

26 June 2017

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Chairperson
Independent Communications Authority of South Africa
Private Bag X10002
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By email: chairperson@icasa.org.za
Cc: transformation@icasa.org.za

Re: 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 ("Discussion Document").

Dear Chairperson

1. The above matter refers.
2. Kindly find enclosed herein Vodacom's written comments in response to ICASA's Discussion Document as published in Government Gazette No. 40759 of 31 March 2017.
3. Vodacom also wishes to express its willingness to participate in any public consultative process which the Authority may convene.

Yours sincerely



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VODACOM PTY LTD'S WRITTEN SUBMISSIONS ON ICASA'S DISCUSSION DOCUMENT: EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS (HDG) AND THE APPLICATION OF THE ICT SECTOR CODE IN THE ICT SECTOR ISSUED IN GOVERNMENT GAZETTE NO 40759 ON 31 MARCH 2017 (DISCUSSION DOCUMENT)

1 INTRODUCTION

- 1.1 Vodacom welcomes the opportunity to provide written submissions on the Discussion Document. We also wish to confirm our willingness to participate in any further consultative processes including undertaking oral hearings.
- 1.2 We are very pleased that the Authority has launched this inquiry. We are hopeful that it will result in much-needed certainty about how empowerment should be implemented in the ICT Sector.

2 GENERAL COMMENTARY

- 2.1 Our submissions are based on our view that the Authority is required to implement empowerment in accordance with the Broad-Based Black Economic Empowerment Act¹ (**BBBEE Act**).
- 2.2 The Authority has noted in the Discussion Document that the BBBEE Act places an obligation on every organ of state and every public entity to apply any relevant code of good practice issued in terms of the BBBEE Act in, amongst other things, determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law². The Authority is bound by such provision as it is an organ of state in terms of the BBBEE Act. The Amended ICT Sector Code issued as a code of good practice in terms of section 9(1) of the BBBEE Act on 7 November 2016³ (**ICT Sector Code**) provides that all person, organisations and entities operating in the ICT Sector in South Africa, and public entities listed in schedule 1, schedule 2 and schedule 3 of the Public Finance Management Act⁴ are measurable under the ICT Sector Code. The Authority is listed in Schedule 1 of the Public Finance Management Act. As such, the ICT Sector Code is a "relevant code of good practice" for purposes of section 10(1) of the BBBEE Act and must be applied by the Authority.
- 2.3 The BBBEE Act also states that, subject to section 9(6), an enterprise in a sector in respect of which the Minister has issued a sector code of good practice may only be measured for compliance with the requirements of broad-based black economic empowerment in

1 Act 53 of 2003, as amended by the Broad-Based Black Economic Empowerment Amendment Act, 46 of 2013 (**BBBEE Amendment Act**)

2 Section 10(1)(a) of the BBBEE Act

3 Government Gazette No 40407

4 Act 1 of 1999, as amended

accordance with that code⁵. Additionally, the BBBEE Act provides that a code of good practice remains in effect until amended, replaced or repealed.⁶

- 2.4 The Electronic Communications Act (ECA)⁷ was amended in April 2014 to incorporate the following provisions relating to empowerment –
- 2.4.1 a definition of "broad-based black economic empowerment" was introduced and is defined as having the meaning assigned to it in the BBBEE Act;
- 2.4.2 the definition of "ICT Sector Charter" was substituted and is defined as a sector code on broad-based black economic empowerment issued in terms of the BBBEE Act. This therefore refers to the ICT Sector Code;
- 2.4.3 Section 2(h) was amended to provide that one of the objectives of the ECA is to promote broad-based black economic empowerment. The effect of this amendment was to remove the reference to promoting the "empowerment of historically disadvantaged persons, including Black People";
- 2.4.4 Section 5(9)(b) was amended to remove the reference to promoting the "empowerment of historically disadvantaged persons". The amended section 5(9)(b) now provides that the Authority must, in granting a licence, promote broad-based black economic empowerment, including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the ICT Charter;
- 2.4.5 Section 9(2)(b) was amended to provide that the Authority may "include the 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"⁸; and
- 2.4.6 Section 13(3)(a) was amended to provide that the Authority may restrict ownership or control of an individual licence in order to "promote the ownership and control of electronic communication services by historically disadvantaged groups, and to promote broad-based black economic empowerment."
- 2.5 When the Electronic Communications Amendment Bill, 2013, was gazetted for purposes of proposing the aforementioned changes to the ECA, it included a Memorandum on the Objects of the Electronic Communications Amendment Bill (**Memorandum**), which set out

