GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE 85 OF 2019

FINDINGS DOCUMENT AND POSITION PAPER ON:

INQUIRY INTO EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODE IN THE ICT SECTOR

JANUARY 2019

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1. DEFINITIONS

1.1. Any terms used in this Position Paper which are not defined in this Position Paper but which are defined in the ECA shall have the meanings ascribed to them therein.

1.2. A reference to an enactment is a reference to that enactment as at the date of publishing this Position Paper and as amended or re-enacted from time to time.

1.3. Unless otherwise stated, or the context otherwise requires, the words and expressions listed below shall bear the meanings ascribed to them:

1.3.1. 2003 Regulations – means Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services in terms of section 52 of the Telecommunications Act (Government Gazette 24288);

1.3.2. 2009 Discussion Document – Independent Communications Authority of South Africa Act Discussion Document on Ownership and Control November 2009 (Government Notice 1532 in Government Gazette 32719 of 17 November 2009);

1.3.3. 2010 Licensing Regulations – means the Licensing Processes and Procedures Regulations in terms of section 5(7) of the ECA (Government Notice 522 in Government Gazette 33293 of 14 June 2010);

1.3.4. 2011 Findings Document – Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communication Network Services (Government Gazette 34601 of September 2011);

1.3.5. 2012 ICT Sector Code – means the Codes of Good Practice on B-BBEE for the Information and Communication Technology Sector in terms of section 9(1) of the B-BBEE Act issued under Government Notice 485 in Government Gazette 35423 of 6 June 2012;

1.3.6. 2013 Final Report – means the ICASA Final Report on the Review of Broadcasting Regulatory Framework towards a Digitally Converged Environment in South Africa (Government Gazette 36598 of June 2013);

1.3.7. 2017 Discussion Document – means the Discussion Document: Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code in the ICT Sector in terms of section 4B of the ICASA Act (Government Gazette 40759 of March 2017);

1.3.8. 2018 ECA Amendment Bill – the Bill published in 2018 proposing amendments to the ECA;

1.3.9. Authority – means the Independent Communications Authority of South Africa established in terms of the ICASA Act;

1.3.10. B-BBEE – means Broad-Based Black Economic Empowerment;

1.3.11. B-BBEE Act – means the Broad-Based Black Economic Empowerment Act, 53 of 2003;

1.3.12. B-BBEE Codes – means the Codes of Good Practice Black Economic Empowerment as published under the B-BBEE Act (as amended from time to time);

1.3.13. Black People – means African, Coloured and Indian people who are citizens of South Africa by birth or descent or who have become citizens of South Africa by nationalization before 27 April 1994 or on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date;

1.3.14. Broadcasting Act – means the Independent Broadcasting Authority Act 153 of 1993;

1.3.15. CCC – means the Complaints and Compliance Commission;

1.3.16. Competition Act – means the Competition Act 89 of 1998;

1.3.17. Constitution - means the Constitution of the Republic of South Africa, 1996;

1.3.18. DTI – means the Department of Trade and Industry;

1.3.19. ECA - means Electronic Communications Act 36 of 2005;

1.3.20. ECNS – means Electronic Communication Network Services;

1.3.21. ECS – means Electronic Communication Services;

1.3.22. HDI – means historically disadvantaged individuals, a term commonly used in the stakeholder submissions although undefined and understood to mean an HDG and/or HDP;

1.3.23. HDG – means historically disadvantaged group, referred to in the ECA and the Telecommunications Act, 1996;

1.3.24. HDP – means historically disadvantaged persons, a term defined, albeit differently, in the 2003 Regulations and 2010 Licensing Regulations;

1.3.25. ICASA Act – means the Independent Communications Authority of South Africa Act 13 of 2000;

1.3.26. ICT Sector – means the Information, Communication and Telecommunications Sector;

1.3.27. PFMA – means Public Finance Management Act 1 of 1999;

1.3.28. Proposed Regulations – regulations to be made in terms of, inter alia, section 13(3) of the ECA and section 3(3)(k) of the ICASA Act;

1.3.29. Revised ICT Sector Code – means the Amended Information and Communication Technology Sector Code (the ICT Sector Code) in terms of section 9 (1) of the B-BBEE Act issued under Government Notice 1387 in Government Gazette 40407 of 7 November 2016; and;

1.3.30. SMME – means a Small, Medium and Micro-sized Enterprise;

1.3.31. Telecommunications Act – means the Telecommunications Act 103 of 1996, which was repealed by the ECA.

2. INTRODUCTION

2.1. The Authority is in the process of auditing and reviewing the regulatory framework governing the broadcasting and telecommunications industries to take into account new technological, cultural, economic and social challenges. A significant step in this process was the 2011 Findings Document.

2.2. Following extensive public consultation to solicit the views of all stakeholders affected by broadcasting services in South Africa, the Authority issued various papers including the 2011 Findings Document and the 2013 Final Report. The 2013 Final Report set out, amongst other things, the Authority's three to five-year strategy for the development of revised or amended regulations affecting broadcasting.

2.3. As part of this process, the Authority, amongst other things, ranked industry regulations and prioritized them for review over the short term (2013 to 2016), medium term (2017 to 2019) and long term (2020 to 2022). To this end, the Review of Ownership and Control of Commercial Services and Limitation on Broadcasting was scheduled for review over the medium term.

2.4. Following this, on 31 March 2017, the Authority published the 2017 Discussion Document, a notice regarding its intention to conduct an inquiry in terms of section 4B of the ICASA Act. The purpose of the inquiry was to determine the Authority's position in respect of:

2.4.1. the implementation of the ICT Sector Code in light of the ECA's ownership requirements in respect of HDGs; and

2.4.2. the promotion of B-BBEE and equity ownership by HDGs as required in terms of the ECA.

2.5. Stakeholders were given the opportunity to engage in writing and through oral submissions at public hearings.

2.6. This Findings Document and Position Paper has been prepared following consideration of these stakeholder submissions and the advice of legal counsel;

2.6.1. Part A – sets out the legislative framework for empowerment in the ICT Sector;

2.6.2. Part B – sets out relevant ownership and control considerations; and

2.6.3. Part C – sets out a summary of the responses by industry stakeholders to the questions posed by the Authority in the 2017 Discussion Document and sets out the Authority's position.

PART A – LEGISLATIVE FRAMEWORK FOR EMPOWERMENT IN THE ICT SECTOR

3. OVERVIEW OF REGULATION IN THE ICT SECTOR

3.1. Initially, both the postal and telecommunications sectors were regulated by the Postmaster-General through the Post and Telecommunication-Related Matters Act[1]. Some parts of this legislation are still in operation today.

3.2. The broadcasting industry was governed initially through the Broadcasting Act[2], which primarily dealt with the South African Broadcasting Corporation.

3.3. The Constitution, in section 192, places an obligation on the Legislature to pass national legislation to establish an independent authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society.

3.4. To give effect to this constitutional obligation, the Legislature passed the Independent Broadcasting Authority Act[3] and the Telecommunications Act establishing the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority respectively. The effect of this was to create two disparate sectors, namely broadcasting and telecommunications, which were regulated by two different regulatory bodies.

3.5. The enactment of the Telecommunications Act was followed shortly by the passing of the Broadcasting Act[4] which repealed the 1976 legislation with the same name. The Broadcasting Act was aimed at encouraging capacity building within the broadcasting sector, especially amongst historically disadvantaged groups.

3.6. The post was regulated through the Postal Services Act[5], certain sections of which are still in operation today.

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[1] Act 44 of 1958
2 Act 73 of 1976
[3] Act 153 of 1993
[4] Act 4 of 1999
5 Act 124 of 1998

4. CURRENT LEGISLATIVE FRAMEWORK: *ICASA ACT*

4.1. In order to ensure consistency in the broadcasting and telecommunication sectors, in May 2000, the ICASA Act was passed to establish the Authority.

4.2. The ICASA Act repealed certain provisions of the Telecommunications Act, specifically those that established the South African Telecommunications Regulatory Authority and replaced them with those that established the Authority as a regulatory body for broadcasting and electronic communications (previously referred to as telecommunications) in the public interest.[6] In 2006 the ICASA Act was amended to expand its mandate to include postal matters.

4.3. The Authority is tasked with monitoring the broadcasting, postal and electronic communications sectors to ensure compliance with the ICASA Act and statutes that underline these sectors.[7]

4.4. As a regulator of the said sectors, the Authority is authorised to grant, renew, transfer and revoke licences in accordance with the provisions of the ICASA Act and the statutes that underline the South African broadcasting, telecommunications and postal services sectors.[8]

4.5. Section 4(3)(k) of the ICASA Act gives the Authority the discretion to make regulations on empowerment requirements to promote B-BBEE in the South African broadcasting, telecommunications and postal services sectors. Following the amendments to the ICASA Act in May 2014, this discretion changed from the promotion of B-BBEE to making regulations in terms of the B-BBEE Act. The proposed amendments to the ECA contained in the 2018 ECA Amendment Bill set out to remove the discretion with the effect that the Authority must make the relevant regulations.

