual ECS and ECNS licensees to have at least 30% ownership by “historically disadvantaged groups”.

A “historically disadvantaged group” or HDG means South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds.

A sample of 130 operational licensees taken in 2016/17 showed that:

- 53% of IECS and IECNS licensees were non-compliant;
- 38% of licensees had no HDG equity ownership; and
- 7% of the licensees had a HDG equity ownership level above 20% but below the prescribed level of 30%.

What is proposed?

The Discussion Document sets out a list of questions to be answered, which indicate their intentions.

Extending the HDG ownership requirement to class licensees?

Currently the HDG ownership requirement applies only to individual licensees. ICASA does not think there is a justification for excluding these licensees from transformation requirements and wants to expand the requirement to apply to class ECS and class ECNS licensees.

Is 30% a high enough requirement?

ICASA wants submissions on whether the 30% requirement is high enough or whether it should be increased.

How should compliance be verified?

How should ICASA deal with licensees that submit BEE certificates to show compliance?

Definitions of ownership and control

It was clear from the manner ICASA dealt with the Vodacom / Neotel transaction that there is confusion about what constitutes “ownership” and what constitutes “control” under the ECA. It is in everyone’s interest to sort this out.

Compliance timeframe

Should ICASA impose a strict timetable for compliance?

Application of the ICT Sector Code

What level of certification would be appropriate for compliance?

Useful links

[Discussion document – Equity ownership by HDGs and application of ICT Sector Code](#)

[Broad-based Black Economic Empowerment Act: Codes of good practice: ICT sector November-2016](#)

Annexure A – Questions raised in the Discussion Document

These are the specific questions which ICASA wants responses to.

Scope of application of HDG Equity Requirement

1. Should class licensees have HDG equity requirements similar to those of Individual licensees?
 - a. Explain the rationale for the position proposed.
 - b. In your opinion, how should the equity requirement be imposed on class licensees?
2. Should the Authority consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement?
3. Should the minimum legislated requirement remain at 30% or should it be increased?
 - a. If so, what targets do you propose and why?
4. Should the Authority require licensees to seek prior approval in instances where:
 - a. A change in shareholding results in reduction of equity ownership by HDGs below 30%; and
 - b. Where the licensee does not meet the 30% minimum requirement, and change in shareholding affects the percentage of equity ownership by HDGs.
5. How should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDGs from participating in share schemes?

30% ownership requirement

6. Should the minimum legislated requirement remain at 30% or should it be increased?
 - a. If so, what targets do you propose and why?

Compliance verification

7. What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?
8. What proof would in your view be appropriate to confirm the compliance of publicly traded entities provided with the HDG equity/ownership requirement?

Defining Ownership and Control

9. Is the definition of a “control interest” as set out in (a) to (f) [here](#) still valid?
10. In your view, what constitutes control and how should the Authority define it? Set out the basis for your argument.
11. Are you of the view that the Authority should define ownership?
12. In your view, what constitutes Ownership and how should the Authority define it? Set out the basis for your argument.
13. Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?

Questions Regarding the Application of the ICT Sector Codes

14. How should the Authority go about promoting BBBEE and compelling organs of state and public entities to apply the applicable sector Codes? Explain the rationale that underpins your view.
15. Should the Authority apply the Codes to all applications i.e. including service, spectrum, type-approval and number applications?

ellipsis regulatory solutions cc

CK2004/113957/23

tel 021 701 2512 fax 086 540 4953 email dominic@ellipsis.co.za
unit c14 westlake square tokai / postnet suite #410, private bag x4, sun valley, 7985
member: dominic cull b.bus.sc. llb llm (ict law), sumaiyah makda llb llm (ict law)

16. Should the Authority require BBBEE certificates to be submitted as part of the licensees' annual compliance requirements?

General Questions

17. The Authority proposes to apply either HDG ownership requirements or the Codes, to all applications and processes, other than applications regarding individual licences. In your view, is this the correct approach? Or should both the HDG ownership and the Codes apply to all applications and processes that do not involve individual licences?
18. What should be the minimum level of BBBEE certification?
19. Should the HDG requirements or the application of the Codes be made mandatory and not be triggered only by an application of some other regulatory process?
20. The Authority proposes that with individual licence applications, both HDG ownership requirements as well as the Codes should be applied. Provide your view whether this proposed approach should apply, providing reasons for your position.
21. Two decades into the South African democratic dispensation, we are yet to see ownership and operations of licensees fully and meaningfully transformed. Consequently, there are growing calls which grow louder for transformation. In response to growing public and government sentiments in this regard, should the Authority impose timeframes for compliance by all of its licensees for requirements for empowerment?
22. What would be an appropriate timeframe? Provide the rationale informing the period required to ensure compliance.