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**PRIMEDIA'S RESPONSE TO ICASA'S DISCUSSION DOCUMENT  
ON EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED  
GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE IN  
THE ICT SECTOR**

**2017**

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PRIMEDIA BROADCASTING, A DIVISION OF PRIMEDIA PROPRIETARY LIMITED (Reg. No. 2005/044403/07)

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**PRIMEDIA'S RESPONSE TO ICASA'S DISCUSSION DOCUMENT ON EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE IN THE ICT SECTOR DISCUSSION**

**1. Introduction**

- 1.1 Primedia (Proprietary) Limited (**Primedia**) is the licensee in respect of four commercial sound broadcasting licences namely, 702, 947 (both in Gauteng) and KFM and Cape Talk (both in the Western Cape). In addition, Primedia also has a non-controlling stake in Kaya FM.
- 1.2 Primedia is grateful for the opportunity to submit comments in response to the Discussion Document on Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT Sector (the **Discussion Document**) published by the Independent Communications Authority of South Africa (the **Authority**) in GN 274, *Government Gazette* 40759 of 31 March 2017 in the context of the inquiry that has been initiated by the Authority in terms of section 4B of the Independent Communications Authority of South Africa 13 of 2000 (**ICASA Act**).
- 1.3 Broad-based black economic empowerment (**BBBEE**) ownership in the broadcasting sector has matured greatly since the mid 1990s and the sector is one of the most transformed in the country. It has given rise to a number of spectacularly successful national BBBEE successes. Primedia is very supportive of transformation in the sector and has consistently over the years improved its levels of black shareholding. It is as a result of this commitment, that Primedia is currently in a position where it has high levels of black ownership in excess of 40% and has a level 3 rating in terms of the general Codes of Good Practice published under the Broad-Based Black Economic Empowerment Act 53 of 2003 (**BBBEE Act**).
- 1.4 Primedia will make representations at any public hearing that is convened as part of the inquiry.

**2. Applicable statutory framework**

- 2.1 The Authority has various powers and obligations in relation to ownership by persons from historically disadvantaged groups (**HDPs**) and BBBEE more generally in terms of the sector-specific legislation which governs the communications sector, the Electronic Communications Act 36 of 2005 (**ECA**), the ICASA Act and the Broadcasting Act 4 of 1999, and the BBBEE Act.
- 2.2 The sector-specific legislation: the ECA, ICASA Act and Broadcasting Act
  - 2.2.1 In terms of section 2(h) of the ECA one of the regulatory objectives to which the Authority must give effect is "broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities. This objective was inserted by the Electronic Communications Amendment Act 1 of 2014 (**Amendment Act**) which came into effect on 21 May 2014. Prior to amendment, section 2(h) provided that the ECA sought to: "*promote 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*". For the purposes of the ECA, BBBEE is defined as having the same meaning as that assigned to the term in the BBBEE Act. This definition

was similarly inserted into the ECA by the Amendment Act. The BBBEE Act (subsequent to its amendment by the ) defines BBBEE as:

*"the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to-*

*(a) increasing the number of black people that manage, own and control enterprises and productive assets;*

*(b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;*

*(c) human resource and skills development;*

*(d) achieving equitable representation in all occupational categories and levels in the workforce;*

*(e) preferential procurement from enterprises that are owned or managed by black people; and*

*(f) investment in enterprises that are owned or managed by black people" (underlined emphasis added).*

2.2.2 In terms of section 5(9)(b) of the ECA, when granting licences the Authority must promote BBBEE including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the ICT charter. For the purposes of the ECA, the "ICT charter" is defined as the "ICT Sector Charter, a sector code on [BBBEE], issued in terms of the [BBBEE Act]".

2.2.3 In terms of section 9(2)(b) of the ECA, when the Authority invites applications for new individual licences it is required to stipulate in the invitation the minimum "percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act". The High Court has held that, on the basis of section 13(6) of the ECA in terms of which sections 9(2) to (6) of the ECA, apply with the necessary changes to transfers and transfers of control of individual licences, that section 9(2)(b) in particular applies to transfers of control of individual licences.<sup>1</sup> This has the result that, on the basis of the current judicial interpretation of the law, in any transaction involving a transfer of "control" of an individual licence the acquirer must have 30% HDP ownership or, presumably, if less than 100% of the shares (or other ownership interests) are being acquired, the licensee should have 30% HDP ownership following the transaction. Given the similar wording that is used in sections 10(2) and 11(3) of the ECA to the wording in section 13(6), it seems that any amendment or renewal of an individual licence may similarly require the licensee to have 30% equity ownership by HDPs, although this question has not yet been addressed by any court.

2.2.4 The term "person from an historically disadvantaged group" is not defined in the ECA or the ICASA Act. This term or the term "historically disadvantaged person" is used in various places in the Act including in section 83(8)(a) in relation to the staff of the Universal Service and Access Agency of South Africa, where the CEO is required to "promote the empowerment of historically

<sup>1</sup> *Telkom SA SOC Limited v Mncube NO and Others; Mobile Telephone Networks (Pty) Ltd v Pillay NO and Others; Cell C (Pty) Limited v The Chairperson of ICASA and Others; Dimension Data Middle East & Africa (Pty) Ltd t.a Internet Solutions v ICASA and Others* (55311/2015; 77029/2015; 82287/2015) [2016] ZAGPPHC 93 (26 February 2016) (**Telkom v ICASA**).

*disadvantaged persons, including women, the youth and persons with disabilities*". As indicated above, the previous section 2(h) prior to the amendment of the ECA by the Amendment Act also referred to persons from historically disadvantaged groups.

- 2.2.5 In terms of section 13(3) of the ECA, the Authority may by regulation 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 HDPs and to promote BBBEE, or to promote competition in the ICT sector. In terms of section 13(5), such regulations must be made with due regard to the objectives of the ECA, the related legislation and any other relevant legislation, and after the Authority has conducted an inquiry in terms of section 4B of the ICASA Act. The placement of these sub-sections in section 13 of the ECA is curious, given that the heading of the section is "Transfer of individual licences or change of ownership" given that the regulations that are envisaged in sections 13(3) and (5) have nothing to do with transfers or transfers of control of licences.
- 2.2.6 Despite the requirements of section 13(5) of the ECA the present inquiry does not appear to have been instituted in terms of that section although it appears to be aimed at developing policy around HDP ownership and BBBEE more generally.
- 2.2.7 Section 4(3)(k) of the ICASA Act provides that the Authority "*may make regulations on empowerment requirements to promote [BBBEE]*". Consistently with the definition in the ECA, for the purposes of the ICASA Act the term "broad-based black economic empowerment" has the meaning given to it in the BBBEE Act. As indicated above, section 9(2)(b) of the ECA contemplates that applicants for new individual licences may be required to comply with additional requirements (including it seems a higher percentage ownership by HDPs) stipulated in terms of regulations made under this section.
- 2.2.8 The Individual Licensing Processes and Procedures Regulations, 2010 indicate the criteria on which an application to transfer or transfer control of an individual licence will be evaluated. Regulation 11(4) provides that a licence transfer, or transfer of control application will be evaluated on the basis of: (a) promotion of competition in the ICT sector; (b) interests of consumers; and (c) equity ownership by HDGs. Regulation 12(c) then provides that the Authority "*may*" refuse to transfer or renew a licence where the transferee's ownership and control by HDPs is less than 30%. Notwithstanding this discretion, the Authority published a notice in the *Government Gazette*<sup>2</sup> indicating that it would no longer approve applications to transfer individual electronic communications service and electronic communications network service licence transfer applications "*which do not have 30% equity ownership by HDGs*".
- 2.2.9 The Authority previously published the Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services, 2003<sup>3</sup> under the Telecommunications Act 103 of 1996 which was repealed by the ECA with effect from 19 July 2006. The Ownership and Control

<sup>2</sup> Published under Government Notice 881 in *Government Gazette* 38087 of 10 October 2014.