4.6. Save for the discretion granted by section 4(3)(k) of the ICASA Act, the only other reference to B-BBEE contained in the ICASA Act is the definition of

[6] Section 2 of the ICASA Act
[7] Section 4(3)(b) of the ICASA Act
[8] Ssection 4(3)(e) of the ICASA Act

broad-based black economic empowerment which was also included by the amendments to the ICASA Act in May 2014.[9]

5. CURRENT LEGISLATIVE FRAMEWORK: *ECA*

5.1. The ECA came into operation in July 2006 with the objective of consolidating the regulation of the broadcasting, broadcasting signal distribution, telecommunications sectors and to some extent postal services, into one piece of legislation. The ECA repealed:

5.1.1. the whole of the Telecommunications Act;

5.1.2. the whole of the Independent Broadcasting Authority Act; and

5.1.3. all sections in the Broadcasting Act that outlined the licence requirements for commercial broadcasting services and community broadcasting services. The types of licences that may be issued by the Authority in terms of the Broadcasting Act are to be issued in terms of the requirements listed in the ECA.[10]

5.2. However, as per section 97 of the ECA, none of the regulations published in terms of the following statutes were repealed:

5.2.1. section 119A of the Post Office Act, 1958 (Act No. 44 of 1958);
5.2.2. the Telecommunications Act;
5.2.3. the Broadcasting Act;
5.2.4. the Independent Broadcasting Authority Act;
5.2.5. the Radio Act, 1952 (Act No. 3 of 1952); and
5.2.6. the Sentech Act.

5.3. Section 95 of the ECA provides that regulations made under these Acts which were in force immediately prior to the commencement of the Electronic

[9] The amendments were made in terms of the Independent Communications Authority of South Africa Amendment Act No 2 of 2014
[10] Section5(3) of the Broadcasting Act

Communications Amendment Act, remain in force until amended or repealed by the Authority in terms of the ECA.

5.4. The primary object of the ECA is to provide for the regulation of ECS, ECNS and broadcasting services in the public interest.[11] The ECA was further enacted with an objective to promote broad-based black economic empowerment with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities. Prior to the 2014 amendment of the ECA, this provision catered for the empowerment of HDPs, including Black People, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities.[12]

5.5. The ECA provides that the Authority may grant individual and class licences for ECNS, broadcasting services and ECS.

5.6. When granting the licences, section 5(9) of the ECA requires the Authority to:

5.6.1. ensure that ECNS, broadcasting services and ECS, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic of South Africa; and

5.6.2. promote broad-based black economic empowerment including the empowerment of women, the youth and persons with disabilities, in accordance with the requirements of the ICT charter.

5.7. In addition to these obligations above, the Authority is required to prescribe standard terms and conditions to be applied to individual licences and class licences.[13] These standard terms and conditions are listed in section 8(2) of the ECA and may vary according to the types of individual and class licenses. The Authority is empowered to prescribe additional terms and conditions.[14]

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[11] Section 2(a) of the ECA
[12] Wording of section 2(h) of the ECA prior to amendments in May 2014
[13] Section 8 (1) of the Electronic Communications Act
[14] Section 8(3) of the Electronic Communications Act

5.8. The following proposed amendments to the ECA, as set out in the 2018 ECA Amendment Bill, are particularly relevant to the 2017 Discussion Document:

5.8.1. the deletion of the term ICT charter and its replacement with the term B-BBEE ICT Sector Code;

5.8.2. section 9(2)(b) is amended to delete the discretion given to the Authority to make regulations under section 4(3)(k) of the ICASA Act with the effect that it is now mandatory for the Authority to make such regulations;

5.8.3. the insertion of a new section 67A which makes provision for a concurrent jurisdiction agreement with the Competition Commission; and

5.8.4. the insertion of a new section 94(2) which provides that in the event of a conflict between the ECA as amended by the Bill and the provisions of any regulations made in terms of the ECA prior to the commencement of the Bill, the provisions of the ECA as amended will prevail.

5.9. The 2018 ECA Amendment Bill also proposes amendments to the ICASA Act, being-

5.9.1. the insertion of the definition of B-BBEE ICT Sector Code;

5.9.2. substitution of the word ‘may’ for the word ‘must’ in section 2(b)(k) with the effect that the regulations envisioned therein are pre-emptory and are required within 12 months of the promulgation of the 2018 ECA Amendment Bill; and

5.9.3. states that any concurrent jurisdiction agreement with the Competition Commission must be in line with section 67A of the ECA as amended.

5.10. Although one of the objects of the 2018 ECA Amendment Bill is to ‘*provide for transformation of the sector through enforcement of broad-based black*

economic empowerment', the 2018 ECA Amendment Bill makes no attempt to remove reference to HDG in the ECA.

5.11. The Authority intends to submit its comments on the 2018 ECA Amendment Bill to the Legislature, some of which are raised by the 2017 Discussion Document and the Authority's position thereon.

6. LEGISLATIVE REQUIREMENTS SPECIFIC TO INDIVIDUAL LICENCES

6.1. A person may only apply for an individual licence pursuant to an invitation published by the Authority calling upon persons to do so.[15] The Authority must give notice of the application in the Government Gazette and inter alia:

6.1.1. include the percentage of equity ownership to be held by persons from HDGs, 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; and

6.1.2. set out the proposed licence conditions that will apply to that licence.[16]

6.2. Section 13(3) of the ECA empowers the Authority to set a limit on or restrict the ownership or control of an individual licence by regulation. The Authority is empowered to do this to promote the ownership and control of electronic communications services by HDGs, to promote broad-based economic empowerment or promote competition in the ICT Sector.[17]

6.3. Once the Authority has granted an individual licence, the Authority can amend the licence after consultation with the licensee to inter alia:

6.3.1. make the terms and conditions of the individual licence consistent with the terms and conditions being imposed generally in respect of all individual licences of the same type; and

[15] Section 9(1) of the Electronic Communications Act
[16] Section 9(1)(b) and (c) of the Electronic Communications Act
[17] Section 13(3)(a) and (b) of the Electronic Communications Act

6.3.2. where the Authority is satisfied that the amendment is necessary to ensure the achievement of the objectives of the ECA.[18]

6.4. The 2010 Licensing Regulations[19] were gazetted by the Authority on 14 June 2010 and they regulate and prescribe inter alia the process and procedures for amending, transferring, surrendering and renewing individual licences.

6.5. These regulations apply to all individual licences issued by the Authority, licences converted in terms of the ECA and all applications for a special temporary authorisation for testing purposes, demonstrations and research and development.[20] The regulations do not regulate the process and procedures in respect of applications for and the granting of radio frequency spectrum licences.[21]

6.6. In respect of new applications for individual licences, the regulations merely set out the administrative aspects of the type of information required to make an application to and the process of submitting the application to the Authority.

6.7. In respect of an application for the transfer of a licence or the transfer of a control interest in a licensee, the application will be evaluated on the basis of the promotion of competition in the ICT Sector, interests of consumers and equity ownership by HDPs.[22]

6.8. Regulation 12 of the 2010 Licensing Regulations, gives the Authority a discretion to refuse to renew or transfer a licence if the licensee:

6.8.1. has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of the ICASA Act; or

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[18] Section 10(1)(a) and (f) of the Electronic Communications Act
[19] Government Notice 522 in Government Gazette 33293 of 14 June 2010
[20] Regulation 3 of the Licensing Processes and Procedures Regulations
[21] Regulation 2(2) of the Licensing Processes and Procedures Regulations
[22] Regulation 11(4) of the Licensing Processes and Procedures Regulations

6.8.2. has not paid the licence fees due and payable at the date of the application; or

6.8.3. intends to transfer to a transferee whose ownership and control by HDPs is less than 30%.

6.9. The requirement for a minimum 30% HDG equity ownership does not apply where the Transferee (in a transfer application) or Applicant (in a renewal application) is a wholly owned state entity, which is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999); and provides documentation proving either that the Transferee or the Applicant: i. has been granted BBBEE facilitator status; or ii. has Management and Control by black persons which is no lesser than 60%.[23]

6.10. Despite regulation 12 giving the Authority the discretion to refuse a renewal or transfer of a licence, the Authority gazetted a notice titled *"Ownership by historically disadvantaged groups in relation to individual electronic communications service (IECS) and individual electronic communications network service (IECNS) licence transfer applications*"[24] which confirms that:

6.10.1. the obligation contained in the individual licence requiring equity ownership by HDGs to be no less than 30% must continue to exist even during and or after the transfer of the individual licence;

6.10.2. the Authority does not have the discretion to approve an application for the transfer of an individual licence where the transferee has less than 30% ownership held by HDGs; and

6.10.3. all IECS and IECNS licence transfer applications submitted to the Authority from 10 October 2014, which do not have 30% equity ownership by HDGs, will not be approved.

