



30 June 2017

Independent Communications Authority of South Africa

Project Manager: Ms Refiloe Motsoeneng

Per email: transformation@icasa.org.za

Dear Ms Motsoeneng

Submissions: ICASA Discussion Document on transformation, ownership and control over ECS and ECNS licences

1. WAPA welcomes the publication by the Authority of its Discussion Document on transformation, ownership and control (“**the Discussion Document**”) and has set out below responses to direct questions raised by the Authority in the Discussion Document.

General comments

2. WAPA has noted that the intention of the Discussion Document is to assist the Authority to determine how ownership and control requirements under the Electronic Communications Act (“**the ECA**”) and the BEE ICT Sector Code (“**the Code**”) should be implemented and how these two different approaches to transformation should be better aligned.
3. WAPA supports such an inquiry. It is also fair to state that there is substantial confusion amongst licensees regarding ownership and control issues relating to licences issued under Chapter 3 of the ECA. While some clarity has been brought to these issues by the courts, it remains the case that distinctions between transfers of ownership and transfers of control appear arbitrary and do not reference the broader body of law relating to control and ownership of juristic persons.
4. WAPA recognises that transformation of the ICT industry has lagged and that there has been insufficient progress. WAPA submits that aligning the requirements of the ECA with those of the Code could facilitate greater and faster progress. WAPA’s members support a move away from the HDG requirements towards application of the Code: this achieves the same objectives in respect of transformation in a broader and more considered manner and will ensure that the ICT industry is aligned with other sectors of South Africa as regards transformation.

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Scope of application of HDG Equity Requirement

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?

5. The majority of WAPA members are SMMEs which have entered the market for service provision through registering class electronic communications service (CECS) and class electronic communications network service (CECNS) licences with the Authority under Chapter 3 of the ECA.
6. Many of these members – particularly those who are sole proprietorships or juristic persons owned by a single person or family – are deeply concerned about being required to transfer a substantial percentage of the ownership of their businesses and the impact that this may have on the viability of such businesses. A number of members raised the fact that their licences had been issued to them without any equity ownership obligations, and that it would be unfair to impose them at this stage.
7. In the event that the Authority is prepared to allow for compliance with transformation requirements either through HDG ownership under the ECA or through certification under the Code, a position in terms of which the exemption of qualifying entities from certification as stipulated under the Code is recognised by the Authority would go some way to meeting these concerns.

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

8. WAPA submits that the Authority should take these factors into consideration. Moreover, they should be taken into account across the spectrum of regulation of class licences which the Authority undertakes.
9. The HDG ownership requirement is a blunt mechanism for transformation, the impact of which differs vastly between an SMME and a large, listed corporation.

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

10. WAPA does not support an increase in the minimum legislated requirement. As stated above, an equity ownership requirement without reference to the broad-based empowerment structure is an extremely blunt mechanism for attaining transformation. Codes under the Broad-based Black Economic Empowerment Act place a heavy empowerment weighting on ownership, but allow for points to be scored through other mechanisms which achieve transformation objectives in a broader manner.

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

- a. *A change in shareholding results in reduction of equity ownership by HDGs below 30%; and*

- b. *Where the licensee does not meet the 30% minimum requirement, and change in shareholding affects the percentage of equity ownership by HDGs.*

11. Yes, to both questions.

Defining Ownership and Control

Is the definition of a “control interest” as set out in (a) to (f) above still valid? In your view, what constitutes control and how should the Authority define it? Set out the basis for your argument.

12. WAPA submits that the Authority – in dealing with applications for transfer of ownership and/or transfer of control – should have reference to the provisions regarding “control” as set out in subsection 2(2) of the Companies Act 71 of 2008 and the body of law regarding this concept as it is applied to juristic persons in South Africa.

Are you of the view that the Authority should define ownership? In your view, what constitutes Ownership and how should the Authority define it. Set out the basis for your argument.

13. WAPA submits that the Authority – in dealing with applications for transfer of ownership and/or transfer of control – should have reference to the concept of ownership as it is dealt with in the general body of law regarding this concept as it is applied to juristic persons in South Africa.

Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?

14. From a legal point of view, these are distinguishable. From a practical point of view in terms of the effect on who directs how a licence is used, there is no difference. It follows that the two processes – applications for transfer of ownership and applications for transfer of control – should be dealt with by the Authority in the same manner.

Questions Regarding the Application of the ICT Sector Codes

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

15. In WAPA's view this is not necessary. The obligation to have 30% ownership by HDGs is correctly applied to service licences issued under Chapter 3 of the ECA because it is required for an applicant for radio frequency spectrum or numbering allocations to be the holder of such licences.

16. If the Authority enforces compliance at the service licence level, it should not be necessary to confirm it when the holder of the service licence applies for spectrum or numbers.



17. WAPA urges the Authority to undertake an impact assessment to ensure that it properly understands the consequences of applying HDG requirements to applicants for type approval certification. WAPA is concerned that this will simply lead to less applications for certification, in turn leading to less consumer choice and a rise in the cost of telecommunications equipment.

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

18. Compliance with the Codes is voluntary. If a licensee elects to comply with transformation requirements through the Code and not through compliance with the HDG requirements of the ECA, then submission of BBBEE certificates should be required.

Conclusion

19. We trust that the above will assist the Authority in its further deliberations.

Regards

WAPA