<sup>3</sup> Published under GN R105 in *Government Gazette* 24288 of 16 January 2003.

Regulations were made pursuant to sections 96(5) and 52<sup>4</sup> of the Telecommunications Act. They applied only to telecommunications service licenses regulated under the Telecommunications Act. They did not apply to broadcasting service licensees licensed in terms of the Independent Broadcasting Authority Act 153 of 1993 (**IBA Act**). Section 95(1) of the ECA, before the amendments effected by the Amendment Act, provided that, within 24 months of the coming into force of the ECA, the Authority may, if it deems necessary, repeal or amend the regulations made under, amongst others, the Telecommunications Act, which were in force immediately prior to the commencement of the ECA. The Ownership and Control Regulations were not repealed or amended. Following the amendments to the ECA by the Amendment Act, section 95(1) now provides that the Authority may, if it considers necessary, repeal or amend the regulations made under, amongst other legislation, the Telecommunications Act which were in force immediately prior to the commencement of the Amendment Act. Section 95(2) provides that the regulations referred to in section 95(1) remain in force "until they are amended or repealed in terms of the ECA". The Authority has not, to date, repealed or amended the Ownership and Control Regulations.

2.2.10 The Ownership and Control Regulations provide that a person has a "control interest" in a licensee, (transfer of which required the Authority's prior approval in certain circumstances) "if, in the absence of proof to the contrary, that person directly or indirectly:

*(a) beneficially owns more than twenty-five percent of the issued share capital of the licensee;*

*(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the licensee or has the ability to control, either directly, indirectly or through an affiliate the casting of a majority of those votes of the licensee;*

*(c) is able to appoint or veto the appointment of a majority of the directors of the licensee;*

*(d) is a holding company and the licensee is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);*

*(e) in the case where the licensee is a trust, has the ability to control a majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;*

*(f) in the case where the licensee is a close corporation, owns more than twenty-five percent of the members' interest, or controls or has the right to control the member's votes in the close corporation; or*

*(g) has the ability to direct or cause the direction of the management or policies of the licensee in a manner similar to any of paragraphs (a) to (f), whether through the direct or indirect ownership of issued share capital, by contract, by other securities, or otherwise."*

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<sup>4</sup> Section 52 of the Telecommunications Act provided that the Authority may by regulation restrict or prohibit the ownership or control of or the holding of any financial or voting interest in (a) a telecommunication service of any category or kind; (b) two or more telecommunication services of the same category or kind; and (c) a telecommunication service of one category or kind and another telecommunication service of a different category or kind.

2.2.11 Regulation 4 of the Ownership and Control Regulations provides that the Authority's prior approval was required for the transfer of a control interest in a licensee or "a decrease in the ownership interests held by [HDPs] in a licensee within the first two years of initial grant of the licence where the licensee proposed such ownership interests to be held by [HDPs] in its application for a licence in response to an invitation to tender issued by the Minister under section 34 of the [Telecommunications] Act". Such approval was not required where, amongst other things, the licensee is a listed entity and the trading of its issued share capital would not result in the transfer of a control interest, or where the market is not a "concentrated market," or a "transfer of ownership interests where such transfer does not result in a transfer of a control interest". A concentrated market is defined as "any telecommunication service category in which ... there are fewer than five licensees", or "the Authority determines that the market is not concentrated" (sic, underlined emphasis added). A telecommunications service category was defined with reference to the various licence categories under the Telecommunications Act e.g. public switched telecommunications service, mobile cellular telecommunications service, value-added network service, international telecommunication service licence etc. A licensee is defined as "any person who holds a telecommunication service licence under the [Telecommunications] Act". A telecommunications service licence was, in turn, defined as "a licence issued or deemed to have been issued in terms of the [Telecommunications] Act".

2.2.12 The IBA Act, which was also repealed by the ECA, also contained provisions relating to the control of broadcasting licensees which were relevant in the context of the foreign ownership restrictions, media concentration restrictions and cross-media control restrictions. In any event, Schedule 2(1) of the IBA Act contained a comprehensive list of instances in which a person would be regarded as having control over a private broadcasting licensee. In this regard, a person was indicated to control or be in a position to exercise control over a commercial broadcasting service licensee where -

2.2.12.1 such person, either alone or together with an associate, is in a position to exercise control over such broadcasting licensee;

2.2.12.2 such person, either alone or together with an associate, is in a position to exercise direct or indirect control over the selection or provision of a significant proportion of the programmes broadcast or proposed to be broadcast by such broadcasting licensee;

2.2.12.3 such person, either alone or together with an associate, is in a position to exercise direct or indirect control over a significant proportion of the operations of such a broadcasting licensee in providing a broadcasting service under the broadcasting licence;

2.2.12.4 such person, either alone or together with an associate, is in a position-

2.2.12.4.1 where the licensee or prospective licensee is a company, to veto any action taken by the board of directors of such licensee or to appoint or secure or veto the appointment of at least half of the board of directors of such licensee; or

2.2.12.4.2 to give or exercise in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the broadcasting licensee; or

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2.2.12.5 the existing or prospective broadcasting licensee or, where such a licensee is a company, more than fifty per cent of the directors of such company-

2.2.12.5.1 acts or is accustomed to act; or

2.2.12.5.2 under a contract, arrangement or understanding (whether formal or informal) is destined, required or expected to act,

in accordance with the directions, instructions or wishes of, or in concert with, such person or such person and his or her associate acting together or, if such person is a company, the directors of the latter company.

2.2.13 Schedule 2(3) in turn provided for deemed control of a company and that: "Without derogating from the provisions of any law or from the common law, and in the absence of proof to the contrary, a person shall be regarded as being in control of, or being in a position to exercise control over, a company if he or she has equity shareholding in the company exceeding twenty-five per cent or has other financial interests therein equal to at least twenty-five per cent of its nett assets".

### 2.3 The general BBBEE legislation: the BBBEE Act and the Codes of Good Practice

2.3.1 The BBBEE Act applies generally to all businesses operating in South Africa and regulates the manner in which they measure levels of BBBEE. The BBBEE Act does not impose requirements that measured entities must achieve particular levels of BBBEE and does not contain sanctions for non-compliance with any such requirements. Instead, the BBBEE Act and the Codes of Good Practice published under it provide for the manner in which BBBEE is measured and scored. The sanctions that it contains relate to this scoring exercise. For example, the BBBEE Act makes "fronting" (where a measured entity represents that it has undertaken particular empowerment initiatives when in substance this is untrue) a criminal offence.