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[23] Licensing Processes and Procedures For Individual Licences Amendment Regulations, 2018 Published In Government Notice 767 Of 2018 In Government Gazette 42087 of, 5 December 2018
[24] Government Notice 881 in Government Gazette 38087 of 10 October 2014

7. LEGISLATIVE REQUIREMENTS SPECIFIC TO CLASS LICENCES

7.1. Unlike with the individual licences, the requirement for a minimum equity ownership to be held by persons from HDGs does not apply.

7.2. The Authority may issue a class licence upon receipt of written registration and satisfaction that the applicant is a natural person, a citizen of the Republic of South Africa; or a juristic person registered under the laws of the Republic of South Africa and has its principal place of business located within the Republic of South Africa.[25]

7.3. The Authority has gazetted regulations on the standard terms and conditions for class licences[26] which set out terms and conditions that the Authority may impose on class broadcasting licences, ECNS licences and ECS.

7.4. These regulations require a licensee of any type of class licence to submit written notice to the authority within seven days of the occurrence of any changes in their name, contact details, physical address, financial year or shareholding.

8. A BRIEF HISTORY OF EMPOWERMENT TERMINOLOGY

8.1. The Constitution provides that *"to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."* Parliament has passed many pieces of legislation to give effect to the provisions of section 9 of the Constitution. The Constitution does not provide a definition for the persons who are to be the recipients of the measures to protect or advance them. Consequently, there has been a lack of consistency with regards to the terms used and how the different terms are defined in different legislation.

8.2. Three examples are provided below:

[25] Section 16(1) of the Electronic Communications Act
[26] Government Notice 525 in Government Gazette 33296 of 14 June 2010

8.2.1. The Preferential Procurement Policy Framework Act[27] uses the term *"persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability*". The now repealed 2001 regulations to the PPPFA used the term *"historically disadvantaged persons"* and defined it as-

a South African citizen –

(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa,1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa,1993 (Act No 200 of 1993) ("the Interim Constitution"); and / or

(2) who is a female; and / or

(3) who has a disability:

Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI.

The 2017 regulations to the PPPFA which repealed the 2001 regulations no longer contain a reference to historically disadvantaged persons, having replaced this term with Black People, although the term is still contained in the principal legislation.

8.2.2. The Electronic Communications and Transactions Act[28] uses the term historically disadvantaged persons and communities but does not define this term.

27 Act 5 of 2000
28 Act 25 of 2002

8.2.3. The Mineral and Petroleum Resources Development Act[29] defines a historically disadvantaged person as *"(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect, (b) any association, a majority of whose members are persons contemplated in paragraph (a); (c) a juristic person, other than an association, which –*

(i) is managed and controlled by a person contemplated in paragraph (a) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or

(ii) is a subsidiary, as defined in section 1(e) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (c)(i)."

8.3. Section 2(l) of the repealed Telecommunications Act sets out that one of its objects was to *"encourage ownership and control of telecommunication services by persons from historically disadvantaged groups."* This is the first juncture at which the concept of HDG's was introduced to the telecommunications industry. This term was however not defined in the Telecommunications Act.

8.4. The 2003 Regulations, published in terms of the Telecommunications Act, set parameters applicable to the ownership and control of holders of a telecommunication service licence, and defined the concept of "historically disadvantaged persons" as:

(a) natural persons, who before the Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993) came into operation,

29 Act 28 of 2002

were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion;

(b) an association, a majority of whose members are natural persons referred to in regulation (a) above;

(c) a juristic person other than an association, and natural persons referred to in regulations (a) and (b) above own and control more than twenty-five percent of such juristic person's issued share capital (directly or indirectly) or members' interests and are able to control a majority of the juristic person's votes;

(d) a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b) or (c) above own and control more than twenty-five percent of such juristic person's or association's issued share capital or member's interest and are able to control a majority of its votes;

(e) a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b), (c) or (d) above possess the power to direct or cause the direction of the management and policies thereof whether through the direct or indirect ownership of issued share capital, by contract or otherwise.

8.5. The Authority has received advice that although the 2003 Regulations have not been repealed, the passage of subsequent legislative and regulatory provisions such as the 2014 amendments to the ECA and the 2010 Licensing Regulations has diminished its relevance and applicability. The Authority therefore intends to repeal the 2003 Regulations in the Proposed Regulations.

9. BROAD-BASED BLACK ECONOMIC EMPOWERMENT

9.1. In and around 2004, a framework for B-BBEE was established in terms of the B-BBEE Act. The B-BBEE Act is aimed at the economic advancement of Black

People[30] in South Africa. The B-BBEE Act, as amended, is the framework legislation which regulates B-BBEE and sets out the objectives to be achieved and the way to achieve these objectives. The B-BBEE Act is implemented by the DTI and is general in its application.

9.2. Section 9 of the B-BBEE Act gives the Minister of Trade and Industry the power to issue Codes of Good Practice for the purpose of giving content to the manner in which the objectives of the Act should be achieved. In particular, section 10 of the B-BBEE Act provides that every organ of state (which includes the Authority) must apply any relevant code of good practice issued in terms of the B-BBEE Act.

9.3. The current generic scorecard which is used to measure B-BBEE compliance is contained in the B-BBEE Codes which came into effect on 1 May 2015 and contains five elements against which B-BBEE compliance is measured and assessed. The scorecard works on a points system, which is calculated out of 109 points, with each element being allocated a certain number of points. The following elements are measurable:

9.3.1. Ownership, with 25 points;
9.3.2. Management Control, with 19 points;
9.3.3. Skills Development, with 20 points;
9.3.4. Enterprise and Supplier Development, with 40 points; and
9.3.5. Socio-Economic Development, with 5 points.

9.4. Section 3(2) of the B-BBEE Act provides a trumping provision in that in the event of any conflict between the B-BBEE Act and any other law in force immediately prior to the amendments coming into effect, the B-BBEE Act prevails if the conflict specifically relates to a matter dealt with in the B-BBEE Act.

9.5. The perceived conflict between empowerment under B-BBEE legislation and empowerment under the ECA (prior to the 2014 amendments) and the

[30] The Act defines black people as: a generic term which means Africans, Coloureds and Indians - (a) who are citizens of the Republic of South Africa by birth or descent; or (b) who became citizens of the Republic of South Africa by naturalisation - (i) before 27 April 1994; or (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.

survival of the 2003 Regulations, raised a number of ownership and control issues which ultimately, amongst other things, resulted in the Authority publishing the 2009 Discussion Document.

9.6. Amendments were effected to the B-BBEE Act[31] and assented to on 23 January 2014, but only came into effect in October 2014, to inter alia promote compliance by organs of state and public entities and to strengthen the evaluation and monitoring of compliance.

9.7. Following the amendments to the B-BBEE Act, the ECA was amended[32] inter alia to align the ECA with B-BBEE. In addition to the amendments detailed above, the 2014 changes to the ECA include, inter alia:

9.7.1. the insertion of a definition of B-BBEE;

9.7.2. the substitution of the definition of ICT Charter from the Black Economic Empowerment Charter for the ICT Sector to the ICT Sector Charter, a sector code on B-BBEE, issued in terms of the B-BBEE Act; and

9.7.3. the amendment of section 9(2)(b) of the ECA to read as follows:

"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." Section 4(3)(k) of the ICASA Act permits the Authority to "*make regulations on empowerment requirements to promote broad-based black economic empowerment"* when giving notice of an application for an individual licence.

[31] The amendments were in terms of the Broad-Based Black Economic Empowerment Amendment Act No 46 of 2013
[32] The amendments were made in terms of the Electronic Communications Amendment Act

9.8. In addition to considering B-BBEE, the Legislature therefore appears to have elected to retain the protection and advancement of a wider category of beneficiaries, those being HDGs.

10. SCOPE OF B-BBEE CODES

10.1. Each element of the generic scorecard has in place its own scorecard that breaks down the element into categories. Specific formulae are used to determine an actual score. The cumulative points achieved determine the entity's B-BBEE Status and Recognition Level.

10.2. In general, from a legislative perspective, compliance with the B-BBEE Codes is not compulsory. There are no mandatory minimum targets that must be met. Rather, an entity is assessed against the portion of the target that they have been able to meet, if at all.

