

29 June 2017

**Independent Communications Authority of South Africa**  
Pinmill Farm  
164 Katherine Street  
Sandton  
2146

Attention: Ms Refiloe Motsoeneng  
e-mail: [transformation@icasa.org.za](mailto:transformation@icasa.org.za)

Dear Madam

**Discussion Document on Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT Sector**

- 1 M-Net and MultiChoice thank the Independent Communications Authority of South Africa ("the Authority") for the opportunity to comment on the Discussion Document on Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT Sector in terms of s4B of the ICASA Act<sup>1</sup> ("the Discussion Document").
- 2 We support initiatives to promote broad-based black economic empowerment, with particular attention to the needs of women, youth and persons with disabilities.
- 3 Please find enclosed our written submissions.
- 4 We hope that our input will contribute constructively to this process, and request an opportunity to participate in the public hearings to be held in due course.

Yours sincerely



**Kwezi Mtenganya**  
GM: Regulatory Affairs

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<sup>1</sup> Published under Notice Number 274, Government Gazette Number 40759, 31 March 2017

**DISCUSSION DOCUMENT: EQUITY  
OWNERSHIP BY HISTORICALLY  
DISADVANTAGED GROUPS AND THE  
APPLICATION OF THE ICT SECTOR  
CODE IN THE ICT SECTOR**

**REPRESENTATIONS BY M-NET AND  
MULTICHOICE**

**30 JUNE 2017**

**Attention: Ms Refiloe Motsoeneng  
Independent Communications Authority of  
South Africa  
164 Katherine Street  
Sandton  
[transformation@icasa.org.za](mailto:transformation@icasa.org.za)**

## **1. INTRODUCTION**

- 1.1 M-Net and MultiChoice thank the Independent Communications Authority of South Africa ("the Authority") for the opportunity to comment on the Discussion Document on Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT Sector in terms of s4B of the ICASA Act<sup>1</sup> ("the Discussion Document").
- 1.2 We support initiatives to promote broad-based black economic empowerment ("B-BBEE"), with particular attention to the needs of women, youth and persons with disabilities.
- 1.3 We hope that our input will contribute constructively to this process, and request an opportunity to participate in the public hearings to be held in due course.

## **2. THE APPLICABLE LEGISLATIVE REGIME**

- 2.1 Historically, the ICASA Act promulgated in 2000 did not contain any empowerment provisions. The Electronic Communications Act, 2005 ("ECA") was promulgated at a time when the then nascent Broad-Based Black Economic Empowerment Act, 2003 ("B-BBEE Act") had only recently come into operation, and introduced provisions to promote empowerment.
- 2.2 The ECA as originally promulgated in 2005 ("the Original ECA") initially enjoined the Authority to promote the empowerment of historically disadvantaged persons, including women, the youth and people with disabilities,<sup>2</sup> primarily by legislating the minimum percentage of equity ownership to be held by persons from historically disadvantaged groups ("HDGs") in respect of applications for individual licences.<sup>3</sup>
- 2.3 The ECA served an important role while the B-BBEE Act was in its infancy. However, as the Authority recognises, there were (and remain) significant differences between the ECA and the B-BBEE Act which render the two frameworks incompatible.

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<sup>1</sup> Published under Notice Number 274, Government Gazette Number 40759, 31 March 2017

<sup>2</sup> s2(h) and s5(9)(b) of the Original ECA

<sup>3</sup> s9(2)(b) of the Original ECA. The provisions of s9(2)(b) applied, with the necessary changes, to the amendment and renewal of an individual licence (s10(2) and s11(3) of the Original ECA)

2.4 Prior to its amendment in 2014 the ECA focussed on equity ownership by persons from HDGs (understood as black people, women and persons with disabilities, although the term is not defined in the ECA or the underlying statutes).

2.5 On the other hand, the B-BBEE Act adopts a broad-based approach to the empowerment of "Black" people<sup>4</sup> through a holistic range of measures of which ownership is only one factor – ultimately resulting in a B-BBEE contributor status level reflected as an output from compliance levels into balanced scorecard. Further details regarding the B-BBEE legislative regime are set out below.

## 2.6 The B-BBEE Act

2.6.1 The primary legislation regulating B-BBEE is the B-BBEE Act which took effect on 21 April 2004.

2.6.2 The B-BBEE Act is an enabling framework that allows Government to implement detailed B-BBEE policies and to provide a standard framework for the measurement of B-BBEE across all sectors of the economy.