⁵ Section 10(3) of the BBBEE Act

⁶ Section 9(7) of the BBBEE Act

⁷ Act No 36 of 2005, as amended

⁸ The underlined sections reflect the changes that were made to section 9(2)(b)

explanatory notes on why certain amendments were being proposed. In regard to the changes relating to empowerment, the Memorandum states as follows –

- 2.5.1 Objects of the Bill – *"The objects of the Bill are to amend the Electronic Communications Act, 2005, so as to align the Act with broad-based black economic empowerment initiatives...."*;
- 2.5.2 Regarding the Amendment to section 2(h) – *"The amendment seeks to replace the phrase "historically disadvantaged individuals" with the term "broad-based black economic empowerment"*;
- 2.5.3 Regarding the Amendment to section 9 – *"The focus of the Act has been changed from the empowerment of "historically disadvantaged individuals" to broad-based black economic empowerment. Therefore, the required equity ownership by historically disadvantaged groups in section 9(2)(b) has been retained for the time being provided that broad-based black economic empowerment requirements prescribed by ICASA under section 4(3)(k) of the ICASA Act may replace it in due course."*
- 2.6 The Independent Communications Authority of South Africa Act (**ICASA Act**)⁹ was also amended in 2014 and incorporated the following provisions relating to empowerment –
- 2.6.1 a definition of "broad-based black economic empowerment" was introduced and is defined as having the meaning assigned to it in the BBBEE Act; and
- 2.6.2 section 4(3)(k) was amended to provide that the Authority may make regulations on empowerment requirements to promote broad-based black economic empowerment.
- 2.7 The Memorandum clearly indicates that the aforementioned amendments to the ECA were made with the intention of ensuring that the Authority promotes broad-based black economic empowerment in terms of the BBBEE Act, and shifts from focusing on the empowerment of historically disadvantaged individuals to broad-based black economic empowerment. The amendments also acknowledge that in doing so, the Authority will apply the ICT Sector Code. Broad-based black economic empowerment and the ICT Sector Code seek to benefit "black people", which is a narrowly defined term and quite different from the term historically disadvantaged individuals or groups, which, while not defined in the ECA, is understood to be broader and not limited by race. If the Authority carries out its objective of promoting broad-based black economic empowerment, it would have to promote the benefits to black people and not historically disadvantaged individuals or persons. We are therefore of the view that the terms historically disadvantaged persons or individuals and HDGs are no longer relevant to, and should have no further application in the context of, the ECA.

⁹ Act No 13 of 2000, as amended

- 2.8 In addition, the BBBEE Act provides that in the event of any conflict between the BBBEE Act and any other law in force immediately prior to the date of commencement of the BBBEE Amendment Act, the BBBEE Act prevails if the conflict specifically relates to a matter dealt with in the BBBEE Act¹⁰. We are of the view that the references to HDG in the ECA conflict with the BBBEE Act, and that the BBBEE Act prevails over the HDG references in the ECA for the following reasons –
- 2.8.1 the concept of HDG is broader than the definition of "black people" as utilised in the BBBEE Act, and the concept of HDG should be replaced with the term "black people";
- 2.8.2 the Memorandum states that the object of the changes to the ECA relating to empowerment was to align the ECA with broad-based black economic empowerment initiatives and in regard to the amendments to section 9(2)(b) that the "focus of the Act has been changed from the empowerment of historically disadvantaged individuals to broad-based black economic empowerment"; and
- 2.8.3 the Authority has an obligation to apply the ICT Sector Code when determining the qualification criteria for the award of licences under the ECA. The ICT Sector Code sets targets and measurement criteria for ownership by black people. The Authority is therefore required to apply the measurement principles for ownership by black people as set out in the ICT Sector Code.
- 2.9 Furthermore, it is evident from the Memorandum that the reason why the reference to HDG ownership was not removed from section 9(2)(b) of the ECA is because it was contemplated that the Authority would prescribe broad-based black economic empowerment requirements in terms of its powers under section 4(3)(k) of the ICASA Act which would replace the HDG ownership requirements in section 9(2)(b), and until such time that it did so, the HDG provisions would continue to apply. As a result, the amendments to section 9(2)(b) of the ECA as underlined in paragraph 2.4.5 above, have the effect that the 30% HDG requirement is not mandatory and the Authority is entitled, by virtue of the provisions of section 4(3)(k) of the ICASA Act, to apply other conditions in promoting broad-based black economic empowerment in lieu of the 30% HDG ownership requirement. The Authority's discretion in this regard was acknowledged by the High Court in the matter of Telkom SA SOC Limited v Dr Mncube NO¹¹, where the Court stated that *"To the extent that there is a discretion, it appears that such discretion relates only to a higher percentage or such other conditions as may be prescribed under section 4(3)(k) of the ICASA Act."* We are of the view that even though the amended section 9(2)(b) provides the Authority with a discretion, the intention of the amendment was to move away from the 30% HDG ownership requirement and for the Authority to deal with matters of broad-based