10.3. However, B-BBEE compliance is an important requirement and is applicable when:

10.3.1. entities undertake any economic activity with organs of state and public entities; and

10.3.2. entities undertake economic activity, whether directly or indirectly, with entities referred to in paragraph 10.3.1 above.

10.4. Section 10 of the B-BBEE Act makes it compulsory for all organs of state and other public entities to take into account relevant B-BBEE Codes when awarding contracts in the private sector; and in relation to the granting of statutory permits, licences, concessions, the formation of public private partnerships and the sale of state owned assets.

10.5. In terms of sections 10(3) and (4) of the Act, industry specific sector codes, developed in accordance with the principles set out in the B-BBEE Codes, may be published and will apply to entities falling within such industries instead.

11. ICT SECTOR CODES

11.1. On 6 June 2012, the Minister of Trade and Industry issued the 2012 ICT Sector Code which became binding on all stakeholders, operating within the ICT Sector. To this end, their compliance with the requirements for B-BBEE would be measured in terms of the 2012 ICT Sector Code.

11.2. Following the 2014 amendments to the B-BBEE Act and B-BBEE Codes, in and around November 2016, the Revised ICT Sector Code was published by the Minister of Trade and Industry and replaced the 2012 ICT Sector Code.

11.3. The Revised ICT Sector Code is applicable to the following entities:

11.3.1. all persons, organisations and entities operating in the ICT Sector in South Africa. Just like the 2012 ICT Sector Code, the Revised ICT Sector Code does not define ICT Sector but provides in its introduction that the ICT Sector stakeholders comprise of the broadcasting, electronic, information technology and telecommunications sub-sectors;

11.3.2. all public entities in terms of the B-BBEE Act, including those listed in schedule 1, 2 or 3 (parts A, B and C) of the PFMA that fall within the ICT Sector. The application of the Revised ICT Sector Code has amended and extended from just public entities listed in schedule 2 or 3 (Parts A and C) of the PFMA that fall within the ICT Sector to all public entities in terms of the B-BBEE Act, including those listed in schedule 1. The B-BBEE Act defines a public entity to mean “a public entity listed in schedule 2 or 3 to the PFMA”; and

11.3.3. any public entity listed in schedule 3 (Parts B and D) which is a trading entity which undertakes any business with an organ of state, public entity or any other enterprise that falls within the ICT Sector.

11.4. The ownership element measures the effective ownership of the enterprise by Black People. In order to achieve all the points allocated to ownership

under the Revised ICT Sector Code, as a minimum, 30% of the entity's shareholding must be in the hands of Black People. Amongst other things, failure to meet the 30% target does not render the entity non-compliant, but rather affects the B-BBEE Status Level which the entity is able to achieve.[33]

12. DIFFERENCES BETWEEN THE EMPOWERMENT OF HDGS IN THE ECA AND THE EMPOWERMENT OF BLACK PEOPLE IN THE B-BBEE ACT

12.1. B-BBEE legislation is primarily focused on the empowerment of Black People.

12.2. By contrast, empowerment in the ICT Sector is commonly understood to apply to a wider pool of beneficiaries known as HDGs, HDP and/or HDI's, which terms are used interchangeably notwithstanding the fact that they are defined differently in different pieces of legislations and in some instances not at all.[34]

12.3. The ECA assesses empowerment only on the element of ownership, whereas B-BBEE assesses empowerment across a broad range of elements listed in paragraphs 9.3.1 to 9.3.5.

12.4. Although the Revised ICT Sector Code lists the types of entities that are bound by its terms, there are no hard targets in the Revised ICT Sector Code which stipulate strict compliance given that B-BBEE compliance as regulated under the DTI is driven by peer pressure through preferential procurement. By contrast, the ECA adopts a strict compliance approach in requiring licensees to be 30% owned and controlled by HDGs when applying for, renewing or transferring a licence.

12.5. Currently, the requirement for a minimum of 30% ownership by HDGs is only applicable to individual licence applicants and holders. The requirement for the Authority to apply relevant B-BBEE Codes when issuing licences is however not limited in any way. The distinction between the empowerment

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[33] The 30% compliance target was introduced by the 2012 ICT Sector Code and deviated from the ownership compliance target of 25% + 1 vote which is set out in the generic B-BBEE Codes.
[34] See clause 8 above. In addition, the 2010 Licensing Regulations defined HDPs to include *"South African citizens who are Black People (i.e. Africans, Indians and Coloureds), women, or people with disabilities"*.

of HDGs in the ECA and the empowerment of Black People in the B-BBEE Act is tabulated below:

	ECA	B-BBEE ACT
Beneficiaries	HDGs – include: • Black People • women, and • People with disabilities	Black People ONLY
Assessment of empowerment	Equity Ownership	Five elements including: • Ownership • Management Control • Skills Development • Enterprise and Supplier Development • Socio-Economic Development
Targets	• Compulsory compliance • Mandatory 30% Requirement	• Not Compulsory • No hard targets

PART B: OWNERSHIP AND CONTROL CONSIDERATIONS

13. LEGISLATIVE FRAMEWORK ON OWNERSHIP

13.1. The ECA uses the term “ownership” three times. The first reference is in section 9 which regulates the application for individual licenses and requires a minimum percentage equity ownership to be held by HDGs. Section 13(2) empowers the Authority to make regulations governing ownership in order to promote ownership by HDGs and to promote competition. Section 13(3) also empowers the Authority to make regulations governing individual licences in the broadcasting sector in order to ensure a diversity of views.

13.2. The ECA does not define the term “ownership”. However, the 2003 Regulations define ‘ownership interest’ as ‘any direct or indirect ownership of issued share capital of more than five per cent in a licensee’. The 2003 Regulations contain a methodology for the calculation of an indirect ownership using a multiplier.

13.3. The 2003 Regulations do not permit a person or her affiliates to hold an ownership interest or a control interest in more than one licensee in a telecommunication service in a concentrated market. The 2003 Regulations further require licensees to maintain a record of, inter alia, the details of persons holding an ownership interest in them. A transfer of an ownership interest requires notification to the Authority within 10 days of the licensee updating its records (such records must be updated within 30 days of the transfer).

13.4. A transfer of a control interest in the licensee or a decrease in the ownership interests held by HDGs within the first two years of the initial grant of the licence, however, requires the prior approval of the Authority. Notably, the transfer of an ownership interest which does not also result in a change in the control interest does not require the Authority’s prior approval.

13.5. The 2010 Licensing Regulations do not provide a definition for the term “ownership”. However, Form G which licensees are required to complete when applying for a transfer of ownership requires the disclosure of all

ownership interests in the applicant. However, only the details of juristic persons with 5% or more percentage ownership must be disclosed. Furthermore, details of the persons holding an ownership interest in the persons holding an ownership interest in the applicant are also required.

13.6. The Standard Terms and Conditions for Individual Licences[35] also do not define "ownership" or "ownership interest". These regulations require Individual Broadcasting Services licensees to notify the Authority within 7 days of the occurrence of a change in the shareholding of a licensee. Licensees may not change shareholding in a manner which reduces the ownership and/or control by HDGs in the licensee below the 30% threshold or where the 30% threshold is not yet held, without the prior written approval of the Authority. The penalty for not complying with these regulations is a fine of not more than R100 000.

13.7. Individual ECS and ECNS licensees must provide details of a change in shareholding in 7 days, provided that all changes comply with licence terms and conditions and the ECA.

13.8. The Authority has experienced several challenges arising from the legislative framework described above. The Authority has received numerous notifications of a change in shareholding from licensees which in the Authority's view required the prior written consent of the Authority. In these circumstances, the transaction comes to the Authority's attention after it has been implemented and the parties to the deal can therefore not "un do" the deal. In such instances the Authority has referred the offending licensee to the CCC.

13.9. It is therefore clear that certainty regarding when a change in shareholding triggers a requirement for the Authority's consent and when a mere notification will be acceptable is important.

[35] Published in terms of sections 4 and 8 of the ECA in the Government Gazette 33294 in GNR 523 of 14 June 2010

14. LEGISLATIVE FRAMEWORK ON CONTROL

14.1. Unlike the term ownership, the term control is used in various contexts in the ECA. Examples include the limitations on control of commercial broadcasting in certain circumstances set out in sections 64, 65 and 66 and section 31(2A) which governs a radio frequency spectrum licence. Many of the provisions mentioned above govern the obligations of licensees in circumstances of a transfer of control. Save for section 66(5) of the ECA, which limits cross-media control between radio and newspapers, and which defines a 20% shareholding in a commercial radio licence as control, the ECA does not define the term control.