2.6.3 s10 of the B-BBEE Act outlines the following for the implementation of B-BBEE:

*"every organ of state and public entity must apply any relevant Code of Good Practice issued in terms of [the B-BBEE Act] in -*

*(a) determining qualification criteria for the issuing of licences, concessions or authorisations in terms of any law;*

*(b) developing and implementing a preferential procurement policy;*

*(c) determining qualification criteria for the sale of state-owned enterprises;*

<sup>4</sup> "Black people" is defined in s1 of the BBBEE Act as meaning –

"a generic term which means Africans, Coloureds and Indians -

(a) who are citizens of the Republic of South Africa by birth or descent; or

(b) who became citizens of the Republic of South Africa by naturalisation-

(i) before 27 April 1994; or

(ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date"

*(d) developing criteria for entering into partnerships with the private sector'*. (our emphasis)

- 2.6.4 The B-BBEE Amendment Act No. 46 of 2013 ("the B-BBEE Amendment Act") was gazetted on 27 January 2014. The B-BBEE Amendment Act aims, amongst other things, to clarify and expand on matters that were already included in the B-BBEE Act. The salient features of the B-BBEE Amendment Act are:
- 2.6.4.1 Fronting, which was previously addressed in guidelines published by the Department of Trade and Industry, is now defined and dealt with in the B-BBEE Amendment Act. Fronting practices such as 'window dressing', benefit diversion and opportunistic intermediaries are now punishable by penalties of up to 10 years in prison or up to 10% of the offending enterprise's annual turnover. In addition to the possibility that any contract or authorisation awarded by an organ of State or public entity may be cancelled, a person and/or entity convicted of fronting will be blacklisted and prohibited from contracting or transacting with any organ of State and/or public entity for a period of 10 years. The B-BBEE Amendment Act further introduces an obligation on B-BBEE verification professionals, procurement officers and officials of organs of State and public entities to report instances of fronting.
- 2.6.4.2 The B-BBEE Amendment Act established a B-BBEE Commission whose key functions include the promotion of adherence to B-BBEE, good governance and accountability in the implementation of B-BBEE and B-BBEE advocacy. The B-BBEE Commission is empowered to receive complaints and, of its own initiative or as a result of complaints, investigate any matter, relating to B-BBEE.
- 2.6.4.3 Importantly, in the context of these submissions, the B-BBEE Amendment Act provides that, to the extent of any conflict between the provisions of the B-BBEE Act and any other law in force immediately prior to the date of commencement of the B-BBEE Amendment Act, the provisions of the B-BBEE Amendment Act will prevail if the conflict specifically relates to a

matter dealt with in the B-BBEE Amendment Act. This is the so-called 'trumping provision'. In order to allow for the statutory alignment as contemplated in this provision in the B-BBEE Amendment Act, it provided for a one year transitional period.

2.6.5 The status of the Sector Codes (which for purposes of these submissions would include the ICT Sector Codes (defined in paragraph 2.7.1 below) is clarified in that enterprises in a sector in respect of which a Sector Code has been issued may only be measured for B-BBEE compliance in accordance with that Sector Code. Those enterprises must also report annually on their compliance to the sector council established for that sector.

## 2.7 **The ICT Sector Code**

2.7.1 The Information and Communications Technology Sector Codes ("**ICT Sector Codes**") were originally published on 6 June 2012. The revised version was published and took effect on 7 November 2016. The ICT Sector Codes provide a standard framework, in the form of an "ICT Sector Scorecard" for the measurement of B-BBEE for entities operating in the ICT Sector such as broadcasters and ECNS licensees. The ICT Sector Scorecard is set out below:

Element	Weighting	Overall / Range of Compliance targets
Effective ownership by black people [with specific sub-targets for ownership by black women and black designated groups] ("Ownership")	25 points	30% economic interest  30 vote voting rights
Effective management control by black people and employment of black people [including sub-targets for black women] ("Management Control")	23 points	50% for effective management control  60% to 88% for different levels of employees
Skills development expenditure on black people and black employees and number of black people and unemployed black people participating in learnerships, apprenticeships and internships ("Skills Development")	20 points	6% of payroll
BEE procurement spend based on BEE recognition levels from <u>Empowering Suppliers</u> as a percentage of total procurement spend (see clause 9 of report) [with sub-elements for spend on Qualifying Small Enterprises, Exempted Micro-Enterprises, 51% black-owned entities and 30% black women owned suppliers. Value of enterprise and supplier development contributions ("Enterprise and Supplier Development")	50 points	80% for procurement  2% of Net profit After Tax ("NPAT") for Supplier Development  3% NPAT for Enterprise Development
Value of socio-economic development contributions ("Socio-Economic Development")	12 points	1.5% of NPAT
<b>Total</b>	<b>130 points</b>	