¹⁰ Section 3(2) of the BBBEE Act

¹¹ An unreported judgment, JDR 0338 (GP)

black economic empowerment only in accordance with the BBBEE Act and the ICT Sector Code.

- 2.10 In terms of its obligations under the BBBEE Act, read with the ECA, the Authority should require applicants to demonstrate overall BBBEE compliance levels as determined in terms of the ICT Sector Code in order to carry out its objective of promoting broad-based black economic empowerment. A component of the ICT Sector code is the measurement of black ownership of an entity. Ownership is therefore factored into the overall BBBEE compliance level of an entity. It is important to note that ownership is only one aspect of what is measured – other elements deal with key focus areas of Government's transformation agenda including support of black owned small business and skills development. In our view the Authority should not impose an ownership requirement but should rather focus on the overall BBBEE compliance level of an applicant or licensee.

3 RESPONSES TO SPECIFIC QUERIES IN DISCUSSION DOCUMENT

Application of HDG Equity Requirement (Paragraph 5 of the Discussion Document)

- 3.1 Paragraph 5.1.2 - 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?
- 3.1.1 The awarding of class licences should be subject to the application of the ICT Sector Code, in accordance with the requirements of section 10(1) of the BBBEE Act. This would require the Authority to apply the overall BBBEE compliance levels of applicants when determining the qualification criteria for class licences, as determined in terms of the ICT Sector Code.
- 3.2 Paragraph 5.1.3 - Should the Authority consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement?
- 3.2.1 As indicated above, the Authority should take into account the overall BBBEE compliance level of applicants for class licences.
- 3.2.2 The ICT Sector Code distinguishes between entities based on annual turnover for purposes of determining how the ICT Sector Code should be applied in measuring overall BBBEE compliance.
- 3.3 Paragraph 5.1.4 - Should the minimum legislated requirement remain at 30% or should it be increased? If so, what targets do you propose and why?
- 3.3.1 Please refer to our General Commentary in paragraph 2 above. The ECA does not contain a mandatory legislated requirement of 30% HDG ownership. Section 9(2)(b) was amended to permit the Authority to impose other conditions instead of ownership and the intention of the amendment (as set out in the Memorandum) was to ensure that

the Authority deals with broad-based black economic empowerment in accordance with the BBBEE Act and the ICT Sector Code.

- 3.3.2 The Authority is bound by the BBBEE Act and the ECA to apply the ICT Sector Code. The amendment to section 9(2)(b) permits the Authority to consider and apply overall BBBEE compliance level determined in terms of the ICT Sector Code. One of the elements that the ICT Sector Codes measures is ownership.
- 3.3.3 In our view the Authority should apply overall BBBEE compliance levels and not impose specific ownership percentages since ownership is a component of the measurement of overall BBBEE compliance. In our view, it is not necessary to apply a black ownership percentage over and above the overall BBBEE compliance levels.
- 3.4 Paragraph 5.1.5.1 - Should the Authority require licensees to seek prior approval in instances where a change in shareholding results in reduction of equity ownership by HDG's below 30%?
- 3.4.1 We refer to our comments in paragraph 3.3 above. As indicated above, the Authority should apply overall BBBEE compliance levels and not an ownership percentage.
- 3.4.2 The Authority's approval should be sought where a change of shareholding will result in a reduction of a licensee's overall BBBEE compliance level below Level 4.
- 3.5 Paragraph 5.1.5.2 - Should the Authority require licensees to seek prior approval in instances where the licensee does not meet the 30% minimum requirement, and change in shareholding that affects the percentage of equity ownership by HDG's
- 3.5.1 As indicated above, the Authority should apply overall BBBEE compliance levels and not an ownership percentage.
- 3.5.2 The Authority's approval should be sought where a change of shareholding will result in a reduction of a licensee's overall BBBEE compliance level.
- 3.6 Paragraph 5.2 - How should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDG's from participating in share schemes?
- 3.6.1 Please refer to our General Commentary in paragraph 2 above. As indicated above, the Authority should not prescribe a black ownership requirement but should rather apply overall BBBEE compliance levels. Overall BBBEE compliance levels take into account the extent of the measured entity's black ownership.
- 3.6.2 Black ownership in all participants in the ICT Sector, including publicly traded entities, should be measured in terms of the measurement principles set out in the ICT Sector Codes.