14.2. The 2003 Regulations define control interest as circumstances where-

"in the absence of proof to the contrary, [a] 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."

14.3. This definition of "control interest" is similar to the definition of "control" provided for in the Competition Act, with the exception that a 25% shareholding is an additional "bright line" form of control under the 2003 Regulations. The difference between the two provisions is that the Competition Act requires a case-by-case assessment in respect of the form of control where the bright-line threshold of 50% is not crossed.

14.4. The Authority regularly evaluates notifications of a change in shareholding and requests for prior approval in respect of a change in control of licensees. In evaluating these applications, the Authority is of the view that a clear definition of the term control which speaks to the objects of the ECA and ICASA is essential for the industry.

14.5. Control has different definitions and implications under company law, competition law and ICT Sector law, with the differences largely being driven by corporate governance concerns under company law and by the mandates of the authorities under competition and the ICT Sector. The Authority has considered the definition of control in the Companies Act and in the Competition Act to inform its own definition of control.

Company Law

14.6. Section 2(2) of the Companies Act provides that—

a person controls a juristic person, or its business, if—

(a) in the case of a juristic person that is a company—

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or (ii) that first person together with any related or inter-related person, is—

(aa) 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

(bb) 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;

...

(d) 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 in paragraph (a), (b) or (c).

14.7. Section 3(1) of the Companies Act provides that a company is—

(a) a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination-

(i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(ii) has or have 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; or

(b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a).

14.8. These sections of the Companies Act, read together, indicate that a firm is understood to control another where it has a majority of voting rights, either directly through votes at shareholder meetings, or indirectly through votes at a board meeting. These thresholds for control are often referred to as "bright line" thresholds. Alternatively, a firm has "material influence" under the Companies Act if it has de facto control akin to these bright line forms of de iure control.[36]

14.9. Chapter 5 of the Companies Act contains various consent and compliance requirements. However, Regulation 83(1)(a) and (b) of the Companies Regulations, 2011 to the Companies Act specifically provide that provisions of Chapter 5 of the Companies Act (Fundamental Transactions) do not apply in respect of a transaction that involves only a person with a non-controlling beneficial interest in a regulated company, or two or more unrelated persons who individually own non-controlling beneficial interests in a regulated company and are not acting in concert (i.e. cross-shareholdings).

Competition Law

14.10. Section 12(2) of the Competition Act 89 of 1998 provides that a person controls a firm if that person—

(a) beneficially owns more than one half of the issued share capital of the firm;

(b) 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;

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

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

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[36] Henochberg on the Companies Act 71 of 2008 (citing *De Klerk v Ferreira and Others* 2017 (3) SA 502 (GP) para 80.)

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

(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) 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 in paragraphs (a) to (f).

14.11. The concept of control is relevant for jurisdiction of the competition authorities under section 12(1)(a) of the Competition Act, which defines a merger as occurring when— *one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of a business of another firm*.

14.12. A merger that meets the merger notification thresholds will be notifiable to the competition authorities. Generally, merger review attempts to capture changes in control, rather than acquisitions of passive financial interests, as it is only under circumstances of control that an acquiring firm can be said to be able to affect competitive parameters—price, quality or and quantity decisions—in the target firm.

14.13. The South African competition authorities have in the past recognised that control is measured on a continuum, and that there can be a range of different control scenarios, ranging from no control to sole control, with variations of joint control in between.

14.14. In *Ethos Private Equity Fund IV / Tsebo Outsourcing the Competition Tribunal* established that the acquisition of more than 50% of the shares in a company in terms of section 12(2)(a) would cross what is considered as a "*bright line*",

and that notification would be required even if the accretion in market shares is small.[37]

14.15. The Competition Tribunal clarified in Ethos that—

> *As the Commission has argued, other jurisdictions adopt bright lines not because they are perfect in each case, but because by and large they are consistent with commercial reality and, most importantly, they help create certainty for both regulator and regulated*.[38]

14.16. In Distillers Corporation (South Africa) / Bulmer (SA) (Pty) Ltd, the Competition Tribunal stated that—

> *the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities to examine a wide range of transactions which could result in an alteration of the market*.[39]

14.17. What differentiates the control provisions in the Competition Act from control as defined in the Companies Act is that the Competition Act recognises the potential for veto rights to allow a firm to control the strategic issues of a firm (that is, it recognises negative control in addition to positive control). In general, the acquisition of veto rights or positive consent requirements by any one shareholder or group of shareholders in respect of the:

14.17.1. business plan;
14.17.2. budget;
14.17.3. strategic plans; or
14.17.4. appointment of key employees (including CEO and CFO), who are capable of materially influencing strategic direction of the firm;

would be regarded as the acquisition of control.

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[37] Case No. 30/LM/Jun03
[38] Ibid at para 35
[39] Case No. 08/CAC/May01 at p 46

14.18. For example, a firm that can appoint 2 out of 5 directors to the board and which can vote regarding one or more of the above topics would be more likely to be regarded as having negative control. If that firm held 30% of the shares and could vote in proportion to its shareholding, it would also have negative control in respect of special resolution matters requiring 75% or more of the votes. Therefore, a firm with more than a 25% shareholding would be regarded as having control for competition law purposes, depending on which matters are designated special resolution matters. While it is possible for firms to alter the threshold for special resolution matters, the threshold must be 61% at a minimum in terms of section 65(8) of the Companies Act. Therefore, in most cases, a shareholder with at least 39% shareholding will have negative control.

14.19. A firm could also have de facto control but no de iure control if it had control over strategic issues in practice. The assessment of control is determined on a case-by-case basis, having regard to the constitutional documents of the company and past voting patterns.[40]

14.20. Competition law also recognises that it is possible for joint control and sole control to exist simultaneously. For example, the Competition Appeal Court in Distillers supra noted the following example:

14.21. A beneficially owns more than half the issued share capital of the firm. He concludes an agreement with B in order that the latter may run the business. B agrees provided that he obtains control over the appointment to the board of directors as well as of senior staff and marketing policy. In such a situation A would control the firm as defined in terms of section 12(2)(a) and B would exercise control as defined in term[s] of section 12(2)(g). In short, while A would have ultimate control, B would have control of a sufficient kind to bring him within the ambit of control as defined in section 12.

14.22. The Competition Tribunal in *Iscor Limited / Saldanha Steel (Pty) Ltd* held that a change from joint control (unfettered) to sole control (unfettered) necessitates notification.[41]

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[40] See, e.g. *Life Healthcare Group (Pty) Ltd and Joint Medical Holdings Ltd*, Case 74/LM/Sep11.
[41] Case No. 67/LM/Dec01

14.23. Broadly speaking, the concept of control under both the Companies Act and the Competition Act is aimed at determining whether two entities can be treated as being independent in terms of their actions. However, control as defined in the Companies Act is generally understood to be more formalistic and less nuanced than under the Competition Act, which recognises negative control in addition to bright line control, and de facto control in addition to de iure control, as even negative control and de facto control could result in an effect on competition following a merger.

15. CONCURRENT JURISDICTION BETWEEN ICASA AND THE COMPETITION COMMISSION

15.1. In addition to the purpose of the Proposed Regulations required by section 13 of the ECA being to promote ownership and control by HDGs, such regulations must also promote competition in the ICT Sector. Such regulations must also be cognisant of the concurrent jurisdiction of the competition authorities in terms of the Competition Act.

15.2. In terms of section 3(1A)(b) of the Competition Act, the concurrent jurisdiction between the Competition Commission and a regulatory body to which the Competition Act applies must be managed by an agreement. There is some debate, however, regarding whether an authority can cede its jurisdiction that is established in terms of legislation by agreement.

15.3. The Memorandum of Agreement between the Commission and the Authority was published on 20 September 2002 and records that the two bodies agree to coordinate their investigations, evaluations and analysis of mergers and complaints involving participants in the telecommunications and broadcasting industries. The Agreement clarifies that while the Commission will consider prohibited practices as defined in the Competition Act, the Authority will consider contraventions of telecommunications and broadcasting licence conditions and legislation. Where conduct implicates both, the Agreement provides that there shall be concurrent applications to both the Commission and the Authority.[42] Thereafter, the authorities should make independent

[42] Government Gazette, No. 23857 at para 2.1

determinations and may consult with one another during their processes.[43] The Memorandum of Agreement therefore seems to establish parallel, consultative processes.

15.4. In *The Competition Commission of South Africa and Telkom SA Limited*,[44] Telkom challenged the competition authorities' jurisdiction over a matter that implicated concurrent jurisdiction but was submitted to the Authority for consultation. The case involved a complaint to the Competition Commission that Telkom had engaged in abuse of dominance and price discrimination against downstream value added network providers.