2.8 On an annual basis an ICT entity seeking to determine its B-BBEE status is verified by an independent accredited verification agency. The verification agency will score that entity on the basis of the extent of compliance with each element referred to in the table above. Then, based on its total score, it will determine the entity's B-BBEE status on the basis of the table below:

<b>Points achieved</b>	<b>B-BBEE status</b>	<b>B-BBEE procurement score</b>
Greater than or equal to 120 points	Level 1 contributor	135%
Less than 120 points but equal to and more than 115 points	Level 2 contributor	125%
Less than 115 points but equal to and greater than 110 points	Level 3 contributor	110%
Less than 110 points but greater than and equal to 100 points	Level 4 contributor	100%
Less than 100 points but greater than and equal to 95 points	Level 5 contributor	80%
Less than 95 points but greater than and equal to 90 points	Level 6 contributor	60%
Less than 90 points but greater than and equal to 75 points	Level 7 contributor	50%
Less than 75 points but greater than and equal to 55 points	Level 8 contributor	10%
Less than 55 points	Non-compliant contributor	0%

## 2.9 Interaction between the B-BBEE legislative regime, the ECA and the ICASA Act

2.9.1 The B-BBEE legislative regime is comprehensive, specialist legislation on the promotion of B-BBEE, with specific detailed provisions for the ICT Sector already existing in the ICT Sector Codes read with the B-BBEE Act. The



Authority should avoid creating confusion by introducing additional conflicting requirements in its licensing processes or regulations.

2.9.2 By virtue of the amendments to the ECA and the ICASA Act, the Authority's mandate has shifted from the empowerment of persons from HDGs primarily through equity ownership to B-BBEE in terms of the B-BBEE Act:

2.9.2.1 "*Broad-based black economic empowerment*" is defined in the ECA and the ICASA Act as having the meaning assigned to that term in the B-BBEE Act.<sup>5</sup>

2.9.2.2 The object of the ECA shifted from promoting the empowerment of historically disadvantaged persons (including Black People) with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities,<sup>6</sup> to promoting B-BBEE, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities<sup>7</sup>. The ECA's object accordingly now extends to promoting the wider concept of B-BBEE, as defined in the B-BBEE Act.

2.9.2.3 The ICASA Act now empowers (but does not require) the Authority to make regulations on empowerment requirements to promote B-BBEE (as defined in the B-BBEE Act).<sup>8</sup>

2.9.2.4 The ECA now empowers (but does not require) the Authority to make regulations to set a limit on, or restrict, the ownership or control of an individual licence in order to promote the ownership and control of electronic communications services by HDGs and to promote B-BBEE (as defined in the B-BBEE Act).<sup>9</sup>

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<sup>5</sup> s1 of the ICASA Act as amended with effect from 16 May 2014 and s1 of the ECA as amended with effect from 21 May 2014. The definition of BBBEE is set out for ease of reference in the footnote in paragraph 2.3

<sup>6</sup> s2(h) of the Original ECA

<sup>7</sup> s2(h) of the ECA as amended with effect from 21 May 2014

<sup>8</sup> s4(3)(k) of the ICASA Act as amended with effect from 16 May 2014

<sup>9</sup> s13(3)(a) of the ECA as amended with effect from 21 May 2014

- 2.9.3 In granting a licence under the ECA, the Authority must now promote B-BBEE ... in accordance with the requirements of the ICT Charter.<sup>10</sup> (Prior to the ECA's amendment the Authority was required, in granting a licence, to promote the empowerment of HDPs in accordance with the requirements of the ICT Charter.<sup>11</sup>)
- 2.9.4 In addition, in respect of applications for individual licences, the Authority's invitation for an individual licence must include the percentage of equity ownership to be held by persons from HDGs, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under s4(3)(k) of the ICASA Act.<sup>12</sup>
- 2.10 Given these amendments to the ECA, the ICASA Act and the BBEE Act, and the greater (although not complete) alignment between the two frameworks, we submit that it is not necessary for the Authority to impose empowerment obligations over and above those already existing under the B-BBEE Act read with ICT Sector Codes ("B-BBEE Legislative Framework").
- 2.11 It is against this background that we provide our specific responses to some of the questions raised in the Discussion Document, which we have attempted to categorise on a thematic basis.