How Should Compliance with the HDG Requirements be Verified? (Paragraph 6 of Discussion Document)

3.7 Paragraph 6.4.1 – What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?

3.7.1 As previously expressed, the Authority is bound to apply the ICT Sector Code in regard to the assessment of overall BBBEE compliance generally, which assessment includes the principles for the measurement of black ownership. As a result, the continuing consequences principle is valid and applicable.

3.7.2 In terms of the ICT Sector Code, verification certificates issued by accredited BBBEE verification agencies are acceptable to prove black ownership. Vodacom supports the use of verification certificates to confirm an entity's overall BBBEE compliance as well as its ownership. Whilst it is correct that the information upon which a verification certificate is issued may have changed following the date of issue thereof, such changes should not prejudice an applicant since the ICT Sector Code recognises the continuing validity of a certificate for 12 months after its date of issue. If the Authority were to adopt the approach that its consent is required if the overall BBBEE compliance level of a licensee reduces below the licensee's overall BBBEE compliance level at the date it applied for its licence then this should alleviate the Authority's concern about the duration of the validity of the certificates.

3.8 Paragraph 6.4.2 - What proof would in your view be appropriate to confirm the compliance of publicly traded entities provide with the HDG equity/ownership requirement?

3.8.1 Please refer to our General Commentary in paragraph 2 above. As indicated above, the Authority should apply overall BBBEE compliance levels to measure broad-based black economic empowerment. BBBEE verification certificates issued by accredited BBBEE verification agencies would be appropriate to confirm the overall BBBEE compliance level (including the black ownership) of publicly traded entities as measured in terms of the ICT Sector Code.

What Constitutes Ownership and What Constitutes Control? (Paragraph 7 of the Discussion Document)

3.9 Paragraph 7.7.1 - Is the definition of a *control interest* as set out in 7.3 above still valid?

3.9.1 Save for the reference to the Companies Act, 61 of 1973, and to a beneficial ownership of more than 25%, Vodacom is of the view that the definition of control interest is still relevant. It is also fairly similar to the definition of control contained in the Companies Act 71 of 2008 and in the Competition Act.

- 3.9.2 The ownership of more than 25% of the issued shares in a licensee will not necessarily give such party control over the licensee and it's not clear why a reference to such percentage shareholding should be retained in the definition of "control".
- 3.10 Paragraph 7.7.2 - In your view, what constitutes control and how should the Authority define it. Set out the basis for your argument.
- 3.10.1 Control should be defined in the same manner as set out in the Companies Act 71 of 2008 or in the Competition Act.
- 3.11 Paragraph 7.7.3 - Are you of the view that the Authority should define ownership?
- 3.11.1 No, the Authority should not define ownership. The term ownership has an accepted legal meaning in terms of South African law and there is no reason to define the term separately. The legal concept of ownership contemplates, amongst others, that an owner of property has an exclusive right of possession of the property and a right to freely dispose of the property.
- 3.12 Paragraph 7.7.4 - In your view, what constitutes Ownership and how should the Authority define it. Set out the basis for your argument.
- 3.12.1 Please refer to our response set out in paragraph 3.11.1 of this document.
- 3.13 Paragraph 7.7.5 - Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?
- 3.13.1 It will constitute a transfer of both ownership and control. Ownership will be transferred because the owner of the shares will transfer his rights of ownership to the purchaser. Control will be transferred because the transfer of 100% of the shares in the licensee will result in a change in the party who has the ability to, amongst others, control the majority of the voting rights in the licensee, appoint the majority of the board of directors of the licensee and direct the management or policies of the licensee.