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2.3.2 Section 10(a) of the BBBEE Act provides that organs of state, including the Authority, must apply the Codes of Good Practice when, amongst other things, they "[determine] qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law".

2.3.3 Various Codes of Good Practice have been published by the Minister of Trade and Industry under the BBBEE Act. The BBBEE Act is the principal legislation through which BBBEE is measured. The Minister of Trade & Industry previously published the general Codes, which set out the details of the measurement process, in 2007. The revised Codes of Good Practice, which replaced the previous Codes with effect from 1 May 2015, were published on 11 October 2013.

- 2.3.4 The Minister has also published various sector-specific codes which detail the manner in which BBBEE must be measured for businesses operating in particular sectors. Where a sector-specific code has been issued, businesses in that sector are required to apply the relevant sector code rather than the general Codes. The general Codes of Good Practice apply only where there is no sector-specific code although the general Codes of Good Practice and the sector-specific codes generally apply the same broad principles.
- 2.3.5 All previously issued sector codes are required to be aligned with the new Codes. The previous ICT Sector Code (which was published in 2012) was replaced with the current aligned ICT Sector Code in November 2016.
- 2.3.6 Neither the BBBEE Act nor the new Codes nor any sector code impose any requirement that a certain level of BBBEE must be achieved or that a certain percentage of equity in a business must be held by black people and there are no sanctions for non-compliance. Instead, the approach taken in the Codes and in each of the sector codes is to set targets for various indicators under each of the elements of BBBEE (being ownership, management control, skills development, enterprise and supplier development and socio-economic development, along with any other elements introduced in the context of a specific sector code).
- 2.3.7 In assessing BBBEE, a "scorecard" approach is used whereby the different aspects of BBBEE are accorded points. A general scorecard is included in the general Codes of Good Practice. Sector-specific scorecards are included in the sector codes that are applicable to particular sectors including the ICT Sector Code. The scorecards detail the various elements and sub-elements of BBBEE on which enterprises are measured and stipulate targets to be achieved for each element and sub-element. The closer an enterprise is to reaching a particular target, the more points it will achieve for that element of BBBEE.
- 2.3.8 The more points a business achieves in total across each of the individual elements, the higher its BBBEE status level will be. Level 1 is the highest status level, where a business achieves 105 points or more. Level 8 is the lowest level, where a business achieves between 40 and 55 points under the new Codes. Under the new Codes, less than 40 points is considered to be "non-compliant". Each BBBEE level translates into a procurement recognition level.
- 2.3.9 Ownership is only one of the elements on which BBBEE scores are measured. Along with skills development and enterprise and supplier development it is one of the priority elements under the new Codes and each of the sector codes including the ICT Sector Code. This means that sub-minimum threshold requirements are imposed in relation to ownership. If a measured entity does not comply with these requirements its overall BBBEE level will be discounted e.g. an entity that achieves sufficient points to be a level 4 BBBEE contributor will be deemed to be a level 5 contributor. The sub-minimum requirements for ownership are imposed in relation to the net value indicator on the ownership scorecard (see below). Net value measures the actual value of the shares held by black shareholder net of any outstanding acquisition debt as a percentage of the value of the company as a whole. The targets for net value increase over time from year 1 to the beginning of year 9 following an acquisition by a black shareholder. The sub-minimum



requirement is that a measured entity must score at least 40% of the available points for net value (being 3.2 points – 40% of 8 points) in order to avoid dropping a BBBEE level.<sup>5</sup>

2.3.10 The ownership scorecard under the current ICT Sector Code (introduced in 2016) is generally the same as the scorecard in the general Codes save for the fact that the target for voting rights and economic interest rights of black people is increased from 25% to 30%. The ownership scorecard is as follows - <sup>6</sup>

	<b>Indicator</b>	<b>Target</b>	<b>Points weighting</b>
2.3.10.1	Voting rights in the hands of black people	30%	4
2.3.10.2	Voting rights in the hands of black women	10%	2
2.3.10.3	Economic interest rights of black people	30%	4
2.3.10.4	Economic interest rights of black women	10%	2
2.3.10.5	Economic interest rights of broad-based structures (ESOPs, BBOs) or designated groups	3%	3
2.3.10.6	Economic interest rights of new entrants	2%	2
2.3.10.7	Net value		8
	<b>Total</b>		<b>25</b>

2.3.11 Under the general Codes and the ICT Sector Code, ownership is calculated on an effective, flow-through basis. As such, if for example, 60% of the shareholders of Company A are black people and Company A holds 40% of the shares in Company B, the effective ownership by black people in Company B is 24% (60% x 40%). However, for the purpose of calculating the score for voting rights in the hands of black people (paragraph 2.3.10.1) 2.3.10.3 and economic interest of black people (paragraph 2.3.10.3), one entity in the ownership chain which has more than 50% ownership by black people may be treated as if it is 100% owned by black people. This is referred to as the "modified flow-through principle". By way of an example, if 60% of the shareholders in Company A are black people and Company A holds 40% of the shares in Company B, on application of the modified flow-through principle, Company A may be treated as if it was 100% owned by black people. On this basis, 40% of the shares in Company B would be regarded as being held by black people even though on an effective basis black people would hold only 24% of the shares. As such, Company B would score the total available points for voting rights in

<sup>5</sup> See Statement AICT100, para 3.2.1.

<sup>6</sup> See Statement AICT100, para 2.

the hands of black people (paragraph 4.1.1.1) and economic interest of black people (paragraph 4.1.2.1) because it reached and exceeded the relevant target.

2.3.12 In addition, the Codes provide that any ownership by organs of state and public entities must be excluded and ownership by mandated investments may be excluded from the ownership calculation. Mandated investments are 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 e.g. investments made for a pension fund in terms of the Pension Funds Act 24 of 1956. Where a measured enterprise excludes mandated investments from its ownership calculation, it may not also use the modified flow-through principle for the purposes of its scores for voting rights and economic interest rights of black people. The Codes also provide that certain organs of state and public entities are designated as "BEE Facilitators" which means that any ownership rights they hold in a measured enterprise is treated as if they are held by 100% black people, 40% black women, 20% by black designated groups, without any acquisition debts, and without any third party rights.

2.3.13 Realisation points are scored in relation to the extent to which the ownership interests held by black people in the company are unencumbered (i.e. debt-free). The net value indicator relates to the extent to which black shareholders have been released from funding obligations in respect of their acquisition of shares and their shareholding becomes unencumbered. The target for the percentage of shares that should be debt-free increases over a 10 year period from when black shareholders are first introduced. As such, for example, in year 1 following a B-BBEE transaction in the ICT sector, the target is that 3% of the shares in the company that are held by black people should be debt-free i.e. assuming that an acquisition was fully funded and that no discount was given, 10% of any debt should be paid down by the end of year 1. By year 9, the full 30% target should be debt-free i.e. 100% of the debt should be paid down. If only a portion of the acquisition price is funded and/or shares are acquired by black people at a discount, the percentage of the acquisition debt that would need to be paid down in each year following the transaction to meet the target would be adjusted.

