



SACF WRITTEN SUBMISSION on The Discussion Document: 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 2000, as amended

30 June 2017

## 1. INTRODUCTION

1. The South African Communications Forum ("SACF") thanks the Independent Communications Authority of South Africa ("ICASA") for the opportunity to submit comments on the Discussion Document: Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT sector in terms of S4B of the Independent Communications Authority of South Africa Act 2000, ('ICASA Act') as amended.

2. The South African Communications Forum (SACF) is an industry association which represents members from a broad group of participants in the ICT sector, which includes class and individual licensees, as well as, participants who do not hold licences who contribute to the ICT ecosystem in general.

3. The SACF welcomes the publication of the Authority's Discussion Document on Equity Ownership by Historically Disadvantaged Groups and the Application of the (B-BBEE) ICT Sector Code(s) as published in Government Gazette 40759 on 31 March 2017.

4. The SACF on behalf of its members would like to participate in any hearings or further engagements that the Authority may have in this regard.

While, we acknowledge that as a country we still have a long way to go on our journey of transformation, our members have made and continue to make significant contributions to transformation and are committed to the goals of transformation.

5. The SACF will respond thematically to the Authority's Discussion Document and will provide broader context therefore not limiting itself only to answering the questions posed in the Discussion Document. We have adopted this approach to provide the Authority with as much information as we are able to provide, in order to enable it to meaningfully take the process forward. We are of the view that transformation is a national imperative.

## **TWO LEGISLATIVE MASTERS – ALIGNMENT OF THE LEGISLATIVE FRAMEWORKS**

The SACF notes its concern that the ICT sector is the only sector in the economy that continues to effectively have two legislative masters with divergent requirements – a narrow-based focus on equity as well as application of the BBBEE Act which has a broader focus and application. The ECA also continues to hang onto HDI rather than Black people which makes computation unnecessarily complex and challenging. The B-BBEE Act and resultant Codes of Good Practice have adopted a significantly different approach to empowerment from that of Regulations promulgated in terms of the ECA, in that the BBBEE legislative framework places a discretion on companies on the extent of compliance with the Codes while encouraging compliance through the competitive advantage that higher levels of compliance gives to a measured entity. For example, a measured entity may be excluded from accessing government business as it failed to meet the criteria to participate on a commercial level as it may be a less favoured partner due to the impact of lower levels of compliance would have on partners, suppliers and clients. The opposite would also be applicable, in that a measured entity would positively impact the compliance levels of partners, suppliers and clients. Therefore, higher levels of compliance with the applicable sector codes becomes the obvious choice for our members.

8. The B-BBEE Sector Codes in general and B-BBEE ICT Sector Codes specifically, creates a framework to empower Small, Medium and Micro-Enterprises

(SMMEs) and creates opportunities for SMMEs which are a significant step towards transformation of the ICT Sector.

9. The SACF is of the view that, narrow-based empowerment through the imposition of HDI equity targets, was amongst the early attempts at transformation of those prejudiced as a result of South Africa's historical legacy of disenfranchisement and disempowerment. Narrow-based empowerment made some gains by enriching a few, however, it had severe limitations which forced a rethink on empowerment in order to broaden the scope of its application to include a significantly broader group of people. The result was the promulgation of the BBBEE Act and underlying Codes of Good Practice.

10. Its approach is broader and seeks the pool of skills and business opportunities for black people at various levels of the economic spectrum. Consequently, it would be beneficial that the ICT sector too adopts the single nationwide approach to transformation. In this regard, we urge the Authority to advocate for the streamlining of the Regulations following from the ECA's B-BBEE Act with the requirements for transformation. It will undoubtedly reduce the and costs of regulatory compliance and address the uncertainty as to which requirements apply.

11. The SACF also acknowledges that earlier licences may be impacted by the HDI ownership as a result of licensing obligations when licences were issued. The SACF is of the view that this may be addressed differently, in that those licensees need not be prejudiced, as new obligations or legislative changes will only be applicable going forward and cannot be applied retrospectively.

12. The SACF is mindful that ICASA is grappling with the issues also confronting our members in respect of B-BBEE and equity ownership of HDG's. We note that the ECA empowers ICASA to develop regulations on B-BBEE. The ECA

further requires ICASA to make regulations on the application of the B-BBEE Codes for licensing.

