



# **THE AMERICAN CHAMBER OF COMMERCE IN SOUTH AFRICA<sup>NPC</sup>**

## **COMMENT ON THE ICASA DISCUSSION DOCUMENT ON EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE**

**JUNE 2017**



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#### 1. BACKGROUND ON THE AMERICAN CHAMBER OF COMMERCE IN SOUTH AFRICA (AMCHAM)

The American Chamber of Commerce in South Africa (Amcham) consists of 250 American companies. A survey was completed of just 89 of these companies in 2013 and found that the companies contributed a combined annual revenue of R278 billion to South Africa, and employed 221 000 South Africans, both directly and indirectly. These companies contributed more than R400 million to skills and development, spent R144 million on training, and more than R350 million on corporate social investment.

American investment is quality investment and the figures provided above are a clear indication that American business is committed to growing the South African economy by uplifting its people, increasing investment in South Africa, and contributing to a more competitive ICT sector in South Africa.

#### 2. INTRODUCTION

The Independent Communications Authority of South Africa ("the Authority") has invited written responses to the discussion document on Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code in terms of S4B of the ICASA Act 2000.

The document focuses on how the Authority should approach the implementation of the ICT Sector Code in light of the existing Historically Disadvantaged Groups/Individuals ("HDG/I") ownership

requirements, and how the Authority can promote B-BBEE and equity ownership of HDGs as required in terms of Sections 9 and 13 of the Electronic Communications Act (“ECA”).

An imperative focus needs to be met in recognising the Generic codes under B-BBEE and the emerging misalignment with the ICT Sector Codes. Clarity needs to be provided as the Generic Codes advocate for a 30% ownership element, whereas the ICT Sector Codes stipulate a lower requirement at 25%. A clarified position needs to be established in navigating between the Generic Codes, ICT Sector Codes, ICASA General License Fee Regulations and the Regulations in respect of the Limitation of Ownership and Control of Telecommunication services.

Much confusion is met in implementing measuring standards upon considering the ECA and its stipulations on ownership restrictions and measurements for licences, as well as the integration of the National White ICT Policy Paper - providing a holistic overview of the entire ICT Sector, in enhancing the transformation agenda. A consolidatory position must be called for clearly paving the correct way forward in light of the various legislative positions.

We are addressing the questions posed in the Discussion Document, below.

### **3. DISCUSSION**

**3.1 Question 1: Should class licensees have HDI equity requirement similar to those of individual licensees? Explain the rationale for the position proposed.**

**In your opinion, how should the equity requirement be imposed on class licensees?**

**Answer:**

We request that license requirements should be consistent across the board – i.e. the same equity requirement needs to be maintained in order to ensure universal compliance and monitoring.

**3.2 Question 2: Should the Authority consider income levels and size of the entity as criteria for differentiation on the imposition of the HDI requirement?**

**Answer:**

This concept is already covered under the Codes of Good Practice implemented by the dti, and therefore all criteria should comply with these Codes.

**3.3 Question 3: Should the minimal legislated requirement remain at 30%? Should it be increased? If so, what targets do you propose and why?**

**Answer:**

Any increase would need to be considered in the context of what the ultimate end state is, the progress that has been made to date, and the realistic stretched targets required in order to achieve the end state over an agreed timeframe.

**3.4 Question 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 HDIs below 30%; and
- b. Where the licensee does not meet the 30% minimum requirement, and change in shareholding that affects the percentage of equity ownership by HDIs.

**Answer:**

Given that the licensing requirement is a 30% minimum HDG shareholding, prior approval would be required for any transaction, which would result in such shareholding being diluted or reduced – however, license holders would need to demonstrate what the plan would be in order to increase their shareholding to the 30% level and in what timeframe this can be achieved. There is a need for clarity in terms of misalignment in measuring structures implemented across the various policy and legislative requirements.

**3.5 Question 5: How should HDI equity ownership requirements be applied to publicly traded entities, without discouraging HDIs from participating in share schemes?**

**Answer:**

The creation of liquidity is vital when investing in public entities, and can be achieved through the BEE Xchange.

When companies employ equity equivalent schemes (such as phantom share schemes) for their employees, it is not recognised towards the ownership target – even though these schemes are often more lucrative for employees and are more broad-based than pure ownership deals. Recognition needs to be made for the equity equivalent scheme and its implementation.

ICASA's position on dispensation of entities who participate in Equity Equivalent type investments needs to be clarified. In terms of the B-BBEE Codes, these entities are recognised under the points framework but obviously cannot claim percent (%) Black SA recognition. The absence of a position here is material.

**3.6 Question 6: What proof should the Authority consider appropriate to confirm compliance with the HDI requirements (in terms of difference in terminology between Black People and HDIs?)**

**Answer:**

As part of harmonising and consolidating various legislation, we would like to see a process whereby terminology is aligned.

