



# Submission to the Independent Communications Authority of South Africa

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DISCUSSION DOCUMENT ON EQUITY OWNERSHIP BY  
HISTORICALLY DISADVANTAGED GROUPS AND THE  
APPLICATION OF THE ICT SECTOR CODES IN THE ICT  
SECTOR - Published in Government Gazette No. 40759 of 31  
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## **A Introduction**

- 1 Telkom SA SOC Limited (“Telkom”) welcomes the opportunity to submit its written submission on the Discussion Document on Equity Ownership by Historically Disadvantaged Groups (“HDGs”) and the application of the ICT Sector Codes in the ICT Sector Conditions Regulations (“Discussion Document”), as published in Government Gazette No. 40759 dated 31 March 2017 by the Independent Communications Authority of South Africa (“ICASA” or “the Authority”). Telkom also indicates its availability for making oral submissions to the Discussion Document.
- 2 The Discussion Document recognises that historically when telecommunications licences were issued, there was no clarity or uniformity of policy on black economic empowerment.
- 3 Telkom supports the alignment of broad-based economic empowerment (“BBBEE”) compliance with the requirements as set out in the Electronic Communications Act 36 of 2005 (the “ECA”). We confirm that in addition to ICASA’s own jurisdiction to promote and advance the interests of HDGs in terms of the ECA, the Broad-Black Economic Empowerment Act 53 of 2003 (the “B-BBEE Act”) enjoins ICASA to consider and apply the ICT Sector Code (the “Code”) in the discharge of its mandate. Telkom further supports the Authority’s stance that the implementation of the Code as well as the promotion of BBBEE and HDG equity ownership requires a process guided by sound principles and analysis.
- 4 We understand that ICASA seeks assistance from the public and industry on how it can harmonise its mandate in terms of the ECA and that which it derives from the BBBEE Act and the Code. In this regard, Telkom has structured its submission as follows:

Section A: Introduction

Section B: Executive Summary

Section C: The legislative and regulatory environment

Section D: HDG equity ownership

Section E: Verification process

Section F: Ownership and control

Section G: General compliance issues

Section H: Harmonisation of definitions and concepts

Conclusion

## **B. Executive summary**

- 5 Telkom welcomes the Authority’s commitment to promoting BBBEE and HDG equity ownership as mandated in terms of the ICASA Act 13 of 2000 (the “ICASA Act”), the ECA and the BBBEE Act. Telkom supports a gradual increase of the HDG equity requirement to 30%, but submits that Government ownership should be taken into account when determining HDG equity ownership. It further supports the application of BEE and HDG equity requirements to both individual and class licensees.
- 6 With regards to prior approval for changes in shareholding of listed companies, a distinction should be made between a change in the free float stock and a change in the shareholding held by institutional investors. Only significant reductions in BEE equity due to changes in free float should trigger a regulatory concern. It is suggested that ICASA should consider the shareholding disclosure requirements contained in Section 122 of the Companies Act 71 of 2008, as amended (the “Companies Act”) which require an acquirer / seller to notify [the] listed company of any change of 5% of shareholding (or multiples thereof), and the listed company to then notify its shareholders through a SENS notice.
- 7 Furthermore, Telkom proposes the alignment and harmonisation of the definitions of ‘Black’ and ‘HDG’ between the Code and the ECA as well as other relevant regulations with regards to definitions of HDGs, scope of application, compliance and proof of ownership and control. Compliance with HDG requirements should be verified by means of a valid rating certificate from a South African National Accreditation System (“SANAS”) approved rating agency as well as reports by external auditors. The reporting by listed companies should be aligned with the release of their annual financial results.

### **C. The legislative and regulatory environment**

8 Telkom recognises that there is a need for an expedited transformation in the sector.

9 In this regard, we recognise that in terms of sections 4(3)(j) and (k) of the ICASA Act, the Authority may make regulations on any matter consistent with the objects of the ICASA Act and the underlying statutes, including the ECA, and may make regulations on empowerment requirements in terms of the BBBEE Act. The Authority can further promote BBBEE and equity ownership of HDGs in relation to the application and granting of individual licences (section 9 of the ECA), the renewal of individual licences (section 11 of the ECA) and the transfer of individual licences or change of ownership (section 13 of the ECA) and promote the empowerment of HDGs, including black people, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities as set out in section 2(h) of the ECA.