Application of the ICT Sector Codes (Paragraph 8 of the Discussion Document)

- 3.14 Paragraph 8.1 - The ECA requires the Authority to promote BBBEE and the BBBEE Act compels all organs of state and public entities to apply the applicable Sector Codes. How should the Authority go about doing this? Explain the rationale that underpins your view.
- 3.14.1 Please refer to our General Commentary in paragraph 2 and our comments in paragraph 3.3 above.
- 3.15 Paragraph 8.2 - Should the Authority apply the Codes to all applications i.e. including service, spectrum, type-approval and number applications?

- 3.15.1 The Authority should apply the ICT Sector Code to all applications for licences for service and spectrum, in terms of its obligations under section 10(1) of the BBBEE Act.
- 3.15.2 The Authority should not apply the ICT Sector Code to type-approval and number applications as such applications do not fall within the ambit of section 10(1) of the BBBEE Act. In any event, such a requirement would seriously inhibit the daily conduct of the operations of a licensee.
- 3.16 Paragraph 8.3 - Should the Authority require BBBEE certificates to be submitted as part of licensees' annual compliance requirements?
- 3.16.1 Yes, the Authority should do so.

General

- 3.17 Paragraphs 9.2 and 9.3 - With the exclusion of applications regarding individual licences, the Authority proposes to apply either HDG ownership requirements or the Codes, to all applications and processes. Please provide your view whether this is the correct approach, or whether both HDG ownership and the Codes should apply to all applications and processes that do not involve individual licences?
- 3.17.1 Please refer to our General Commentary in paragraph 2 and our comments in paragraph 3.3 above. In our view, only the ICT Sector Code should be applied.
- 3.18 Paragraphs 9.3.1 and 9.3.4 - What should be the minimum level of BBBEE certification?
- 3.18.1 Vodacom submits that the minimum overall BBBEE compliance level should be level 4 based on the current ICT Sector Code.
- 3.19 Paragraph 9.3.2 and 9.3.5 - 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?
- 3.19.1 Please refer to our General Commentary in paragraph 2 and our further comments in paragraph 3.3 above. In our view, only the ICT Sector Code should be applied.
- 3.19.2 The BBBEE Act does not make overall BBBEE compliance mandatory for all participants in the economy. Overall BBBEE compliance is intended to be driven by organs of state and public entities through processes such as the awarding of licences and procurement. However, if the Authority applies overall BBBEE compliance levels as measured in terms of the ICT Sector Code to determine the qualification criteria for the award of licences in accordance with section 10(1) of the BBBEE Act, as well as for the ongoing maintenance of licences, compliance with the ICT Sector Code will essentially become mandatory for licensees. Since verification certificates expire after

12 months, licensees would have to ensure that their overall BBBEE compliance is maintained or improved so as not to fall foul of their licence requirements.

- 3.20 Paragraph 9.3.3 - The Authority proposes that with individual licence applications, both HDG ownership requirements as well as the Codes should be applied. Please provide your view whether this proposed approach should apply? Provide reasons for your position.
- 3.20.1 Please refer to our General Commentary in paragraph 2 and our further commentary in paragraph 3.3 above. The Authority has an obligation to apply the ICT Sector Code in terms of section 10(1) of the BBBEE Act as read with the ECA. The ICT Sector Code measures overall BBBEE compliance, including black ownership. The Authority should therefore only apply the ICT Sector Code.
- 3.21 Paragraph 9.3.6 - Two decades into the South African democratic dispensation, we are yet to see ownership and operations of licensees fully and meaningfully transformed. Consequently, there are growing calls which grows louder for transformation. In response to growing public and government sentiments in this regard, should the Authority impose timeframes for compliance by all of its licensees for requirements for empowerment?
- 3.21.1 The Authority does not have the power to impose time frames for compliance on existing licences, which have been issued on the basis of particular terms and conditions. If the Authority imposes an overall BBBEE compliance on the issue of new licences, it would in effect be applying a timeframe for compliance on such new licences.
- 3.22 Paragraph 9.3.7 - What in your view would be an appropriate timeframe? Provide the rationale informing the period required to ensure compliance.
- 3.22.1 Please see comments in paragraph 3.21.1 above.