



THE POWER IS IN YOUR HANDS

Cell C (Pty) Ltd
Waterfall Campus
Cnr Maxwell Drive and Pretoria Main Road
Buckleuch, Ext 10, 2090
Private Bag X36, Benmore 2010
Johannesburg, South Africa
General Tel: +27 (0)84 174 4000
Fax: +27 (0)84 167 6598
Website: www.cellc.co.za
Reg. no: 1999/007722/07

30 June 2017

Attention: Project Manager, Ms Refiloe Motsoeneng
Independent Communication Authority of South Africa
By email: transformation@icasa.org.za

Dear Sirs

ICASA discussion document: Equity Ownership by HDGs and the Application of the ICT sector

Cell C Proprietary Limited (Cell C or we) refer to the discussion document issued by the Independent Communication of Authority South Africa (ICASA) on 31 March 2017 under Government Gazette Notice 274 of 2017 (Discussion Document) and set out our comments below.

As you may be aware, Cell C previously contributed to an inquiry on ownership and control in 2011. We now set out Cell C's current general views and response on empowerment in the ICT sector in paragraph 1 of this letter and the responses to the specific questions in the Discussion Document in paragraph 2 of this letter, taking into account changes in the industry since 2011.

In addition, Cell C wishes to seek clarity in respect of paragraph 4.1 of ICASA's Discussion Document. In particular, where it states that a 'minimum of 30% equity ownership by HDG's is a mandatory requirement for Individual licences for the following applications:

"4.1.3 *Transfer of Control or Change of Ownership of a licence*" (our emphasis)

as this statement is not apparent in any legislation or regulations thereto.

Please contact Harrish Kasseepursad on 084 174 4579 or HKasseepursad@cellc.co.za should you have any queries or wish to discuss.

1 General response

1.1 Introduction

Cell C recommends that ICASA should concern itself with the issue of ownership only and should adopt the ownership criteria and test from the *Broad-Based Black Economic Empowerment Act, 2003 (BEE Act)*, the generic *Codes of Good Practice on Broad-Based Black Economic Empowerment (Generic Codes)* and the *Codes of Good Practice on Broad-Based Black Economic Empowerment for the Information Communication and Technology Sector (ICT Codes)* (the Generic Codes and ICT Codes collectively hereinafter referred to as the Codes). However, all other aspects of the BEE Act and Codes should be regulated by the organs that are tasked to do so in terms of the BEE Act and Codes. In addition, the measurement principles under the BEE Act and Generic Codes should become the standard for the ICT sector to ensure that the compliance requirements under the ECA and Black ownership under an entity's BEE scorecard are measured using the same principles.

1.2 Oral representations and public hearing

Cell C requests that it is provided notice of and is afforded an opportunity to be present and participate in any public hearings relating to this matter.

1.3 Regulatory framework

(1) Cell C's recommendation is that the:

- (a) *Electronic Communications Act, 2005 (ECA);*
- (b) *Independent Communications Authority of South Africa Act, 2000 (ICASA Act);*
- (c) BEE Act;
- (d) Generic Codes; and
- (e) ICT Codes;

should be treated as distinct pieces of legislation.

(2) The ECA should set out specific qualification criteria which an entity must achieve in order:

- (a) to be issued with a licence under the ECA;
- (b) for a licence issued under the ECA to be renewed or amended;
- (c) to take control or to take ownership of an entity which holds a licence issued under the ECA; or
- (d) to take ownership of a licence issued under the ECA.

(3) As contemplated in section 10 of the BEE Act, a regulator must apply the Generic Codes when developing these qualification criteria relating to empowerment under their own regulatory framework relating for a licence to be issued. Similarly to the Mining Charter which has developed local ownership qualification criteria before a mining right may be issued, the ECA could state that, in order to be issued with a licence, the applicant must, amongst other matters satisfy the prescribed minimum local ownership qualification criteria. The applicants BEE score is a separate matter.

(4) The ICT Code should create a regime for an entity in the ICT sector to be awarded a BEE score to be used in their commercial dealings as a BEE score is currently used. The Generic Codes do not have any compliance or minimum qualification criteria and is a system to measure any BEE initiatives implemented (in terms of the Generic Codes) in order to award a BEE score.

(5) The same regulatory framework should also apply to all entities in the ICT sector.

1.4 Historically Disadvantaged Group v Black people

(1) The terminology in the ECA (i.e. Historically Disadvantaged Group) should be aligned with the Generic Codes (i.e. Black people) to ensure consistency and certainty across the empowerment legislation in South Africa.