### 3. General comments

3.1 At present, except in the limited instances where licence conditions stipulate a minimum HDP shareholding level for particular licensees, there is no general requirement that licensees in either the broadcasting or telecommunications sectors must maintain a minimum level of HDP ownership or ownership by black people.

3.2 Primedia notes certain comments in the Discussion Document (see paragraphs 1.3, 1.5 and 2.3.4) which suggest that, where licensees do not have at least 30% ownership by HDPs, they are non-compliant "with the Authority's 30% HDG equity ownership level requirement". This is not an accurate reflection of the current legal position. As set out above, in terms of the ECA, at present, HDP ownership requirements are imposed on applicants for new individual licences in terms of section 9(2)(b) of the ECA, on transferees of individual licences and individual licensees in respect of which a transfer of control is taking place at the time of the transaction (in terms of section 13(6) read with

section 9(2)(b) of the ECA<sup>7</sup>), and potentially on licensees applying for the amendment of their licences (in terms of section 10(2) read with section 9(2)(b) of the ECA), and on licensees applying for renewal of their individual licences (in terms of section 11(3) read with section 9(2)(b) of the ECA).<sup>8</sup> As such, except where licence conditions are included in an individual licence regarding a minimum level of HDP ownership, licensees which do not have HDP ownership are not in breach of any legal requirement.

- 3.3 Primedia understands that the object of the present inquiry is to determine whether or not it is appropriate to impose HDP ownership requirements generally on licensees or categories of licensees. Its comments and responses to the specific questions posed by the Authority should be understood in this light.

#### 4. Responses to specific questions

##### 4.1 Application of HDG Equity requirement

- 4.1.1 *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?*

4.1.1.1 No. The ECA stipulates only that minimum HDP equity ownership requirements should be imposed on individual licensees (in section 9(2)(b)). There is no similar requirement stipulated in the ECA in relation to class licensees.

4.1.1.2 The regulatory scheme contemplates that large-scale telecommunications operators and broadcasting services with a significant impact on socio-economic development must hold individual licences. Smaller scale operations, including community broadcasting services and low power services, which do not have a significant impact on socio-economic development must hold only class licences. By including HDP equity ownership requirements only for individual licensees, the legislature has clearly indicated that such minimum requirements should only be imposed on major licensees. The background to the inclusion of the 30% minimum equity ownership requirement is discussed in paragraph 4.1.3.2 below which reflects that the position has always been that such requirements should only apply to major licensees. Any introduction of such requirements for class licensees would contradict the approach that the legislature, as the primary law-maker responsible for giving effect to government policy, has adopted.

4.1.1.3 It is necessary to recognise that while HDP equity ownership is hugely important and should be encouraged by the Authority, transactions to give effect to BBBEE ownership come at a cost. This is discussed in further detail in paragraph 4.1.3.2 below. Such transactions must often be funded by existing shareholders, where a particular company is not in a position to attract an

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<sup>7</sup> HDP ownership requirements are imposed on transferees of individual licences and individual licensees in respect of which a transfer of control is taking place following the decision of the High Court in *Telkom v ICASA*, and the interpretation given to section 13(6) read with section 9(2)(b) of the ECA.

<sup>8</sup> The correct legal position is reflected in paragraph 4.1 of the Discussion Document.

investor who is able to pay market value to acquire shares. Most class licensees will not be in a position to attract such investors. Large operators, who are required to hold individual licences, are better able to bear these costs. In this context there is a real basis for differentiating between class and individual licensees. Primedia does not agree with the statement in paragraph 5.1 of the Discussion Document which suggests that the Authority should not "exclude a broad sector of licensees from being part of the transformation agenda" to the extent that this is a suggestion that equity ownership requirements must be imposed on class licensees. In terms of the BBBEE Act, ownership is only one element of BBBEE and levels of empowerment should be looked at holistically across all the elements of BBBEE without focussing on one particular element. Even if equity ownership requirements are not imposed on class licensees, this does not mean that class licensees will necessarily be excluded from the transformation agenda. The Authority could, instead, impose requirements or guidelines that class licensees must achieve or aim to achieve a certain overall BBBEE level e.g. level 4, within a certain period. The Codes of Good Practice under the BBBEE Act themselves recognise that it is appropriate to treat small and medium size businesses differently from larger businesses (which is also recognised by the Authority in, for example, the General ICASA Licence Fee Regulations, 2013) in that exempted micro-enterprises have a deemed BBBEE level and qualifying small enterprises' BBBEE levels are measured on a somewhat different basis from larger enterprises. Primedia suggests that a similar approach should be adopted by the Authority.

4.1.1.4 If class licensees are subject to an absolute requirement to have a minimum level of equity ownership by HDPs in place, this is likely to pose a significant barrier to entry, particularly for new, small telecommunications and broadcasting service providers. Before introducing any such requirement, the Authority should conduct a regulatory impact assessment to determine what the true economic cost and likely implications of such a requirement will be.

4.1.1.5 If the Authority decides to put minimum HDP equity ownership requirements in place for class licensees (which Primedia suggests it should not), it should consider, in light of the discussion above, what the appropriate level of ownership would be, the possibility of exemptions in appropriate circumstances, and the inclusion of an appropriate transitional period for compliance by existing licence holders. In line with the transitional period. By way of example, the Regulations for Value-Added Network Services, 2005 (**VANS Regulations**)<sup>9</sup> which were previously published by the Authority under the Telecommunications Act required value-added network service (**VANS**) licensees to achieve 15% HDP ownership within 12 months of the issue of a VANS licence and 30% within 24 months.<sup>10</sup> Licensees with revenues below R1 million were exempted.<sup>11</sup>

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

<sup>9</sup> Published under GN 490 in *Government Gazette* 27608 of 20 May 2005.

<sup>10</sup> Regulation 4(1) of the VANS Regulations.

<sup>11</sup> Regulation 4(2) of the VANS Regulations.

#### 4.1.2.1

Yes. If the Authority is inclined to impose a general HDP ownership requirement on licensees, the requirement to be imposed should take into account the specific circumstances of licensees. For example, where a licensee has a high market valuation, a requirement that that licensee must have 30% HDP or BBBEE ownership means that the value of any transaction in terms of which HDP or BBBEE shareholders acquire shares in the licensee in order to comply with the requirement will be significantly more than for a smaller licensee with a lower market valuation. In some instances, companies operating in the communications sector are valued in the billions. This means that, for these licensees, a requirement to introduce a 30% HDP or BBBEE shareholder will mean that the licensee will have to undertake a significant BBBEE ownership transaction, the value of which may similarly be in the billions. Such transactions most often need to be funded, often by the licensee itself. This is particularly the case where a proportion of shares are acquired by a broad-based ownership scheme or employee share ownership programme as is encouraged by the ICT Sector Code. The value of the funding required to undertake such a transaction can be prohibitive.