10 In light of the statutory powers conferred on ICASA to regulate, it is our submission that ICASA should invoke these powers and promulgate an overarching regulation on HDG. The regulation may address both procedural and substantive issues regarding transformation. For instance, it may provide a time-frame for attainment of the HDG target of 30% and provide incentives to licensees who comply. It may also harmonize its content and processes with those provided for in the BBBEE Act and the Code.

11 The proposed regulation can address details on how ICASA will approach transformation issues during the application for new licences and when a permission to transfer ownership or control of a licence is sought.

12 The High Court judgment in *Telkom SOC and Others v Neotel (Pty) Ltd* (605/2016) [2017] ZASCA 47 states that an applicant for permission to transfer control or

ownership of a licence must comply with the 30% HDG requirement as set out in section 9 of the ECA. Most of the licensees do not comply with this requirement. It takes no less than a year, at best, to have regulatory approvals for any M&A in the sector. It is therefore our considered view that ICASA should approach the Minister and Parliament for an appropriate amendment to the ECA to allow licensees involved in M&As adequate time to comply.

## **D HDG Equity ownership**

- 13 Telkom is not averse to gradual / managed increase of the 30% BEE equity requirement, but we suggest that the current requirement is sufficient so that licensees in the ICT sector can start implementing plans to bring about changes that will see HDG equity ownership numbers increase. We therefore propose that licensees be granted 5 years to comply with requirement of 30% BEE equity ownership, and further propose an amendment of HDG requirements in ECA to allow for progressive compliance by licensees.
- 14 Telkom is further of the view that the Authority should impose HDG equity requirements on all licensees including class licensees, irrespective of income levels and size of the entity and HDG equity / BBBEE ownership should be a compulsory element of the ICT Sector Scorecard.
- 15 Government ownership should also be taken into account when determining HDG equity ownership. Telkom submits that Government shareholding is different from private sector shareholding or individual equity ownership, as dividends earned by government are paid into the National Revenue Fund towards the support of government objectives, including promotion of BBBEE and HDGs.
- 16 As regards prior approval for changes in shareholding, Telkom submits that this may have the effect that every change of shareholding or control which results in a change to BEE levels would be notifiable to ICASA. As publicly listed JSE companies undergo changes to their shareholding which affect their BEE

credentials on a daily basis, such notification would not only be cumbersome but also practically impossible. Telkom proposes that a distinction be made between a change in the free float stock and a change in the shareholding held by institutional investors.

- 17 With regard to a change in the free float stock, we propose that ICASA align any proposed regulations to the Companies Act wherein only a change of 5% shareholding (or multiples thereof) triggers disclosure via a SENS announcement.
- 18 In order to encourage HDGs from participating in share schemes, Telkom proposes that equity share schemes aimed at increasing ownership by HDGs should be limited to HDGs (black people and women, youth and persons with disabilities) with exercisable voting rights in the entity to HDGs and that the initial public offering could be made at a cheaper price. SMME deals can be entered into in order to earn licensees more points on Economic Interest under the Code in order to be attractive to HDGs. The share scheme could be structured in such a way that the equity shares are not tradable within a certain period, are only transferable to other members of HDGs and a special dividend pay-out of a higher value could be considered as an incentive. These equity shareholders could also be invited to participate in skills development programmes aimed at HDGs to add to the Skills Development points.

## **E Verification**

- 19 Telkom supports the verification of the HDG credentials of licensees. We propose that ICASA adopts two methods of verification, (1) the certificate from a rating agency accredited by the South African National Systems ("SANAS"); or (2) a certificate of compliance issued by the external auditors of the relevant licensees. The HDG credentials could be verified annually in tandem with the release of the annual financial statements of a publicly listed licensee.

