

30 June 2017

**Independent Communications Authority of South Africa**

**Project Manager: Ms Refiloe Motsoeneng**

Per email: [transformation@icasa.org.za](mailto:transformation@icasa.org.za)

Dear Ms Motsoeneng

**Submissions: ICASA Discussion Document on transformation, ownership and control over ECS and ECNS licences (“the Discussion Document”)**

1. ISPA has noted the launch of an inquiry in terms of section 4B of the ICASA Act by the Authority to assist in determining how ownership and control requirements under the Electronic Communications Act (“**the ECA**”) and the BEE ICT Sector Code (“**the Code**”) should be implemented.
2. ISPA recognises that this inquiry and the process which it initiates is long overdue. ISPA welcomes efforts to align the different approaches to transformation applicable to licensees.
3. ISPA has set out responses to selected questions raised in the Discussion Document below.

**Scope of application of HDG Equity Requirement**

*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?*

4. ISPA is concerned that broadening the HDG ownership requirement to class licensees may have unintended consequences for SMMEs and entrepreneurship in South Africa. A decision was taken by the drafters of the ECA specifically to exclude class licensees from this requirement and the reasons for such decision need to be revisited when considering whether to extend the requirement.
5. ISPA has submitted on many previous occasions that the Authority has failed to promote SMME development by creating a meaningful distinction between the way in which class licences as opposed to individual licences are regulated. The class licensing system is intended to lower barriers to entry: introducing HDG requirements for class licensees creates another barrier.

6. This position could be softened if there is reference to the Code and class licensees are able to comply with the Authority's requirements through certification or as exempt micro-enterprises.

*Should the Authority consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement?*

7. Yes. Different considerations apply according to the income level and size of the entity. A licensee which is essentially a one-person operation should not be treated in the same manner as a mobile network operator.

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

8. ISPA does not support an increase in the minimum legislated requirement.
9. An equity ownership requirement without reference to the broad-based empowerment structure is an extremely blunt mechanism for attaining transformation. Codes under the Broad-based Black Economic Empowerment Act place a heavy empowerment weighting on ownership, but allow for points to be scored through other mechanisms which achieve transformation objectives in a broader manner.

*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.*

10. ISPA submits that requiring prior approval in both sets of circumstances is consistent with the objectives and requirements of the ECA and ICASA Act.

#### Defining Ownership and Control

*Is the definition of a "control interest" as set out in (a) to (f) above still valid?*

11. ISPA does not believe that the 2003 Control and Ownership Regulations should have any application in the vastly-different telecommunications market of 2017. The 2003 Regulations were drafted specifically to address the market structure created under the vertical licensing framework imposed by the Telecommunications Act 103 of 1996. The horizontal licensing framework created by the ECA does not distinguish between categories of services such as mobile and fixed and the concept of a "control interest" is no longer relevant.

12. There is no longer a rationale for special treatment of juristic persons holding licences issued by the Authority.
13. Rather, reference should be had to the provisions regarding “control” as set out in subsection 2(2) of the Companies Act 71 of 2008 and the body of law regarding this concept as it is applied to juristic persons in South Africa.

*In your view, what constitutes control and how should the Authority define it? Set out the basis for your argument.*

14. ISPA refers to its previous response.

*Are you of the view that the Authority should define ownership?*

15. ISPA’s submissions in respect of the definition of control apply equally to the definition and interpretation of the concept of ownership within the context of ICASA processes.

*In your view, what constitutes Ownership and how should the Authority define it. Set out the basis for your argument.*

16. ISPA’s submissions in respect of the definition of control apply equally to the definition and interpretation of the concept of ownership within the context of ICASA processes.

*Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?*

17. ISPA believes that the true legal nature of service licences issued by the Authority is poorly understood. Does the question pertain to transfer or change of control of a licensee, or transfer or change of control of a licence? This can only be properly considered once a firm definition and understanding of “control” has been reached.
18. It is not necessary, however, to consider this to respond to this question practically: what can be said is that the effect in respect of the use of the licences is the same in respect of a transfer of 100% share capital as it is for a transfer of ownership.
19. It follows that the same process and criteria should be employed in dealing with each type of corresponding application.

## Questions Regarding the Application of the ICT Sector Codes

*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.*

20. ISPA does not perceive this to be a role that the Authority should be fulfilling. The Authority exercises its powers in respect of transformation over licensees and achieves its transformation objectives through the impact of those powers on licensees.

21. In ISPA's view this is correctly the role of the Department of Trade and Industry.

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

22. ISPA submits that this would – type-approval aside – amount to an unnecessary duplication of effort. The ECA is explicit that a service licence under Chapter 3 of that Act is required before a radio frequency spectrum licence or allocation of numbering resources will be considered by the Authority. If compliance is enforced at service licence level it does not have to be enforced for applications which require the holding of the service licence.

23. It should be borne in mind that all service licensees are required to provide a statement of their current shareholding to the Authority as part of the Standard Terms and Conditions Report, which falls due for submission on 31 March every year.

24. ISPA cautions that extension of HDG ownership requirements to applicants for type approval certification may have the unintended consequence of reducing the availability of consumer devices as well as radio frequency spectrum and terminating apparatus in South Africa.

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

25. Compliance with the Codes is voluntary. If a licensee elects to comply with transformation requirements through the Code and not through compliance with the HDG requirements of the ECA, then submission of BBBEE certificates should be required.

## General Questions

*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?*

26. ISPA supports a movement away from the blunt HDG requirement to application of the Code, which achieves the same objectives while ensuring alignment between transformation in the ICT sector and transformation in every other sector of South Africa.

27. As set out above, ISPA does not support the application of the HDG requirement to class licences.

*What should be the minimum level of BBBEE certification?*

28. This would need to be determined with reference to a sliding scale which takes into account size, revenue and other relevant factors.

## Conclusion

29. We trust that the above will assist the Authority in its further deliberations.

Regards

ISPA Chair