#### 4.1.2.2

By way of an illustrative example, where a licensee has a market valuation of R5 billion, the value of a 30% stake in the company which holds the licence is R1.5 billion. When an HDP or BBBEE shareholder acquires shares in the licensee, the acquisition needs to be funded. While such acquisitions are often discounted (i.e. the purchase price is discounted and the full market value of the shares is not paid), a significant proportion of the purchase price still needs to be paid and funded in some manner. Often, given the difficulty in obtaining third party funding (e.g. from banks) and particularly where shares are acquired by a BBOS or ESOP, the acquisition needs to be vendor-funded i.e. the company in which shares are acquired needs to fund the acquisition. This is particularly given that the new Codes of Good Practice, 2013 emphasise the need for net value to be created in the hands of black people through the imposition of sub-minimum requirements for this indicator on the ownership scorecard. As such, measured entities need to have some control over the manner in which acquisition debt incurred by black shareholders is repaid in order to avoid a failure to meet the sub-minimum threshold net value level. Providing funding at this level has significant implications for existing shareholders.

#### 4.1.2.3

These commercial considerations should be borne in mind by the Authority when determining: (1) the appropriate level of HDP and/or BBBEE ownership that licensees should be required to maintain; and (2) the timelines within which existing licensees should be permitted to achieve compliance with any requirements that are imposed. In particular, the fact that a licensee has a high market capitalisation does not mean that it is appropriate to impose higher HDP or BBBEE ownership requirements on it. In fact, licensees with high market valuations are, for the reasons given above, sometimes more constrained in their ability to effect major BBBEE transactions, particularly where they are listed. Accordingly, Primedia suggests that, where the value of the BBBEE or HDP ownership transaction that is required in order to comply with ownership requirements (in terms of which black or other HDP shareholders acquire shares directly or indirectly in a licensed entity) exceeds or will exceed a particular threshold, the Authority consider permitting the licensee to extend the timelines for compliance. In the

context of the VANS Regulations the Authority has accepted previously that time is required to effect ownership transactions. This is also recognised in the revised Mining Charter.

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

4.1.3.1 As discussed above, at present, aside from what is contained in certain licensees' licences, there is no general ongoing requirement for individual licensees to maintain a particular level of HDP or black ownership.

4.1.3.2 There is no basis or need to increase the requirement that applicants for new individual licences, transferees, licensees seeking approval for a transfer of control, or licensees seeking renewal or amendment of their individual licences, should have HDP ownership above the 30% level. This is for the following reasons:

4.1.3.2.1 The 30% HDP equity ownership requirement contained in section 9(2)(b) of the ECA appears to have its roots in the Telecommunications Amendment Act 64 of 2001, which amended the Telecommunications Act. Following the amendment, section 35(3) of the Telecommunications Act provided that, when considering licence applications, the Authority had to have due regard to applications by persons from historically disadvantaged groups or which promote the empowerment and advancement of women in the telecommunication industry. Section 35(4), in turn, provided that "*in the evaluation of equity ownership held by persons from historically disadvantaged groups or held by women in an application for a licence in terms of this Act, the Authority shall give due preference for up to 30% of such equity ownership or such higher equity ownership percentage as may be prescribed*" (underlined emphasis added). This 30% level was based on policy directions from the Minister of Communications.<sup>12</sup> Under the heading "Economic Empowerment of persons from historically disadvantaged groups" the policy directions provided that:

*"Pursuant to the objects set out in section 2(l) and (q) of the [Telecommunications] Act it shall be a condition of all new major telecommunications licences issued, that an aggregate amounting up to thirty percent (30%) of the shareholding of an applicant company and/or entity shall be set aside for the above mentioned groups" (underlined emphasis added).*

4.1.3.2.2 During deliberations on the Telecommunications Amendment Bill, the then Director-General of the Department of Communications indicated that the 30% level was arrived at after due consideration of the reality of the financial markets and the availability of capital, and postulated that this percentage would probably increase with the proportional growth of the black bourgeoisie. He stated that the South African government is very clearly committed to granting the control of a corner of the market to historically

<sup>12</sup> Policy Directions issued by the Minister of Communications published under GN 1756 in *Government Gazette* 22503 of 23 July 2001.

disadvantaged groups, but noted that the reality of the situation is that the major problem is the availability of capital. It was suggested by the chairperson of the committee that the extension of the (local) equity ownership beyond 30% would only succeed in warding off much needed foreign investment, and that committee members have to be realistic about whether finances in excess of the 30% could be acquired.<sup>13</sup>

4.1.3.2.3 The cautions that were raised against increasing the level of HDP equity ownership for which due preference would be given, remain applicable today.

4.1.3.2.4 There are a limited number of B-BBEE investors who are able to fund an investment at the 30% level. This means that, in order to introduce a B-BBEE shareholder, the existing shareholders of a company which holds an individual licence must fund the acquisition in some way. For the reasons given in paragraph 4.1.2 above, the burden that will be imposed on licensees with large market capitalization to comply with a higher requirement will be disproportionate. The clear need to increase levels of ownership by HDPs in the communications sector must be balanced against the importance of attracting local and foreign investment in line with the regulatory objectives expressed in section 2(d) of the ECA and section 2(g) of the Broadcasting Act. Increasing the HDP ownership requirement above 30% is likely to discourage investment, particularly where it is often necessary for HDP ownership transactions to be funded by the company itself.

4.1.3.2.5 Although section 9(2)(b) of the ECA refers to equity ownership by HDPs, most licensees seek to increase ownership by black people specifically in complying with this requirement because it aids in their BBBEE scores. The ICT Sector Code in terms of which licensees operating in the sector are measured sets the target for ownership by black people at 30%. Under the ICT Sector Code, 30% ownership by black people is not a requirement. BBBEE is also not solely focused on ownership. The BBBEE Act and the Codes of Good Practice contemplate a holistic assessment of empowerment levels across all the various elements of BBBEE. By increasing the threshold level of HDP equity ownership, the Authority would be moving away from the approach adopted by the Minister of Trade & Industry, the line ministers for the sector, being the Minister of Telecommunications and Postal Services and the Minister of Communications, the ICT Sector Council, and members of the ICT industry under the ICT Sector Code in terms of which 30% is the maximum target for voting rights and economic interest rights in the hands of black people. The Authority should not seek to impose a requirement which is in excess of the target set in the ICT Sector Code (given the Authority's obligation to promote BBBEE when granting licences, with reference to the ICT Sector Code in terms of section 5(9)(b) of the ECA).

4.1.4 *Should the Authority require licensees to seek prior approval in instances where:*

4.1.4.1 *a change in shareholding results in reduction of equity ownership by HDGs below 30%?*

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<sup>13</sup> Meeting report, Communications Portfolio Committee, 10 October 2001.