- (2) In other words, entities must achieve 30% ownership by Black people (as defined in the *Broad Based Black Economic Empowerment Act, 2003 (BEE Act)*) before ICASA may approve an application under paragraph 2.3(2)(b) below.

1.5 Calculation of ownership by Black people

- (1) The ownership by Black people in an entity should be determined in accordance with the principles of the BEE Act, Generic Codes and ICT Codes (collectively the BEE Laws) to ensure consistency and certainty across the empowerment legislation in South Africa.
- (2) If an entity is recognised under the BEE Laws as achieving 30% ownership by Black people, the entity should be recognised as having achieved 30% ownership by Black people for the purposes of the ECA.
- (3) ICASA should not attempt to create any other grounds of recognising Black ownership. In particular, an entity should not be able to have been “deemed” to achieved 30% ownership by Black people simply based on the Rand value of a transaction (as was previously included in the old ICT Codes). The ownership element is intended to promote Black participation in an entity and any such additional deeming provisions in the ECA or any other misalignment with the Generic Codes will undermine the objectives of the BEE Act.

1.6 Minimum ownership by Black people

- (1) Application for new or renewed licence / change of control / change of ownership
 - (a) Cell C recommends that it is a requirement that any person must have 30% ownership by Black people in order to be:
 - (i) issued with a licence under the ECA;
 - (ii) for a licence issued under the ECA to be renewed;
 - (iii) to take control of an entity which holds a licence issued under the ECA; or
 - (iv) to take ownership of a licence issued under the ECA.
 - (b) Although the minimum ownership is higher than the Generic Codes and a number of other licences minimum qualification criteria, Cell C does not believe that this percentage should change as the ICT Codes have only recently been released and entities subject to the ICT Codes may have structured themselves appropriately in relation thereto.
- (2) On-going empowerment
 - (a) Cell C believe that the requirement of 30% ownership by Black people should be maintained for five years after ICASA has approved an application under paragraph 2.3(2)(b) below. The five year lock in should be subject to a remedy period and certain exceptions so that the lock-in is not to the detriment of Black shareholders who will not be able to enjoy the capital value of those shares for five years and allows for Black shareholders to dispose of shares at their discretion as any other shareholder would.

- (b) This obligation to maintain 30% ownership by Black people:
 - (i) should be imposed on existing licences (which already have agreed terms and conditions) but existing licensees should be given a reasonable time period within which to comply with this obligation. Cell C suggests a period of three years; and
 - (ii) should be imposed as a condition for any newly issued or renewed licences.
- (c) The on-going compliance should not be indefinite as this reduces the value of the Black shareholders' shares, and prevents the Black shareholders disposing of their shares in an open market. Cell C believes that the requirement of 30% ownership by Black people should be maintained for five years (subject to the remedy period and exceptions) after ICASA has approved an application under paragraph 2.3(2)(b) below.

1.7 Application for approval

- (1) Cell C believes that ICASA should be required to approve:
 - (a) the issue of any new licences under the ECA;
 - (b) the renewal of licences issued under the ECA;
 - (c) the acquisition of control in an entity holding a licence issued under the ECA. In order to ensure consistency and certainty for these concepts across South African legislation:
 - (i) a definition of "Control" should be included in the ECA which should be informed by the provisions set out in section 12 of the *Competition Act, 1998 (Competition Act)*. The term "control interest" is outdated and does not align with other legislation relating to "control"; and
 - (ii) whether a "Change" of control has occurred should also be determined with reference to section 12(2) of the *Competition Act*, but should be nuanced to accord with unique requirements of the regulatory regime under ICASA.
- (2) We acknowledge that the concept of control in the *Competition Act* applies for the purposes of merger control only. However, it is the most developed approach to an acquisition of Control and we submit that it should be used as a basis from which to develop a definition and determination of control that uniquely suits the requirements of ICASA and the ECA.

2 Specific responses

Cell C sets out its responses to the specific questions in the Discussion Document below, using the paragraph numbering in the Discussion Documents:

2.1 Paragraph 5.1.2 of the Discussion Document:

- (1) Question: Should class licensees have HDG equity requirements 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?

(2) Answer:

- (a) Yes, but as stated above, Cell C does not believe that HDG should be the test for ownership but rather Black people as defined in the BEE Act.
- (b) All entities being issued a licence under the *Electronic Communications Act, 2005 (ECA)* should be subject to the same regime, notwithstanding the size of applying entity or licence being sought.

2.2 Paragraph 5.1.3 of the Discussion Document:

(1) Question: Should the Authority consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement?

(2) Answer:

- (a) No.
- (b) All entities being issued a licence under the ECA should be subject to the same regime, notwithstanding the size of applying entity or licence being sought.