## **F Ownership and Control**

- 20 With regards to what constitutes ownership and what constitutes control, we note the uncertainty occasioned by the ambiguity in the ECA.
- 21 We are of the view that the definition of a control interest in the Limitation of Ownership and Control of Telecommunication Services, 2003 Regulations (the "LOCT regulations") is still relevant. It is wide enough to cover a myriad of possibilities. This definition is further aligned with the definition in the Competition Act and the Companies Act, barring that the LOCT regulations refers to a control interest as inter alia 25% ownership of issued share capital. The Competition Act 89 of 1998 defines control as ownership of more than one half of issued share capital of a firm whilst the Companies Act 71 of 2008 inter alia refers to control as the exercise of a control over a majority of the voting rights. We are of the view that all relevant definitions should be aligned to refer to 25% ownership as per the LOCT regulations, for example by incorporating the definition in the LOCT regulations by reference in the applicable legal instruments.
- 22 We are further of the view that separate definition of ownership is not necessary as it is evident from the common law definition that it refers to full dominion over an asset, i.e. 100% ownership. Furthermore, the Code already provides measurements in respect of Black Ownership. In instances where 100% of a licensee's share capital is transferred, we are of the view that this should constitute a change of ownership. Should any of the conditions of a control interest as defined in the LOCT regulations be met, such a transfer could simultaneously constitute a transfer of control. Where less than 100% of a licensee's share capital is transferred, it may constitute a change of control subject to the definition of a control interest in the LOCT regulations.

## **G General compliance issues**

- 23 The Code assesses transformation using a multiplicity of inputs. This results in the affected company's level of compliance according to stated levels. In our view, ICASA can rely on the assessment done in terms of the Code in its assessment of the level of transformation of a licensee. ICASA may consider appropriate ways to infuse the compliance assessment into its own regulations or processes. Any additional process will only add complexity to the current regulatory framework and contribute to further uncertainty.
- 24 Furthermore, the latest amendments to the JSE Listings Requirements (as of 19 June 2017) require listed companies to make available their BEE compliance certificates (prepared pursuant to the BEE Amendment Act) on their website and to notify shareholders of such availability via a SENS announcement. This should serve as sufficient confirmation of licensees' level of compliance.

## **H Harmonisation of definitions and concepts**

- 25 As a general point, Telkom proposes the harmonisation of definitions between the various acts and regulations. The definition of HDGs in the LOCT Regulations refers to HDGs as natural persons, whom before the Constitution came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion. The ECA does not contain an explicit definition of HDGs. The BBBEE Act defines 'Black People' as Africans, Coloureds and Indians, but does not define HDGs.
- 26 Under the Code, there is enhanced recognition for certain categories of Black People namely Black Women, Black People with disabilities, Black Youth, Black People living in rural areas and Black Unemployed People. HDGs is however

defined in the Processes and Procedures Regulations for Individual Licences, 2010. HDGs are defined as 'South African citizens who are Black people, women or people with disabilities and black people are defined to include Africans, Indians and Coloureds.

- 27 Furthermore, with regard to the application for radio frequency spectrum licences, in terms of the Radio Frequency Spectrum regulations of 2015 (as amended), 30% BEE equity or level 4 certification is required, as set out in regulations. However, in respect of a transfer or transfer of control of a radio frequency spectrum licence, if such a transaction results in a reduction of HDG equity ownership to less than 30%, the transaction will not be approved.
- 28 Telkom proposes that ICASA's regulations harmonise the various definitions and concepts by making sure that the various legislative amendments are effected and towards consistency.

## **CONCLUSION**

- 29 The discussion document raises issues that are likely to define the future regulatory landscape on BBBEE in the sector. There are sufficient powers in the ECA for ICASA to invoke to enforce the Code and to extend its reach by way of draft regulations following ICASA's analysis of the submissions received by industry in respect of any such draft regulations.
- 30 Telkom requests any opportunity to make a verbal presentation should the Authority hold public hearings on the matter covered in this submission.