- 4.1.4.1.1 As noted above, at present, there is no ongoing general requirement for individual licensees to maintain a particular level of HDP or black ownership.
- 4.1.4.1.2 Section 13(1) of the ECA already requires individual licensees to obtain the Authority's prior approval for a transfer of control of an individual licence. When the Authority considers an application for approval of a transfer of control, one of the considerations that it takes into account is ownership by HDPs. In addition, at present and following the decision of the High Court in *Telkom v ICASA*, where control of an individual licence is transferred the licensee must, subsequent to the transaction, have 30% HDP ownership and this is a prerequisite for approval of the transaction.
- 4.1.4.1.3 Accordingly, a requirement to obtain the Authority's approval for a reduction in equity ownership by HDPs below 30% would apply only in the context of a transaction where control was not transferred.
- 4.1.4.1.4 The ability of investors to exit and realise an investment, subject to ordinary arms' length commercial restrictions, is a fundamental feature of ownership. A requirement that the Authority must approve a transaction where an HDP investor (which is generally also a B-BBEE investor) disposes of its investment thus reducing HDP equity ownership levels in a licensed entity in a situation where there is no transfer of control means that the Authority will have a discretion to refuse to grant approval. This means that an investor may be precluded from realizing their investment. In Primedia's view this would constitute undue interference in the commercial activities of licensees. This would contradict the regulatory objective stipulated in section 2(y) of the ECA.
- 4.1.4.1.5 In the context of listed companies, share ownership changes on a day to day basis or even more frequently. Listed companies are not aware exactly who holds shares in them at any point in time and would not necessarily know if shares changed hands such that there was a reduction in HDP ownership below 30%. The very nature of a listing on the stock exchange is that shares change hands all the time. Accordingly, listed companies would not be in a position to seek or obtain approval from the Authority for a reduction in HDP ownership below 30%.
- 4.1.4.1.6 If the Authority proposes to introduce a new requirement that licensees must maintain a particular level of HDP equity ownership on an ongoing basis, Primedia suggests that the Authority should not restrict the ability of HDP shareholders to dispose of their investment by imposing an approval requirement. While it is likely that commercial lock-in periods will already be provided for in the context of B-BBEE transactions, the Authority should not create a barrier to B-BBEE investors realizing their investment. Such barriers would be contrary to the regulatory objective expressed in section 2(h) of the ECA. In addition, in recognition of the need to allow HDP investors to exit their investment in line with ordinary principles of ownership, the Authority should allow licensees a grace period following the exit of an HDP investor to introduce a new HDP shareholder to increase HDP equity ownership to the requisite level.



4.1.4.2 *the licensee does not meet the 30% minimum requirement, and [there is a] change in shareholding that affects the percentage of equity ownership by HDGs?*

For the same reasons given in paragraph 4.1.4.1 above, Primedia's view is that such an approval requirement is unnecessary and inappropriate particularly given that, at present, where a change in shareholding results in a transfer of control of a licensee and its licences, the licensee must in any event have at least 30% ownership by HDPs. Outside of a transfer of control situation, and in circumstances where licensees are not presently required to maintain a particular level of HDP ownership, it is not clear why the Authority should have oversight of a simple shareholding change. The Authority will, in any event, be alerted to the shareholding change in terms of the notification that must be submitted in terms of regulation 14A of the Individual Licensing Processes and Procedures Regulations, 2010.

4.1.5 *How should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDGs from participating in share schemes?*

4.1.5.1 Primedia's view is that listed entities should be treated in a manner that takes cognisance of the realities of publicly traded entities. In this regard, our view is that publicly traded entities should ensure compliance with any HDP ownership requirements at the time that they first list. It should be recognised that listed entities can only comply with ownership requirements in the context of those shares that are not free float shares (i.e. non publicly-traded shares). A licensee which undertakes an IPO (i.e. whose shares are listed on a securities exchange) should comply with any ownership requirements through non-publicly traded shares on the date of listing (e.g. an ESOP could hold shares) and should maintain such compliance going forward.

4.1.5.2 The Authority should allow for licensees to apply the measurement principles outlined in the BBBEE Codes when calculating levels of HDP ownership. As such, the Authority should allow for the exclusion of mandated investments, the recognition of BEE Facilitators designated by the Minister of Trade & Industry under the Codes, the application of the modified flow-through principle, and sales of assets in lieu of equity ownership.<sup>14</sup>

## **4.2 How should compliance with the HDG requirement be verified?**

4.2.1 *What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?*

4.2.1.1 Primedia suggests that the Authority specifically recognise that a BBBEE certificate and accompanying report prepared for the purposes of the Codes of Good Practice by an accredited verification agency can be submitted as proof of ownership by black people, being one class of HDP, and black women. For licensees which are EMEs affidavits reflecting revenue and black ownership levels as contemplated in the Codes should be accepted.

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<sup>14</sup> As provided for in Statement AICT102 of Code Series AICT100 of the ICT Sector Code.

4.2.1.2 Affidavits prepared by company officers should be submitted as proof of ownership by other HDPs who are not black people, e.g. women, the youth, and disabled people.

4.2.2 *What proof would be appropriate to confirm the compliance of publicly traded entities with the HDG equity/ownership requirement?*

As set out above, Primedia suggests that publicly traded entities which hold licences should be required to show compliance with any applicable requirements through non-publicly traded shares. For this purpose, the documents referred to in paragraph 4.2.1 should suffice.

### 4.3 **What constitutes "ownership" and "control" for the purposes of the ECA?**

4.3.1 *Is the definition of a control interest as set out in Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services Regulations, 2003 still valid?*

4.3.1.1 No. The requirements set in terms of section 4 of the Ownership and Control Regulations have been superseded by the requirements which have now been set in section 13 of the ECA. These provisions of the Ownership and Control Regulations have likely been impliedly repealed. Section 13(1) and section 31(2A) of the ECA provide that the control of an individual and/or individual RF spectrum licence may not be transferred without the prior written permission of the Authority. Neither sections 13(1) or 31(2A) nor section 1 (the general definitions section) of the ECA provides a definitions of what constitute "ownership" and "control" for the purposes of the ECA. The definition of control as set out in the Ownership and Control Regulations cannot be of any assistance in interpreting the meaning of the word "control" in sections 13(1) and 31(2A) of the ECA for the following reasons:

4.3.1.1.1 The Ownership and Control Regulations were published by the Minister of Communications in 2003, including the definition of "control interest". The provisions of sections 13(1) and 31(2A) requiring Authority's approval for the transfer of "control" of a licence were enacted by Parliament more than ten years later, in 2014.

4.3.1.1.2 In general, it is "not permissible to use a definition created by a Minister in regulations to interpret the intention of the legislature in an Act of Parliament".<sup>15</sup> The words used in the ECA must be interpreted on their own terms.

4.3.1.1.3 In the present case: (1) the Amendment Act (which introduced the new transfer of control requirement in section 13(1)) was enacted after the Ownership and Control Regulations and Parliament chose not to adopt the definition in the Regulations; and (2) the term used by Parliament in the Amendment Act ("control") is not even identical to the term used in the Regulations ("control interest").

4.3.1.2 In short, "control" in terms of section 13(1) of the ECA is different from a "control interest" under the Ownership and Control Regulations. Absent a specific statutory definition of "control" for the purposes of the ECA, "control" as used in section 13(1) must be interpreted in

<sup>15</sup> See *National Lotteries Board v Bruss NO 2009 (4) SA 362 (SCA)* at para 37.

line with ordinary principles of statutory interpretation. As such, what it means must be interpreted in line with the purpose of the provision and the context in which it appears. As discussed in further detail below, "control" does not ordinarily mean a shareholding of 25%, which is one of the indicia of the existence of a "control interest" under the Ownership and Control Regulations, although it may well include certain other types of control as referred to in the definition of "control interest". This is not because the definition of "control interest" can be used to interpret the word "control" as used in section 13(1) of the ECA (as discussed above, legally, it cannot) but because the ordinary meaning of "control" encompasses these types of control.