2.3 Paragraph 5.1.4 of the Discussion Document:

(1) Question: Should the minimum legislated requirement remain at 30% should it be increased? If so, what targets do you propose and why?

(2) Answer:

(a) No it should not be increased. The minimum ownership is already higher than the Generic Codes and so Cell C does not believe that this percentage should change. In addition the ICT Codes have only recently been released and entities subject to the ICT Codes may have structured themselves appropriately in relation thereto.

(b) The minimum requirement should remain that any person must have 30% ownership by Black people:

- (i) to be issued with a licence under the ECA;
- (ii) for a licence issued under the ECA to be renewed;
- (iii) to acquire control of an entity which holds a licence issued under the ECA; or
- (iv) to take ownership of a licence issued under the ECA.

(3) Furthermore, the terminology in the ECA (i.e. Historically Disadvantaged Group) should be aligned with the Generic Codes (i.e. Black people) to ensure consistency and certainty across the empowerment legislation in South Africa.

(4) In other words, entities must achieve 30% ownership by Black people (as defined in the BEE Act) before ICASA may approve an application under paragraph 2.3(2)(b) above.

2.4 Paragraph 5.1.5.1 of the Discussion Document:

(1) Question: Should the Authority require licensees to seek prior approval in instances where a change in shareholding results in reduction of equity ownership by HDG's below 30%?

(2) Answer: See response in paragraph 1.6(2)(a) and paragraph 2.3 above.

2.5 Paragraph 5.1.5.2 of the Discussion Document:

(1) Question: Should the Authority require licensees to seek prior approval in instances where the licensee does not meet the 30% minimum requirement, and undergoes a change in shareholding that affects the percentage of equity ownership by HDG's?

(2) Answer: See response to paragraph 1.6(2)(a) and paragraph 2.3 above.

2.6 Paragraph 5.2 of the Discussion Document:

(1) Question: how should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDG's from participating in share schemes?

(2) Answer:

(a) In the same manner as non-publicly traded entities.

(b) There should be no separate framework for listed entities compared to unlisted entities.

2.7 Paragraph 6 of the Discussion Document:

(1) Question: How should compliance with the HDG requirement be verified?

(2) Answer:

(a) The ownership by Black people in an entity should be determined in accordance with the principles of the BEE Laws to ensure consistency and certainty across the empowerment legislation in South Africa, and the measurement principles under the BEE Act and Generic Codes should become the standard for the ICT sector to ensure that the compliance requirements under the ECA and Black ownership under an entity's BEE scorecard are measured using the same principles.

(b) Accordingly, the documentation required by a verification agent to calculate Black ownership under the BEE Laws should be used to determine compliance with the minimum ownership requirements under the ECA (this usually includes the share certificates, share register, shareholders agreement and memorandum of agreement of the measured entity and each of its juristic shareholders).

2.8 Paragraph 6.4.1 of the Discussion Document:

(1) Question: What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?

(2) Answer:

(a) See response in paragraph 2.7 above.

2.9 Paragraph 6.4.2 of the Discussion Document:

- (1) Question: what proof would in your view be appropriate to confirm the compliance of publicly traded entities provide with the HDG equity/ownership requirement?
- (2) Answer:
 - (a) The same proof required by non-publicly traded entities.
 - (b) There should be no separate framework for listed entities compared to unlisted entities. The ownership by Black people in an entity should be determined in accordance with the principles of the BEE Laws to ensure consistency and certainty across the empowerment legislation in South Africa.
 - (c) See response in paragraph 2.7 above.

2.10 Paragraph 7.7.1 of the Discussion Document:

- (1) Question: Is the definition of a *control interest* as set out in paragraph 7.3 of the Discussion Document above still valid?
- (2) Answer:
 - (a) No. The term control interest is outdated and does not align with other legislation relating to “control”. Furthermore, a control interest does not account for other circumstances or ways in which a person could acquire control, as set out in paragraph 2.11 below.
 - (b) As with the *Competition Act, 1998 (Competition Act)* the concept should relate to control and not to a control interest to ensure consistency and certainty across legislation in South Africa.