15.5. Telkom argued that the conduct was authorised by the Telecommunications Act and its public switched telecommunications licence and therefore was subject to review by the Authority, who should have taken the lead on the investigation, rather than the Competition Commission. The SCA found that as a question of law, a failure to abide by the Memorandum of Agreement did not affect the legality of the Commission's jurisdiction, and that there was evidence, in any event, that there had been cooperation and consultation between the two bodies.

15.6. The Supreme Court clarified that the objects of the Telecommunications Act are to ensure the development of a competitive and effective telecommunications industry, as well as fair competition within that industry. While there is some concurrent jurisdiction between the Authority and the competition authorities with respect to certain conduct, this concurrency is limited to the particular areas of overlap. For example, under section 36(1)(d) of the Telecommunications Act, the Authority may direct Telkom to take or refrain from taking a step that gives it an advantage over a competitor, conduct which could equally be dealt with under the Competition Act's abuse of dominance provisions in section 8, depending on the circumstances. The Supreme Court held that the competition authorities are specialist structures that were designed for the resolution of particular disputes, and that it would be preferable to use that specialist system, where possible. Consequently, the Supreme Court considered that the Competition Tribunal, as a specialist

[43] Ibid at para 2.2
[44] [2010] 2 All SA 433 (SCA)

body, would be best placed to consider whether it had jurisdiction over the complaint.

15.7. In short, the decision in the Telkom case indicated that with respect to matters of concurrent jurisdiction, the jurisdiction of the competition authorities is not ousted in circumstances where the authorities do not abide by the Memorandum of Agreement by consulting with the Authority, and vice versa. Following this decision, the Competition Tribunal imposed an administrative penalty of R449 million on Telkom for abusing its dominance between 1999 and 2004.

15.8. Section 4B(8)(b) of the ICASA Act limits ICASA's authority when it states that—

the Competition Commission had primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act.

15.9. Section 4B(9) of the ICASA Act provides that, unless otherwise agreed, the Authority may not take any action where a matter is being dealt with by another authority or institution. In other words, the ICASA Act envisages that the Commission and Authority processes should occur consecutively rather than in parallel. The ICASA Act leaves the precise exercise of powers up to the Memorandum of Agreement. The introduction of the concept of primary authority creates ambiguity about the roles of the Authority and the competition authorities.

15.10. However, a review of the cases implicating both the competition and the Authority processes indicates that the two processes do occur independently and that participation and consultation as provided for in the Memorandum of Agreement is not undertaken in practice.

PART B – INQUIRY INTO THE APPLICATION OF THE REVISED ICT CODES

16. 2017 DISCUSSION DOCUMENT

16.1. The Authority published the 2017 Discussion Document on 31 March 2017 inviting input from affected stakeholders in the ICT Sector and the public at large.

16.2. The closing date of 8 June 2017 for submission of representations was extended to 30 June 2017. The authority received written representations from:

16.2.1. the American Chamber of Commerce in South Africa ("ACCSA");
16.2.2. AT&T, BT Orange Business Services and Verizon;
16.2.3. Cell C;
16.2.4. George Matlakala;
16.2.5. Internet Service Providers' Association ("ISPA");
16.2.6. Internet Solutions;
16.2.7. Kagiso Media;
16.2.8. Liquid Telecom;
16.2.9. MTN;
16.2.10. Multichoice;
16.2.11. National Association of Broadcasters ("NAB");
16.2.12. Primedia Broadcasting;
16.2.13. South African Communication Forum ("SACF");
16.2.14. Telkom;
16.2.15. Tracker;
16.2.16. Vodacom;
16.2.17. Progressive Blacks in Information and Communication Technology ("PBICT"); and
16.2.18. Wireless Access Providers' Association of South Africa ("WAPA").

16.3. On 23 April 2018, the Authority published a notice for public hearings to be held in respect of the 2017 Discussion Document and related matters.

16.4. Public hearings were held on 16 and 17 May 2018 where stakeholders were given an opportunity to make oral submissions. SAFC, NAB, MTN, Telkom, Primedia, Microsoft (representing the ACCSA), ISPA, WAPA, Vodacom, Cell C, Liquid Telecom, Progressive Blacks in Information and Communication Technology ("PBICT"), and Kagiso Media made oral submissions.

16.5. During the hearings, stakeholders were given an opportunity to expand on their written submissions, provide clarity on issues raised and address the Authority on other relevant topics related to the inquiry. The pertinent aspects of these submissions have been incorporated in the summaries detailed below.

16.6. Some participants, such as ISPA and WAPA undertook to canvass the views of their members in response to questions raised by the Authority's panel and provide a written response thereto. Such responses were due to be submitted within 7 days of the oral hearing. The Authority has not received any responses.

16.7. The gist of the PBICT's submissions related to the need to assist black SMME's to enter the ICT Sector by amongst other things, waiving certain upfront capital costs, providing subsidies and, where appropriate, revoking licences which are dormant and issuing them to black SMMEs. While these submissions are important and raised many issues which the Authority may need to consider in ensuring substantive empowerment, the submissions do not directly address the key questions asked during this inquiry and accordingly have been set aside for further consideration in a separate process.

17. AUTHORITY'S POSITION ON KEY ISSUES FLOWING FROM THE INQUIRY

17.1. The purpose of the 2017 inquiry has been to determine the Authority's position in respect of:

17.1.1. the implementation of the ICT Sector Code in light of the ECA's ownership requirements in respect of HDGs; and

17.1.2. the promotion of B-BBEE and equity ownership by HDGs as required in terms of the ECA; and

17.1.3. the concepts of "ownership" of and "control in" a licence.

17.2. The Authority's questions were framed in four broad themes, namely:

17.2.1. the application of the HDG equity requirement;

17.2.2. the manner in which to verify compliance with HDG requirements;

17.2.3. what constitutes ownership and what constitutes control; and

17.2.4. the application of the Revised ICT Sector Code.

Empowerment

17.3. In essence, the themes set out in paragraphs 17.2.1, 17.2.2 and 17.2.4 talk to the manner in which empowerment is to apply in the ICT Sector.

17.4. Section 10 of the B-BBEE Act requires all organs of state and public entities to apply the Sector Codes, relevant to it, when, amongst other things, determining qualification criteria for issuing licences. The trumping provision in the B-BBEE Act also provides that where there is a conflict between any legislation and the B-BBEE Act in respect of B-BBEE, the B-BBEE Act prevails. The question which the Authority has interrogated is whether there is in fact a conflict between the B-BBEE Act and the ECA.

17.5. In coming to a position on the issues, the Authority has closely examined the notion of empowerment and the varied manner in which it has been applied.

17.6. To date, the objective to achieve empowerment in the ICT Sector (as mandated in section 2(h) of the ECA) has taken a narrow approach and focused to a large degree on ownership, in particular, ownership interests in licences. Furthermore, in the ICT Sector, it is undisputed that the concept of empowerment (through ownership) has also focused on the concept of HDGs.

17.7. In considering the ECA's narrow "ownership" approach to empowerment, it is important to take note that the empowerment of HDGs (by way of equity requirements), as set out in section 9(2)(b) of the ECA, is specific to the concept of licensing in the ICT Sector. Empowerment as applied in the ICT

Sector, in terms of the ECA, is a much narrower concept than empowerment under the B-BBEE Act.

17.8. In contrast, B-BBEE is a wider concept than just ownership. It is defined 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…"* and seeks to advance the empowerment of Black People across a broader spectrum of interests.

17.9. As such, at its essence the relevant question is whether, vis a vis the ECA and the B-BBEE Act, there is a conflict between the narrow ICT notion of empowerment and the more far-reaching notion of empowerment under B-BBEE framework. It is the Authority's position that while the two regimes may be distinct, they are not in conflict. Moreover, even if they were in conflict, they are not irreconcilable.

17.10. In the ICT Sector, as with the mining sector, the focus of empowerment has always been on ownership as beneficial ownership is in many respects, the most instrumental way for historically disadvantaged people to gain access to the economy. This fact is recognized in the B-BBEE Codes and ICT Sector Codes where ownership is also a key, priority element.

17.11. It is notable that the ECA has been amended since the amendments to the B-BBEE Act and further amendments are currently being considered by Parliament, yet the Legislature has not removed the mandatory equity shareholding requirement.

17.12. Some industry participants expressed the view that the references to HDG in the ECA were simply an oversight, while others state that it was not removed from the ECA in order to give the Authority an opportunity to make regulations giving effect to the ICT Sector Code. Presumably such industry participants believe that once the Proposed Regulations have been put into effect the ECA will be amended to delete reference to HDGs. The Authority is not aware of any intention on the Legislature's part to do away with the HDG equity ownership requirement.