4.3.1.3 The reason why 25% was previously deemed to be control for the purposes of the Ownership and Control Regulations (which applied to telecommunications licensees) and the IBA Act (which applied to broadcasting licensees) was presumably because this was the threshold under the previous Companies Act for the passing of a special resolution in respect of a company. As such, a person who held more than 25% of the shares in a company would effectively have had a veto right in respect of reserved matters (which required approval by special resolution). Under the new Companies Act, 75% of voting rights is similarly the ordinary threshold for passing a special resolution.<sup>16</sup> However, except for listed companies which are required to maintain the 75% threshold under the JSE Listings Requirements, this threshold can now be altered in a company's memorandum of incorporation (**MOI**).<sup>17</sup> As such, a shareholder which holds less than 25% of the shares in a company could potentially have a veto right in respect of reserved matters. A veto right could also be obtained by means of a voting pool agreement as opposed to through the MOI. As discussed below, however, when considering what constitutes "control" what is important is not the veto right in respect of reserved matters in and of itself (i.e. a person who is able to block a special resolution does not necessarily have control) but the type of reserved matters to which the veto may apply (a person who can block a special resolution in respect of key strategic company matters is likely to have control).

4.3.2 *Taking into account the Companies Act, 2008 (Act No. 71 of 2008) and the Competition Act of 1998 (Act No. 89 of 1998) what constitutes "control" and how should the Authority define it?*

4.3.2.1 It is not open to the Authority to define what "control" as referred to in section 13(1) of the ECA means. (The High Court in *KZN Talk Radio (Pty) Limited v Independent Communications Authority of South Africa*<sup>18</sup> held that control for the purposes of section 65 of the ECA, which applies only to commercial broadcasters, must be interpreted in line with the deeming provision in section 66(5) of the ECA, in terms of which a 20% shareholding interest amounts to control. However, this is not relevant for the purposes of section 13(1) which appears in a completely different context and chapter in the ECA and applies to all licensees rather than only to broadcasters.) This is because regulations cannot be used to interpret an Act of

<sup>16</sup> Section 65(9) of the Companies Act.

<sup>17</sup> Section 65(10)(a) of the Companies Act.

<sup>18</sup> (41672/12) [2014] ZAGPJHC 396 (5 August 2014).

Parliament. The word "control" as used in section 13(1) of the ECA must be interpreted in its own right in line with the ordinary principles of statutory interpretation. On this basis, "control" should be interpreted in line with its ordinary meaning. At most, the Authority should issue a guidance note to indicate what its interpretation of the word "control" in the ECA is. Ultimately, though, this question will be decided by a court.

- 4.3.2.2 Section 2(2) of the Companies Act 71 of 1998 (**Companies Act**) provides that a person controls a juristic person, or its business, if in the case of a juristic person that is a company—
- 4.3.2.2.1 that juristic person is a subsidiary of that first person; or
- 4.3.2.2.2 that first person together with any related or inter-related person, is—
- 4.3.2.2.2.1 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
- 4.3.2.2.2.2 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;
- 4.3.2.2.3 that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to above.
- 4.3.2.3 Accordingly, for the purposes of the Companies Act, a person would have control of a company if that person, on any basis, is able materially to influence the policy of that company in a manner comparable to a person who, in ordinary commercial practice, would be able, directly or indirectly, to exercise or control the exercise of a majority of the voting rights associated with securities of that company, or who 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 its board.
- 4.3.2.4 Section 12(2) of the Competition Act 89 of 1998, provides that a person "controls" a firm if that person:
- 4.3.2.4.1 beneficially owns more than one half of the issued share capital of the firm (i.e. 50% plus one);
- 4.3.2.4.2 is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- 4.3.2.4.3 is able to appoint or to veto the appointment of a majority of the directors of the firm;

- 4.3.2.4.4 is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the previous Companies Act;<sup>19</sup> or
- 4.3.2.4.5 has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to above.
- 4.3.2.5 The wording of section 12(2) of the Competition Act contemplates a situation where more than one party could simultaneously exercise control over a company.<sup>20</sup>
- 4.3.2.6 The Competition Act goes slightly further than the Companies Act on the question of what constitutes control: a person will be considered to be in control of a company where it holds more than 50% of the issued shares, even if it does not exercise more than 50% of the voting rights.
- 4.3.2.7 In the context of the *Caxton* matter the Authority's Complaints and Compliance Committee (CCC) found that "control" in company law can be "generically defined as control over the management of the company" either through voting rights in respect of shares (whereby the holder of the voting rights indirectly controls the appointment of directors who manage the company), or by direct control at board level. The CCC's approach was that, while a significant shareholding is one manifestation of control of a company, control of a company may also be acquired or exercised through various mechanisms or arrangements other than shareholding. The enquiry into whether or not a person or entity controls a licensee should thus extend beyond mere shareholding.
- 4.3.2.8 The ordinary meaning of control (in the context of a company) is that someone has the power to influence the affairs of the company, and should, in Primedia's assessment, be understood in line with the definition contained in the Companies Act. This means that a person who (1) has the ability to exercise more than 50% of the voting rights in respect of the issued shares in the company, (2) the right to appoint or elect or control the appointment or election of directors who control more than 50% of the votes of the members of the board of directors, or (3) has the ability to materially influence policy or to exercise rights similar to those described in (1) and (2), whether by way of contract or otherwise would "control" a company. Given that the ECA itself does not contain a definition of the word "control" it is not open to the Authority to narrow the term by, for example, prescribing by way of regulation that a 25% shareholding or a 50% shareholding (in and of itself without reference to voting rights) constitutes "control"

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<sup>19</sup> In terms of section 1(3)(a) of the previous Companies Act, a company (Company A) was a subsidiary of another company (Company B) if: (1) that other company (Company B) was a member of that company (Company A) and held a majority of the voting rights in it, had the right to appoint or remove directors holding a majority of the voting rights at meetings of the board, or had the sole control of a majority of the voting rights in it, whether pursuant to an agreement with other members or otherwise, (2) it (Company A) was a subsidiary of any company which was a subsidiary of that other company (Company B) i.e. a subsidiary of a subsidiary, and (3) subsidiaries of that other company (Company B) or that other company and its subsidiaries together held the majority rights referred to in item (1). For the purposes of section 1(3) "hold" or any derivative thereof refers to the registered or beneficial holder (direct or indirect) of shares conferring a right to vote.

<sup>20</sup> *Distillers Corporation (SA) Ltd v Bulmer (SA) (Pty) Ltd* [2001–2002] CPLR 36 (CAC) 46; *Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd* [2006] 1 CPLR 410 (CT) para 52.

as is provided for under the deeming provisions of the Ownership and Control Regulations and the Competition Act, respectively.