A B-BBEE Verification Agency would need to be used by the Authority to confirm compliance, along with ownership certificates.

**3.7 Question 7: What proof would, in your view, be appropriate to confirm the compliance of publicly traded entities provided with the HDI equity/ownership requirement?**

**Answer:**

A competent persons reports should be required.

**3.8 Question 8: In light of the foregoing, and taking into account the Companies Act, 2008 (71 of 2008) and the Competition Act of 1998 (89 of 1998):**

- a. Is the definition of a control interest as set out in Section 7.3 of the Discussion Document still valid?
- b. In your view, what constitutes control and how should the Authority define it? Set out the basis for your argument.
- c. Are you of the view that the Authority should define ownership?
- d. In your view, what constitutes ownership and how should the Authority define it? Set out the basis for your argument.
- e. Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?

**Answer:**

- a. Yes.
- b. As per the Companies Act of 2008.
- c. No – this would just add to legislation already stipulated in the Companies Act.
- d. As per the Companies Act of 2008.
- e. Both a transfer of control and a transfer of ownership indicate substance over form, which needs to be taken into account.

**3.9 Question 9: The ECA requires the Authority to promote B-BBEE, and the B-BBEE Act compels all organs of state and public entities to apply the applicable Sector Codes. How should the Authority go about doing this? Explain the rationale that underpins your view.**

**Answer:**

The B-BBEE Act, which by virtue of the trumping provision, reigns supreme over all other legislation relating to Black economic empowerment, and caters for the promotion of B-BBEE.

The Authority are advised against the role of the dti and it is not certain what the intent would be in doing so. Furthermore (and simply from a resource perspective) it is not clear how and to what end this duplicate role would be served. Procedures are in place as determined by the B-BBEE Act and this is the regulatory ambit of the dti.

**3.10 Question 10: Should the Authority apply the Codes to all applications – i.e. including service, spectrum, type-approval and number applications?**

**Answer:**

We seek clarity on the definition for *number applications* and *type-approval*, as the uncertainty surrounding these terms results in Constitutional concerns.

**3.11 Question 11: Should the Authority require B-BBEE certificates to be submitted as part of the licensees' annual compliance requirements?**

**Answer:**

Yes, the Authority should require B-BBEE certificates to be submitted as annual compliance requirements.

**3.12 Question 12: With the exclusion of applications regarding individual licenses, the Authority proposes to apply either HDI ownership requirements, or the Codes, to all applications and processes. Please provide your view whether this is the correct approach, or whether both HDI ownership and the Codes should apply to all applications and processes that do not involve individual licenses?**

**Answer:**

We request that consistency be maintained in terms of B-BBEE legislation and its requirements.

**3.13 Question 13: What should be the minimum level of B-BBEE certification?**

**Answer:**

Clarity is needed on what minimum level of B-BBEE certification means – i.e. is this in relation to the certification process or the percentage required?

**3.14 Question 14: Should the HDI requirement of the application of the Codes be made mandatory and not be triggered only by an application of some other regulatory processes?**

**Answer:**

Yes, HDI requirements should be mandatory forming part of the licensing conditions.

**3.15 Question 15: The Authority proposed that with individual license applications, both HDI ownership requirements, as well as the Codes, should be applied. Please provide your view whether this proposed approach should apply? Provide reasons for your position.**

**Answer:**

The question is unclear – does ‘HDI’ in this sense apply to ownership? We request that consistency in terminology be maintained. Further, clarity is sought on the following phrasing: *as well as the Codes*.

**3.16 Question 16: Should the Authority impose timeframes for compliance by all of its licensees for requirements for empowerment?**

**What, in your view, would be an appropriate timeframe? Provide the rationale informing the period required to ensure compliance.**

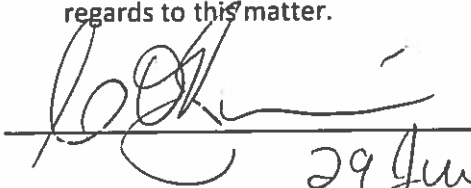
**Answer:**

Yes, we propose that timeframes for compliance be implemented. A period of 12 months should suffice, as this gives entities sufficient time to align with compliance. However, the implementation of the timeframe needs to be established by the Authority – and clarity needs to be provided on whether the timeframe is applicable from date of gazette or date of application.

## **4. CONCLUSION**

Amcham welcomes the opportunity to provide input to the discussion document on Equity Ownership and HDIs in terms of the ICT Sector Code. We look forward to engaging with ICASA on this document in order to stimulate growth within the sector, as well as better enhance efficiency and inclusivity within society and employment sector

We look forward to allocating a representative to attend any public hearings that ICASA may hold with regards to this matter.

  
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C O'Brien  
Executive Director

29 June 2017