2.11 Paragraph 7.7.2 of the Discussion Document:

- (1) Question: In your view, what constitutes control and how should the Authority define it? Set out the basis for your argument.
- (2) Answer:
- (3) The definition of “Control” should be defined with reference to the understanding of control that has development under the Competition Act in relation to merger control to ensure consistency and certainty across legislation in South Africa. As stated above, the concept of control in the Competition Act is the most developed approach to an acquisition of Control and therefore we submit that it should be used as a basis from which to develop a definition and determination of control that uniquely suits the requirements of ICASA and the ECA.
 - (a) Regulatory certainty is essential for participants in a regulated sector. All participants in the ICT sector are also regulated by the provisions of the Competition Act. The purpose of the merger control provisions of the Competition Act which require that the Competition Authorities must provide prior approval for the acquisition of control over all or a part of a business allows the Competition Authorities to determine the impact that the acquisition of control, and the identity of the new controller will have

on competition in any relevant market and on the public interest. It is submitted that purpose of the investigation by the Competition Authorities into the identity and activities of the person acquiring control in terms of the Competition Act is similar to the reason that ICASA would need to investigate and approve the acquisition of control over a holder of a licence.

- (b) It is important for ICASA to understand who will be the controlling mind(s) of a licence holder. In the ICASA Findings Document, 2011 ICASA expressed its preference for a definition of control that is expansive and which has a “multidimensional perspective” that takes into consideration more than mere financial interest.
- (c) It is submitted that the acquisition of control described in section 12 of the Competition Act for the purposes of merger control provides exactly that. The Competition Tribunal and Competition Appeal Court have emphasised that the instances described in section 12 of the Competition Act where there will be an acquisition of control is not a closed list. In the competition law jurisprudence that has developed in relation to the interpretation of section 12 of the Competition Act, it is clear that there are many ways in which control may be acquired by a person, both factual and legal. In addition more than one person may control a firm simultaneously and in different ways. The understanding of control for the purposes of the Competition Act encompasses direct and indirect control, negative and positive control and confers control on persons who are able to materially influence the policy of a firm even if their shareholding, board representation or voting rights does not provide them with control.
- (d) Since 1999 when the Competition Act came into force the Competition Authorities and the courts have refined the understanding and interpretation of control in section 12 of the Competition Act. This body of jurisprudence provides certainty as to when an acquisition of control requires notification to the Competition Authorities allowing parties engaging in transactions to determine whether their transaction will require prior approval or not. The clarity of understanding of the meaning of an acquisition of control, combined with set time periods for investigations in the Competition Act permits transacting parties to plan transactions with relative certainty, minimises business interruption and encourages investment.
- (e) It is more appropriate to adopt the expansive approach to an acquisition of control as set out in the Competition Act then to set an arbitrary shareholding level as the trigger for a change in control. As noted above, the competition assessment encompasses a legal and factual enquiry into who the real controllers of a firm are. It is submitted that amending the ECA to incorporate the provisions of the Competition Act in respect of an acquisition of control would be most appropriate to ensure that ICASA would be in a position to consider and approve all circumstances in which an entity acquires an ability to materially influence the policy of the licence holder, whether through the acquisition of voting rights, board control, or shareholding.

- (f) However, whilst there are similarities and useful aspects of the competition law regime around control that could be imported or applied for the purposes of the ECA, it is important that the concept of control and what constitutes a change in control for the purposes of the ECA and ICASA's licensing regime is bespoke to the specific requirements unique to the telecommunications regulatory regime. Therefore it is submitted that guidance should be taken from the competition law approach considering the particular requirements of the ICT sector.
- (g) What is key, however, to ensuring regulatory certainty for ICT market participants is that, in addition to introducing a clear definition and understanding of the meaning of an acquisition or change of control, is that there are defined time periods during which ICASA will complete its assessment of any acquisition of control. A lack of certainty as to how long it will take for an acquisition of control over a licence holder to be considered and approved by ICASA is a disincentive to investment in the ICT sector.

2.12 Paragraph 7.7.3 of the Discussion Document:

- (1) Question: Are you of the view that the Authority should define ownership?
- (2) Answer:
 - (a) Yes – please see paragraph 2.13 below

2.13 Paragraph 7.7.4 of the Discussion Document:

- (1) Question: In your view, what constitutes Ownership and how should the Authority define it? Set out the basis for your argument.
- (2) Answer: This should be in line with the principles of ownership in South African property law.

2.14 Paragraph 7.7.5 of the Discussion Document:

- (1) Question: Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?
- (2) Answer: An acquisition of 100% of the issued share capital of a licensee will usually be both a transfer of control and a transfer of ownership. The two concepts are, however, distinct. As mentioned above, it is Cell C's position that it would be most appropriate to align the assessment of a transfer of control of a licensee with the merger control provisions of the Competition Act. This permits an assessment of a broader range of circumstances than a transfer of ownership.