### 3. *The 30% HDG Ownership Requirement*

- 3.1 We submit that it is not necessary for the Authority to impose empowerment ownership obligations over and above those already existing under the B-BBEE Legislative Framework.

<sup>10</sup> s5(9)(b) of the ECA as amended with effect from 21 May 2014

<sup>11</sup> s5(9)(b) of the Original ECA

<sup>12</sup> s9(2)(b) of the ECA with effect from 21 May 2014. The provisions of s9(2)(b) apply, with the necessary changes, to the amendment, renewal and transfer (or transfer of control) of an individual licence (s10(2), s11(3) and s13(6) of the ECA with effect from 21 May 2014)

- 3.2 In particular, we submit that the Authority should be circumspect, at this stage of the transformation process, about imposing targets in excess of those set out in the ICT Sector Codes, a revised version of which has just recently been gazetted.
- 3.3 The Authority should note further that as far as ownership is concerned, the ICT Sector Codes sets an overall compliance target of economic interest and voting rights by Black People at 30%. Sub-targets of the overall target includes economic interest and voting rights by Black Women at 10% and economic interest of Black designated groups / Black Participants in Employee Share Ownership Programmes / Black People in Broad-Based Ownership Schemes / Black Participants in Co-operatives (3%). These targets are subject to detailed calculation methodologies and assessments, including, in relation to the existence and release of funding associated with the equity held by Black People.

4. ***If regulations are prescribed how should these apply, and monitor compliance with, the ICT Sector Codes?***

- 4.1 We recommend that, to the extent that the Authority prescribes regulations, these should –
- 4.1.1 require licensees to comply with the relevant requirements of the B-BBEE Legislative Framework;
- 4.1.2 require licensees to submit copies of their B-BBEE certificates to the Authority on an annual basis; and
- 4.1.3 prescribe conditions under s4(3)(k) of the ICASA Act with requirements to promote B-BBEE as an alternative to the minimum 30% equity ownership to be held by persons from HDGs in terms of s9(2)(b) of the ECA. In this regard, we submit that a Level 4 B-BBEE contributor status, which constitutes a 100% recognition level, would be an appropriate alternative to 30% HDG equity ownership. Bearing in mind the obligation for existing licences to have been

converted on no less favourable terms<sup>13</sup> and the vested rights, interests and legitimate expectations of existing licensees, the minimum Level 4 BBEE score, should apply only under s9(2)(b) of the ECA.

**5. *Should the Level 4 B-BBEE Contributor status apply to individual and class licences?***

- 5.1 Section 10 of the B-BBEE Act obliges the Authority to apply the ICT Sector Codes in determining qualification criteria for the issuing of licences in terms of the ECA. Further, given that promoting B-BBEE is an object of the ECA as a whole<sup>14</sup> and that s5(9)(b) of the ECA, which obliges the Authority, in granting a licence, to promote B-BBEE in accordance with the requirements of the ICT Sector Code, applies to the licensing framework as a whole (including both class and individual licences) the obligations on licensees to submit copies of their B-BBEE certificates to the Authority on an annual basis should apply to the granting of both individual and class licences. Furthermore, a Level 4 B-BBEE contributor status, which constitutes a 100% recognition level, would be an appropriate requirement for all new class and Individual licence applications.

**6. *How should HDG equity ownership be measured and verified and how should BBEE ownership in publicly traded entities be treated?***

- 6.1 Firstly, we re-iterate our recommendation that, should regulations be prescribed, licensees can be required to submit copies of their B-BBEE certificates to the Authority on an annual basis and that a Level 4 B-BBEE contributor status would be an appropriate alternative to 30% HDG equity ownership.
- 6.2 The advantage of this is that wrapped into the B-BBEE contributor status level, is an assessment done by an accredited B-BBEE verification agency of the Black ownership level of a licensee, which might include complex structures such as

<sup>13</sup> s93(1) of the ECA

<sup>14</sup> s2(h) of the ECA

publicly traded schemes, ownership by black participants in broad-based ownership schemes or co-operatives or employee share ownership programmes according to established and understood rules as per the ICT Sector Codes.