### **REGULATING ON THE B-BBEE ICT SECTOR CODES**

13. Consequently, the SACF would caution the Authority against morphing a flexible framework that promotes and encourages broad-based transformation into a mandatory framework. B-BBEE Act is primary legislation in respect of B-BBEE and provides for voluntary compliance with the Codes. ICASA's regulations are secondary legislation emanating from powers derived through primary legislation empowering it to make regulations. Consequently, secondary or delegated legislation such as regulations can never have or impose greater rights or obligations than those contained in the primary legislation. Therefore, ICASA cannot adopt or make the sector codes a set of regulations. Compliance with the Codes must remain voluntary. However, it is the SACF's view that ICASA may prescribe the minimum level of compliance that it may require to consider an application, with Level 4. The PPPFMA, already establishes Level 4 compliance with the Codes as the minimum for any public sector procurement. Consequently, the SACF is of the view that this will accordingly be a proper alignment to licensing too.

### **INCLUSION OF AN EQUITY TARGET FOR CLASS LICENCES**

14. To effectively consider whether ICASA ought to impose a mandatory equity target on class licences ICASA would first need to consider the following

- 1) What was the rationale for the legislative framework that class licences currently enjoy?
- 2) How can the Authority effectively address transformation in respect of class licences

15. Class licences is the licence category that replaced Private Telecommunications Networks (PTNs) and Value Added Network Service (VANS) licences. These licence categories were categorised by low income and a limited scope of services were offered. These licences were also typically held by individuals or small groups. Consequently, in the converged framework, the licences were subjected to a registration process rather than an application process to reduce the regulatory burden to the licensee and reduce the timeframes and requirements imposed on these licences.

16. Class licensees typically operate on a smaller scale than individual licensees and a more limited set of rights are applicable. Class licences are typically the licence category that would enable the provision of new services and promotes innovation. As a result the obligations associated with this licence category should encourage and not encumber the licensee with obligations that are complex to fulfil when there is a more flexible yet effective alternate option available, regardless of how noble the objective is.

17. The SACF further understands that this is due to the recognition of the role that small businesses have to play towards economic growth and development. Therefore, it would be prudent for ICASA to maintain lower barriers to entry for class licences.

18. As the Authority is patently aware the ECA's imposition of HDI equity targets on Individual licences poses a significant challenge to the Authority, as well as licensees in its application due to the different obligations that HDI and BBEE impose.

19. The imposition of mandatory HDI equity targets on class licences will expand the scope of the problem to a more vulnerable group of licensees. Therefore, the Authority should not impose mandatory HDI equity ownership requirements on class licences.

20. We presume that ICASA is concerned about the level and pace of transformation in respect of this licence category, although we do not know the extent of the Authority's concerns in this regard as the data in respect of ownership for class licences is not included in the Discussion Document. The SACF is also of the view that all companies in the ICT sector must comply with the ICT Sector Codes in order to secure public/private business. This in our view will promote transformation.

21. The SACF is of the view that imposing ownership targets may not be the best way of achieving transformation amongst class licensees. Compliance with the Sector Codes may better achieve this.

22. The BBBEE ICT Code places emphasis on priority elements of the Code which includes, Ownership Skills and Enterprise Development, as well as preferential procurement. in general. More specifically, Qualifying Small Enterprises (QSEs) that have less than 51% black ownership, are compelled to have a level of black ownership in addition to the other priority areas. The Codes therefore adopts broader approach to empowerment for all entities, including class licences.

23. Notwithstanding the above, the Codes provides for lower compliance standards for Exempt Micro Enterprises (EMEs) and Qualifying Small Enterprises (QSEs).

24. The SACF is of the view that the Authority ought to adopt a more circumspect approach to class licences. The Authority ought to gather information on class licences over a period by gathering evidence to allow it to address trends that may emerge.

## **VERIFICATION**

25. The SACF notes the Authority's challenges in respect of verification and compliance, that plaques the Authority so too affects our members and is linked to the two fundamentally divergent legal frameworks which the Authority has to implement.

26. Licensees are not a homogenous set of entities and vary significantly in terms of size, scale and structure. The B-BBEE Act and Codes provide for the varied ownership structures, while the ECA does not and appears to be trapped in a time before licensees were listed companies. Many licensees are listed entities and the ECA, does not appear to take the complexities related to listed entities.

27. Here we set out some of the challenges faced by our members, although the SACF recognizes the Authority's limitations in being able to address these challenges or provide for them in its regulations. Notwithstanding this, the SACF has opted to include these challenges in our submission to provide the Authority with as full a picture as we can to enable and empower it to make regulations that seek to promote investment and stability and certainty in the sector, as well as, in executing its mandate to advise on necessary legislative amendments that recognize the current reality.

28. An application, with reference to section 9(2)(b) may prescribe manner to apply for an individual licence, which could include a percentage of equity

ownership to the held by HDGs, which must not be less than 30%, although it is silent on how this ought to be done.

- 1) Must this be held by a group of HDIs directly in the licence? If this is the case, what then happens when the company that owns the licence is listed? Is the listed entity required to delist 30% of its shareholding in the licence? If that is required, how would that be done?
- 2) The above represents a sample of questions that the Authority would have to grapple with in complying with the ECA.