2.15 Paragraph 8.1 of the Discussion Document:

- (1) Question: The ECA requires the Authority to promote BBBEE and the BBBEE 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.
- (2) Answer: Regulations under the ECA should be retained or amended to create specific Black ownership requirements (see paragraph 1.6(2)(a) and paragraph 2.3 above) so that ICASA can apply and promote the ownership provisions of the BEE Act and Generic Codes, in order to make them applicable to licences issued by ICASA. These ECA regulations requiring such level of Black ownership to be issued with a licence under the ECA to be achieved in accordance with the recognised principles of the Codes will aid in achieving this ownership in a manner which aligns with the BEE Act and the Generic Codes.

2.16 Paragraph 8.2 of the Discussion Document:

- (1) Question: Should the Authority apply the Codes to all applications i.e. including service, spectrum, type-approval and number applications?
- (2) Answer: Cell C does not believe that this is required. Only the licensee (who should already be compliant) can apply for spectrum, type approval and numbers. The licensee is the entity to which the regulations on ownership by Black people will apply under section 4(3)(k) of the *Independent Communications Authority of South Africa Act, 2000 (ICASA Act)*, therefore there is no need to refer to individual applications which cannot be made by anyone other than the licensee.

2.17 Paragraph 8.3 of the Discussion Document:

- (1) Question: Should the Authority require BBBEE certificates to be submitted as part of licensees' annual compliance requirements?
- (2) Answer:
 - (a) Yes, but only in respect of ownership and only if the measurement principles under the BEE Act and Generic Codes become the standard for the ICT sector to ensure that the compliance requirements under the ECA and Black ownership under an entity's BEE scorecard are measured using the same principles.
 - (b) BEE compliance and matters relating to the BEE Laws should be left to the jurisdiction of the BEE Commission, the relevant Sector Councils and the Department of Trade and Industry.

2.18 Paragraph 9.3 of the Discussion Document:

- (1) Question: Please provide your view whether this is the correct approach, or whether both HDG ownership and the Codes should apply to all applications and processes that do not involve individual licences?

(2) Answer:

- (a) Cell C sets out the recommended approach to all licences issued under the ECA in response to question 8.1. However, only the licensee (who should already be compliant) can apply for spectrum, type approval and numbers. The licensee is the entity to which the regulations on ownership by Black people will apply under section 4(3)(k) of the ICASA Act, therefore there is no need to refer to individual applications which cannot be made by anyone other than the licensee
- (b) All entities being issued a licence under the ECA should be subject to the same regime, notwithstanding the size of applying entity or licence being sought.

2.19 Paragraph 9.3.1 of the Discussion Document:

(1) Question: What should be the minimum level of BBBEE certification?

(2) Answer:

- (a) Cell C sets out the recommended approach in paragraph 1.6(2)(a), paragraph 2.3, paragraph 2.7, and paragraph 2.15 above.

2.20 Paragraph 9.3.2 of the Discussion Document:

(1) Question: Should HDG requirements or the application of the Codes be made mandatory and not be triggered only by an application of some other regulatory process?

(2) Answer:

- (a) See Cell C's response in paragraph 1.6(2)(a), paragraph 2.3 and paragraph 2.15 above regarding Black ownership requirements.
- (b) An entity's BEE score under the Generic Codes should not generally apply to the ECA and should be used for the purposes of the ECA, as ownership should be the only measure considered by the Authority.

2.21 Paragraph 9.3.3 of the Discussion Document:

(1) Question: The Authority proposes that with individual licence applications, both HDG 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.

(2) Answer: See Cell C's response in paragraph 2.15 and paragraph 2.20 above.

2.22 Paragraph 9.3.4 of the Discussion Document:

(1) Question: What should be the minimum level of BBBEE certification?

(2) Answer:

- (a) See Cell C's response in paragraph 2.15 and paragraph 2.20 above.

2.23 Paragraph 9.3.5 of the Discussion Document:

- (1) Question: Should HDG requirements or the application of the Codes be made mandatory or should it be triggered by an application of some other regulatory process?
- (2) Answer: See Cell C's response in paragraph 1.6(2)(a), paragraph 2.3, paragraph 2.15, and paragraph 2.20 above.

2.24 Paragraph 9.3.6 of the Discussion Document:

- (1) Question: 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 grows 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?
- (2) Answer:
 - (a) See Cell C's response in paragraph 1.6(2)(a), paragraph 2.3, paragraph 2.15, and paragraph 2.20 above.

2.25 Paragraph 9.3.7 of the Discussion Document:

- (1) Question: What in your view would be an appropriate timeframe? Provide the rationale informing the period required to ensure compliance.
- (2) Answer: See Cell C's response in paragraph 1.6(2)(a), paragraph 2.3, paragraph 2.15, and paragraph 2.20 above.

Yours faithfully



Graham Mackinnon
Chief Legal Officer