17.13. For this reason, the Authority is of the view that a mandatory ownership target must be achieved and maintained by licensees. But for subminimum

targets, the B-BBEE Codes and ICT Sector Code do not impose mandatory minimum targets. However, there is no legislation which prohibits the Authority from retaining a mandatory minimum equity ownership target as a key component when assessing licence applications.

17.14. In its oral submission, MTN sought to make the point that the Authority cannot make targets that exceed those that are set out in the ICT Sector Code unless it goes through the process set out in provision for in the BEE Codes and liaises with the Minister of Trade and Industry. In requiring a mandatory minimum requirement, the Authority is not exceeding a target set out in the ICT Code but rather it sets the 30% Black ownership target in the ICT Codes as a mandatory minimum.

17.15. As discussed in Part A , the Authority started with a definition of HDI and HDG in the 2003 Regulations which was wide and encompassed a large number of beneficiaries. The 2010 Licensing Regulations narrowed the focus of this definition to some extent. Notwithstanding the wide-ranging definition of HDG, the Authority has noted that the industry has still not transformed, and ownership by Black People in particular is still low. Notably, the High Court in the Vodacom / Neotel matter in discussing the provisions of section 9(2)(b) of the ECA described the mandatory minimum as 30% BEE (rather than HDG) ownership. The Authority is therefore desirous of moving away from the broad concept of HDI / HDG in the context of the ECA and on the empowerment of Black People in particular.

17.16. In considering, amongst other things, Telkom's submissions during the public hearings, the Authority's position is that state ownership of licensees will be recognised as ownership by Black People where the state entity is designated as a B-BBEE Facilitator by the Minister of Trade and Industry, in accordance with the B-BBEE Codes.

17.17. When considering the obligation to apply the ICT Sector Code in determining qualification criteria, it is the Authority's position that the Revised ICT Sector Code can be applied in conjunction with a mandatory minimum equity ownership target.

17.18. Although the Authority is mandated by the B-BBEE Act to apply any relevant sector codes when issuing licences, the manner in which the codes are applied are within the Authority's control, namely:

17.18.1. in the event that the Authority applies B-BBEE as a pre-qualification criteria, it may set a minimum B-BBEE Status level; or

17.18.2. in the event that the Authority applies B-BBEE as a part of a matrix of considerations, including pricing, B-BBEE levels can be ranked. In such a case, the Authority would determine the weight to be afforded to the B-BBEE Status level in the overall ranking. An example from government procurement is that B-BBEE levels contribute 10% or 20% to the overall score, depending on the value of the procurement, while price accounts for 90% or 80% of the overall score.

17.19. B-BBEE compliance in the context of the B-BBEE Codes and the Revised ICT Sector Code is driven by procurement and competition by suppliers of similar goods. Where an entity is the sole player in the market, B-BBEE compliance may be completely irrelevant. In considering the various submissions made, the Authority is of the view that in the context of licensing - which differs substantially from procurement - mere compliance with the Revised ICT Sector Code is not sufficient as the Authority's objective is to promote and advance empowerment. For this reason, the Authority is of the opinion that a mandatory minimum B-Status Level Six in terms of the Revised ICT Code will be compulsory for all licensees and must be maintained for the duration of the licence.

17.20. The Authority is of the opinion that a B-BBEE verification certificate can be submitted to confirm both the equity ownership requirements and the B-BBEE compliance as a whole. In assessing whether the equity ownership target has been met, the Authority is satisfied that all ownership principles in the B-BBEE Codes, except for the Modified Flow-Through Principle, may be applied.

Ownership and Control

17.21. Under section 4(1) (d) and section 13(3) of the ECA, the Authority may make regulations relating to the transfer of ownership and control of individual licences and the control of radio spectrum, activities and apparatus.

17.22. The Authority is of the view that ownership and control are distinct, but related concepts for the purposes of application of the relevant primary legislation.

17.23. Ownership is relevant primarily to measuring the HDG ownership of a licensee prescribed in section 9(2)(b) of the ECA. The recent Vodacom / Neotel High Court decision established that this should be 30% HDG ownership "at the door" of an application for a licence transfer or renewal. The Authority is aware that a number of licensees do not meet the current mandatory minimum HDG ownership requirement. In light of the move away from the concept of HDG which will require a licensee to have 30% of its shareholding in the hands of Black People, the Authority is of the view that the mandatory equity ownership requirement should be grandfathered in for existing licenses.

17.24. A technical legal definition of ownership would take into account that it is a direct concept rather than an indirect concept, because the rights attaching to ownership can be exercised only by a direct owner. However, ownership as it flows through a corporate structure is relevant to the measurement of control and consequently, the Authority recognises that a definition of "ownership interest" is relevant only insofar as it forms part of the definition of control.

17.25. Ownership is also relevant to the concentration of ownership within the broadcasting and telecommunications industries. To the extent that these cross-shareholdings are not already prohibited by sections 65 and 66 of the ECA, the Authority might consider addressing such cross-shareholdings during a substantive assessment stage of a change of control of a licence in terms of section 13(4) of the ECA.

17.26. Change of control of licenses triggers notifications and reviews by the Authority. Control, unlike ownership, is a concept that can be measured both directly and indirectly. The Authority is of the view that a broad definition of control is appropriate because the Authority would like to review applications for a wide range of transactions that might have an impact on the implementation of a licence.

18. SUBMISSIONS BY INDUSTRY STAKEHOLDERS ON 2017 DISCUSSION DOCUMENT

Below is a summary of stakeholder submissions on the questions posed by the Authority in the 2017 Discussion Document and the Authority's position on the issue, with reference to the sentiments set out in paragraph 17.

Application of HDG Equity Requirement

18.1. Question 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?[45]

18.1.1. There was a common theme amongst the submissions that class licensees should be subjected to the same requirements as those that the individual licensees must comply with. However, each stakeholder submitted different reasons for coming to this conclusion.

18.1.2. Cell C, ACCSA, and Tracker agreed that all licences issued in terms of the ECA should be subjected to the same requirement irrespective of the size of the licensee or the licence being sought.

[45] 2017 Discussion Document – par 5.1.2

18.1.3. ACCSA submitted that this introduction would be in order to establish universal compliance and monitoring. Tracker submitted that the introduction of the equity requirements to class licensees would be in the best interests of all as it would prevent companies from creating special purpose vehicles in order to meet the HDG equity requirements whilst diluting economic benefit of frequency spectrum utilisation.

18.1.4. Telkom also supports the application of HDG requirements to individual and class licensees but submitted that government ownership should be taken into account when determining HDG equity ownership. Telkom further submitted that class licensees should be granted 5 years to comply with the 30% HDG equity requirement. To do this, Telkom proposed that the ECA's HDG equity requirements be amended to allow for progressive compliance by licensees.

18.1.5. On the other hand, Kagiso Media and Primedia did not agree that the class licensee be subjected to the same equity requirements as an individual licensee. Kagiso Media submitted that different considerations may be applied in a registration process as provided for in the ECA. Kagiso Media further submitted that there should be a sliding scale of HDG equity ownership requirements up to 40% for class licences too and this will depend on factors such as the size of the operation (if it is an SMME for example the HDG equity ownership requirement ought to be lower) and whether the operation is in a start-up phase. The reference to 40% is presumably a typographical error.

18.1.6. ISPA was concerned that broadening the HDG ownership requirement to class licensees may have unintended consequences for SMMEs and entrepreneurship in South Africa. ISPA submitted that a decision was taken by the drafters of the ECA specifically to exclude class licensees from this requirement and the reasons for such decision need to be revisited when considering whether to extend the requirement. The class licensing system is intended to lower

barriers to entry. The introduction of the HDG equity requirements for class licensees creates another barrier. This barrier may however be softened if class licensees are required to comply with this requirement through certification or as exempt micro-enterprises as set out in the ICT Sector Code.

18.1.7. Vodacom argued that the awarding of class licenses should be subject to the application of the ICT Sector Code, in accordance with the requirements of section 10(1) of the B-BBEE Act. This would require the Authority to apply the overall B-BBEE compliance levels of applicants when determining the qualification criteria for class licenses, as determined in terms of the ICT Sector Code.

18.1.8. MTN submitted that there is no rational basis to distinguish between individual licensees and class licensees.

18.1.9. Tracker submitted that all licensees should be treated fairly in terms of the Constitution. In order to provide for optimal commercial benefit to be derived from the use of frequency licenses, it is in the best interest of all to have a 30% HDG equity requirement as it would prevent companies from creating special purpose vehicles in order to meet the HDG equity requirements whilst diluting economic benefit of frequency spectrum utilisation.