- 6.3 With respect to publicly traded schemes, for example, we submit that the HDG equity ownership requirement could be applied to publicly traded entities in exactly the way the ICT Sector Codes applies the measurement of the Black ownership target to publicly traded entities.
- 6.4 In this regard it should be noted that our own Black publicly traded scheme Phuthuma Nathi has been a particular example of success.
- 6.5 MultiChoice created Phuthuma Nathi Investments, a wholly owned Black South African company that holds 20% of MultiChoice. When launched, Phuthuma Nathi was the largest empowerment transaction in the listed media sector. Phuthuma Nathi gave qualifying Black groups and Black individuals the opportunity to invest in an innovative industry in a truly South African company. The two Phuthuma Nathi empowerment transactions launched in September 2006 and January 2007, have resulted in approximately 109 000 Black shareholders being added to our diverse shareholder base. The success of Phuthuma Nathi lies in its unique structure. By making Phuthuma Nathi broad-based and accessible to people across income levels, ordinary South Africans were able to purchase shares in MultiChoice. Since the inception of the scheme in 2006, Phuthuma Nathi shareholders have received dividends every year. Phuthuma Nathi shares started trading on 8 December 2011. Since trading started up to 31 October 2012, over 11,9 million shares worth over R572,8 million have traded. The total dividends received to date is some R2,2 billion. Phuthuma Nathi shares were bought by Black shareholders for R10 per share when the scheme was launched in 2006. Since then shareholders have received dividends of R4,21 per share. This, together with the capital growth, means shareholders who invested in Phuthuma Nathi at inception have realised a return of over 500%.

- 6.6 In terms of the measurement principles applicable to determining the extent of Black ownership in a publicly traded scheme, the ICT Sector Codes applies the following calculation methodologies:<sup>15</sup>
- 6.6.1 When determining Ownership in a Measured Entity, rights of Ownership of Mandated Investments may be excluded.
- 6.6.2 "Mandated Investments" means "*any investments made by or through any third party regulated by legislation on behalf of the actual owner of the funds, pursuant to a mandate given by the owner to a third party, which mandate is governed by that legislation*"<sup>16</sup>. This generally pertains to shareholding in publicly traded companies held by institutional shareholders such as banks, insurance companies and pension funds.
- 6.6.3 The maximum percentage of the Ownership of any Measured Entity that may be so excluded is 40%.
- 6.6.4 A Measured Entity electing not to exclude Mandated Investments when it is entitled to do so, may either treat all of that Ownership as non-Black or obtain a competent person's report estimating the extent of Black rights of Ownership measurable in the Measured Entity and originating from that Mandated Investments.
- 6.6.5 A Measured Entity cannot selectively include or exclude Mandated Investments and therefore an election to exclude one Mandated Investment is an election to exclude all Mandated Investments and vice versa.
- 6.7 M-Net and MultiChoice, therefore, submit that the ICT Sector Codes has established ground rules for measuring Black ownership in publicly traded entities. The verification agencies are obliged to verify these calculations when verifying measured entities, including measured entities that contain publicly traded schemes. There is therefore no reason to depart from this.

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<sup>15</sup> Paragraph 3.7 of Mended Code Series 100, Statement 100

<sup>16</sup> Schedule 1, Part 2 of the ICT Sector Codes

## 7. What Constitutes Control?

- 7.1 We note that "*control*" is not defined in the ECA and that a regulation cannot be used to interpret the Act under which it was made.
- 7.2 On our assessment, the most meaningful approach is to focus on control over the two organs of a company, namely the general meeting and the board of directors.
- 7.3 We accordingly propose that a person would control a licensee in the following circumstances:
- (a) in the case of a licensee which is a company –
    - (i) that person –
      - (aa) is directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or
      - (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or
    - (ii) that licensee is a subsidiary of that company; or
  - (b) in the case of a licensee which is a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or
  - (c) that person has the ability to materially influence the policy of the licensee in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a) or (b).

## 8. CONCLUSION

- 8.1 M-Net and MultiChoice thank the Authority for the opportunity to participate in this important discussion and to make this submission.