4.3.2.9 Importantly, a right to veto decisions that are required to be taken by way of special resolution under the Companies Act (e.g. where the threshold for a special resolution is 75%, the holder of 25.1% of the shares of a company can block a special resolution) is not ordinarily regarded (for competition law purposes) as conferring control. It is only where a veto is in relation to matters of strategic matters such as a company's business plan, budget, the remuneration, hiring or firing of senior management and, in certain instances, major investments, that the holder of the veto right is considered to exercise control (i.e. such a veto right amounts to the ability to materially influence the policy of the company which is one of the indicia of control under the Competition Act). This is equally true in the context of "control" as provided for in section 13(1) of the ECA.

4.3.3 *What constitutes "ownership" and how should the Authority define it?*

4.3.3.1 "Ownership" is referred to in the following sections of the ECA:

4.3.3.1.1 Section 9(2)(b) which provides that the Authority must, in inviting applications for individual licences, include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or to impose of such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act.

4.3.3.1.2 Section 13(3) which provides that the Authority may by regulation, 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 historically disadvantaged groups and to promote BBBEE.

4.3.3.1.3 In Primedia's assessment, whereas "control" relates to the ability of a person to direct the affairs of a company (generally through the ability to make decisions in respect of the company through voting rights at a shareholder or board level, although control can be exercised by a person who holds no shares at all e.g. by way of a contract), "ownership" refers to both voting rights and economic interest rights (i.e. rights to dividends and the right to participate in the proceeds of the sale or liquidation of the company). This is consistent with the approach in the Codes of Good Practice and the ICT Sector Code in particular.

4.3.4 *Does the transfer of 100% share capital in a licensee amount to transfer of control or transfer of ownership?*

4.3.4.1 This question is not entirely clear: a "transfer of ownership" is not regulated anywhere in the ECA so it is not clear why a transfer of ownership would be relevant.

4.3.4.2 In any event, a transfer of 100% of the share capital in a licensee which is a company would likely amount to both a transfer of control and a transfer of ownership.

4.3.4.3 Control would be transferred from the seller of the shares to the acquirer because the acquirer would acquire the ability to exercise 100% of the voting rights in respect of the shares and would thus acquire control of the licensee and its licences.

4.3.4.4 Ownership of the shares would similarly be transferred from the seller to the acquirer on the basis that both voting rights and economic interest rights associated with the shares would be transferred.

4.3.4.5 A sale of the majority or 100% of the shares in a licensed entity (in a manner which would enable the acquirer to exercise the majority of the voting rights in respect of the company) would amount to a transfer of control of the company. It would not be a transfer of the licence. A transfer of a licence is the assignment of a licence from one licence holder to another new licence holder. By contrast, in the context of a transfer of control, the licence holder remains the same.

#### 4.4 Application of the ICT Sector Code

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

4.4.1.1 In terms of section 10(1)(a) of the BBBEE Act, the Authority must apply relevant Codes of Good Practice when "determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law". Primedia understands from this question that the Authority is asking whether a minimum overall BBBEE level should be imposed in order for persons to qualify to receive authorisations from the Authority such as ECNS, ECS, or broadcasting service licences, numbers from the national numbering plan, or type-approval, and has responded to this question on the basis of that understanding.

4.4.1.2 Primedia does not think that the imposition of such minimum requirements in relation to *all* regulatory authorisations issued by the Authority would be appropriate. Relative overall BBBEE levels are very important and must be taken into account in the context of competitive licensing processes as one of the factors to select the successful applicant e.g. where more than one applicant applies for high-demand spectrum or for assignment of the frequencies associated with a DTT multiplex. It should be recognized however that some of the regulatory authorisations, such as type approvals, are issued by the Authority are issued to foreign entities with no presence in South Africa, which will not be subject to the BBBEE regime. Such authorisations are not necessarily even issued to licensees but instead to equipment providers.

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

4.4.2.1 The submission of BBBEE certificates, where a particular licensee has a BBBEE certificate may enable the Authority to assess empowerment levels in general across the sector. The Authority should evaluate, however, what information is revealed by such certificates and how it may impact on its decisions and actions as a regulator. Certificates should not be required to be

submitted without a clear understanding of what the Authority will do with the information contained in them. It should be noted that entities covered by the ICT Sector Code are already required to submit their BBBEE certificates to the ICT Sector Council in terms of section 10(4) of the BBBEE Act. Accordingly, it may be appropriate for the Authority to liaise with the Council in relation to this information.

4.4.2.2 It should be recognised that under the Codes of Good Practice there is no requirement to obtain a BBBEE certificate. It is only where a measured entity makes any claims regarding its BBBEE status that it is required to obtain a BBBEE certificate to verify and support the claims. In addition, EMEs and certain QSEs are permitted to submit an affidavit confirming their revenues and ownership levels instead of a BBBEE certificate. If the Authority intends to ask licensees to submit BBBEE certificates similar provisions should be included to those contained in the Codes. A licensee should not be required to prepare a BBBEE certificate solely to comply with the Authority's requirements in circumstances where it would not otherwise be required to prepare a certificate.

4.4.2.3 It should also be recognised that, consistent with what is required in the Codes, a licensed entity's BBBEE certificate may not be prepared in terms of the ICT Sector Code. For example, Primedia Broadcasting is a division of Primedia (which holds various broadcasting service licences) and is not a separate legal entity. On the basis that the majority of its revenues do not come from ICT activities, Primedia's BBBEE certificate is prepared in terms of the general Codes of Good Practice rather than the ICT Sector Code. It is not permissible under the Codes for Primedia to make any election in this regard. This is the approach that is prescribed by the Codes. This should be recognised in the context of any requirements that are imposed by the Authority.

#### **4.5 Application of HDG Equity requirement and Codes to applications and processes regarding class licences**

4.5.1 *Should the Authority apply both HDG ownership and Codes in all applications and processes that do not involve individual licences?*

4.5.1.1 For the reasons given above, Primedia is of the view that HDG ownership requirements should not be imposed on class licensees.

4.5.1.2 Primedia is of the view that a requirement to maintain a particular minimum BBBEE level should be imposed in the licences of class licensees who are prepared to make commitments in this regard. Where a licensee's overall BBBEE level goes below the level prescribed in its licence, an appropriate "cure period" in which the licensee can remedy the situation should be provided for.

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

As described above, Primedia's view is that no minimum level of BBBEE certification should be stipulated.



4.5.3 *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?*

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As described above, Primedia is of the view that such requirements would be inappropriate in the context of class licensees given the scope and scale of their operations.

**4.6 Application of HDG Equity requirement and Codes to applications and processes regarding individual licences**

4.6.1 *Should the Authority apply both HDG ownership and Codes in all applications and processes that involve individual licences?*

The approach that is taken in the BBBEE Act and in the Codes of Good Practice is to assess BBBEE holistically and not to focus on any one element of BBBEE, which Primedia views as the preferable approach. The Authority should, in line with section 10(1)(a) of the BBBEE Act, take BBBEE into account when evaluating competing applications to determine which of the competing applicants should be selected. BBBEE is clearly one of the relevant considerations that the Authority should take into account. A particular BBBEE level should be one of the areas which applicants should be asked to make undertakings which could then be stipulated in their licences.

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

To the extent that the Authority intends to impose a minimum level of BBBEE certification, the comments made in paragraph 4.4.1 and 4.4.2 would apply.

4.6.3 *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?*

Please see responses above.