29. The BBBEE framework has already considered many of these elements and made provision for them. For example, the Codes recognizes the principle of continuing recognition – black shareholding continues to be recognized after the black shareholder has exited the scheme. This is important to allow black people to invest and exit and profit from their shareholding in a manner that is flexible enough to do so based on their circumstances or objectives.

30. This is expanded on in more detail to give the Authority a more detailed understanding of the complexity involved.

## **Listed Entities**

- **Exclusion of foreign operations from the ownership of SA operations**
  - 2 out of the 3 telecoms operating in SA and listed on the JSE have operations outside of the boundary of SA.
  - In terms of BBBEE Codes, foreign operations are excluded from the total value (market cap) of the entities when calculating the black ownership within the listed entities that flow through to the SA operation entity, resulting in a higher equity % value recognised in

the SA operation. The reason for this dispensation is due to the fact that BBBEE is intended only for those operations operating within the boundaries of SA. The equity rand value in black hands in the listed entity is calculated against the value of the SA operations.

- **Exclusion of Mandated Investments and government ownership**

- The BBBEE codes allow for the exclusion of Mandated Investments (i.e. Pension Funds, Medical Aids etc.) and government shareholding from the numerator when determining the measurement of the 30% target. The limitation on the percentage exclusion of Mandated Investments is 40%
  - E.g. Telkom which is owned 58% by government will have a denominator of 42% against which to determine the size equity stake to sell to black people = 12.6%. This 12.6% would equate to 30%

- **Inclusion of Mandated Investments**

- Where a company elects not to exclude Mandated Investment, a company can obtain a Competent Persons Report to determine the “deemed” black shareholding derived from Mandated Investments. This is done by measuring the Rand value of black contribution to the Fund to determine the % against the total value of the Fund.

31. The question, then becomes should the Authority attempt to recreate a complex and intricate framework which would be applied in parallel to the BBBEE sector Codes. The consequence is that the compliance costs will rise. The SACF and its members, support a single framework for empowerment. Further, the sector Codes are not static as they are amended from time to time to address the ever changing circumstances. As it is subordinate legislation, a simpler process to amend the Codes is applied over legislative amendments.

32. In addition to our comments above, the SACF will make recommendations on how the Authority could verify compliance of HDI requirements for applications before it.

Given the difference between black and HDG ownership there may be an opportunity for verification agencies to provide one page HDG ownership certifications. The panel of qualified agencies would need to be approved and overseen by ICASA given the mushrooming number of fly by night agencies in the B-BBEE verification space.

33. The complication of the extra certification would be obviated in time should the ownership framework evolve from HDG to black.

## **LICENSING**

34. The SACF recognizes the importance of more aggressive transformation in the sector and economy in general. Consequently, the SACF supports the need for certainty in respect of the criteria for empowerment and appreciates the Authority's attempt to solicit views in creating such a framework.

35. In making a recommendation in this regard, we considered the following:

- 1) Level of difficulty of compliance with the Codes
- 2) Appropriate compliance level of the Codes that ought to be applicable.

36. The targets contained in the Codes appears to increase in each iteration as is evidenced by the last Amendment of November 2016. Measured entities are compelled to do more to maintain their levels of compliance.

37. The BBBEE ICT Sector Council published an Amended ICT Code in November 2016 which significantly increased the targets and application of the targets to compel measured entities to do more to maintain their respective levels of compliance. For example, the ICT Codes sought to place greater emphasis on skills development and the promotion of small businesses and removed the applicable cap in respect of ownership. The result of the introduction of these measures is that there is a broader level of transformation across the sector, rather than a narrow focus only on ownership which seeks to benefit a few.

38. The SACF is of the view that the Authority should apply a minimum of a Level 4 compliance with the BBBEE ICT Sector Codes as a pre-qualifying criteria for all applications for class, individual and spectrum licensing. The Authority may choose to review this from time to time and consider the impact of the application of the Codes to its licensees and the sector.

39. The Authority acknowledges in its Discussion Document that many licensees do not meet the legislated equity targets, consequently, it is difficult to imagine an increase in targets that as yet are not being met. It would seem prudent for the Authority to investigate the challenges faced by these licensees to drive compliance before considering revising the targets upwards.

## **CONCLUSION**

40. The SACF again appreciates the opportunity to submit our comments on the Discussion Document: Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT sector in terms of S4B of the Independent Communications Authority of South Africa Act 2000, ('ICASA Act') as amended. The SACF looks forward to participating further in this process, including making an oral submission.

SACF Written Submission On The HDI Discussion Document – June 2017