18.1.10. Liquid Telecom submitted that although there was no specific, mandatory equity requirement under the ECA that applies to class licences, it would be worthwhile to develop an incentive system which will apply to class licences. Class licensees who comply with the HDI requirements would be incentivised with reductions on other compliance requirements such as contribution to the universal service and access fund.

18.1.11. WAPA submitted that the majority of its members are SMMEs which have entered the market for service provision through

registering class ECS and class ECNS licences with the Authority under Chapter 3 of the ECA. Most of these licensees are individuals or juristic persons owned by a single person or a family. Consequently they were deeply concerned about the HDG requirement applying to class licensees. WAPA submitted that, should the Authority decide to apply the HDI requirements to class licences, either through HDG ownership under the ECA or through certification under the Code; it would go some way to meeting these concerns if the Authority took a position in terms of which qualifying entities are exempt from certification as stipulated under the Code.

18.1.12. Multichoice submitted that the Authority is obliged to apply the B-BBEE Act, which requires it to promote B-BBEE in accordance with the requirements of the ICT Sector Code, when granting a licence. Consequently, the licensing framework as a whole (including both class and individual licenses) and the obligations on licensees to submit copies of their B-BBEE certificates to the Authority on an annual basis should apply to the granting of both individual and class licences.

18.1.13. Primedia disagreed. Primedia submitted that the ECA stipulates only that minimum HDP equity requirements should be imposed on individual licensees. No similar requirement is stipulated in the ECA in relation to class licensees. By including HDP equity requirements only for individual licensees, the Legislature has clearly indicated that such minimum requirements should only be imposed on 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.

18.1.14. Some of the stakeholders did not address the question relating to the equity requirements for class licensees, but merely

addressed how equity requirements should be applied in the ICT Sector.

18.1.15. Internet Solutions submitted that HDG requirements should be applied to individual licensees and class licensees alike as there is no difference between class and individual licences other than the fact that class licensees are provincial whereas individual licensees are national. It submitted further that that the 30% threshold ought to be relied on by the Authority, in all current and future licence transfers and transactions which are presented to it for its consideration, as a benchmark for determining whether the transaction which requires its approval will promote the empowerment of historically disadvantaged persons. This includes black women, as stated in the ICT Sector Codes and this would promote consistency across all categories of licences and create certainty in the sector. To this end, Internet Solutions drew a comparison with the Spectrum Regulations where the 30% equity ownership requirement does not differentiate between categories of licensees.

18.1.16. It was the SACF's position, amongst other things, that class licences should not be encumbered with more onerous obligations; that the legislative framework provided a specific dispensation for class licences and class licensees who typically operate on a smaller scale than individual licensees and that a more limited set of rights are applicable. In particular the SACF submitted that class licences are typically the licence category that would enable the provision of new services while promoting innovation. As a result of the obligations associated with this licence category, the Authority 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. The SACF is of the view that the Authority ought to adopt a more circumspect approach to class licences. The Authority ought to compile information on class

licences, by gathering evidence over a period, which will allow it to address the trends that may emerge.

Authority's Position

18.1.17. The Authority acknowledges that class licensees have been excluded from empowerment obligations in order to encourage participation in the market by SMMEs. However, it must also be acknowledged that while class licenses were initially intended to capture smaller entities, the market has changed significantly such that many entities with large turnovers now have class licences but are not subject to the same criteria, in particular equity requirements, as individual licensees, with whom they compete.

18.1.18. Although the Authority is not empowered to apply minimum equity requirements on class licensees, going forward, it is the Authority's position that class licensees will be required to comply with the Revised ICT Sector Code and will need to maintain a mandatory minimum B-BBEE Status Level which would need to be assessed annually.

18.2. Question 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?[46]

18.2.1. Primedia, WAPA, Vodacom, ACCSA, ISPA and Tracker agreed that income levels and the size of the entity should be considered as criteria for differentiation in the imposition of the HDG requirement.

[46] 2017 Discussion Document – par 5.1.3

18.2.2. Vodacom submitted that by giving effect to the ICT Sector Code and taking into account an applicant for a class licensee's overall B-BBEE compliance, the Authority will be required to distinguish between entities based on annual turnover.

18.2.3. ACCSA agreed with Vodacom and similarly submitted that the concept of differentiating between the requirements to be imposed on entities based on their income and size is already covered under the Codes of Good Practice implemented by the DTI, and therefore all criteria should comply with these Codes.

18.2.4. ISPA agreed and provided that a licensee which is essentially a one-person operation should not be treated in the same manner as a mobile network operator.

18.2.5. Tracker submitted that smaller entities should be legislated to have a higher HDG than larger entities as it is more practical to implement. The HDG strategy would stimulate SMME growth. Forcing large corporates to comply with HDG requirements may result in such companies creating special purpose vehicles, which is not the intention of this legislation.

18.2.6. Cell C does not agree that income levels and the size of an entity should be used as criteria for imposing the HDG equity requirement. Cell C maintains that all of the entities being issued a licence under the ECA should be subjected to the same regime, notwithstanding the size of the applying entity or the licence being sought.

18.2.7. MTN submitted that there was no need, nor is it legal for the Authority to create a parallel regulatory scheme for any aspect of empowerment regulated under the B-BBEE Act and the ICT Sector Codes. MTN further submitted that if the Authority accepts MTN's submission that the Authority should do no more than is stipulated in the B-BBEE Act and the ICT Sector Codes, then there would be no need to consider income levels and the size of the entity as criteria to differentiate on the imposition of any requirements. This is so because the ICT

Sector Codes already distinguish between different sizes of entities in assessing their compliance with the B-BBEE targets set out in the ICT Sector Codes.

18.2.8. Liquid Telecom submitted that the Authority should not consider income levels and the size of the entity as the licensing framework in the ECA developed criteria for individual and class licenses, not for stratification thereof, within the latter.

18.2.9. WAPA submitted that the income levels and size of the entity should also be taken into account across the spectrum of regulation of class licences which the Authority undertakes.

18.2.10. Multichoice submitted that it was not necessary for the Authority to impose empowerment obligations over and above the already existing obligations under the B-BBEE Act read with ICT Sector Codes. In particular, Multichoice submitted that the Authority should be circumspect, at this stage of the transformation process, about imposing targets in excess of those set out in the ICT Sector Codes.

18.2.11. Internet Solutions submitted that the Authority should take the ICT Sector Code into account when drafting regulations on this issue, in particular the exemptions for micro enterprises (which have a turnover of less than R10 million) who are deemed to have a Level 4 B-BBEE Status Level with a B-BBEE recognition level of 100%. In addition, such enterprises receive enhanced recognition where their Black ownership level is above 51%.

Authority's Position

18.2.12. The 30% HDG equity requirement is applicable to all individual licensees, regardless of their size or income level and will remain the case going forward.

18.2.13. HDG equity requirements do not apply to class licensees and accordingly income levels and size are not relevant considerations in this regard.

18.3. Question 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?[47]

18.3.1. AT&T, BT, Orange BS, Tracker, Liquid Telecom, MTN, WAPA and Cell C submitted that the minimum ownership requirements should remain the same.

18.3.2. AT&T, BT, Orange BS further submitted that, as set out in the 2017 Discussion Document, there is a high level of non-compliance, and therefore efforts should focus on bringing licensees into compliance with the current requirements instead of increasing the equity ownership obligations.

18.3.3. Tracker argued that this should be an interim measure until the differentiated HDG requirement criteria has been implemented.

18.3.4. Cell C submitted that the minimum ownership requirement is already higher than what the Codes of Good Practice require. Given that the ICT Sector Code was released recently, Cell C further submitted that entities should be given an opportunity to structure themselves appropriately in relation thereto.

18.3.5. Kagiso Media proposed that the ownership requirement should be in line with what is set out in the ICT Sector Code.

18.3.6. ISPA did not support an increase in the minimum legislated ownership requirement. ISPA submitted that it would be far

[47] 2017 Discussion Document – par 5.1.4

better if the ownership requirement contained in the Codes of Good Practice is followed as it allows entities to score points through other mechanisms which achieve transformation objectives in a broader manner.

18.3.7. Vodacom did not agree that the ECA contained a mandatory legislated requirement of 30% HDG ownership. It submitted that section 9(2)(b) of the ECA was amended to permit the Authority to impose other conditions instead of ownership and the intention of the amendment was to ensure the Authority deals with broad-based black economic empowerment in accordance with the B-BBEE Act and the ICT Sector Code. Consequently, Vodacom submitted that it was not necessary to apply a Black ownership percentage over and above the overall B-BBEE compliance levels which are set out in the ICT Sector Code.

18.3.8. Telkom supported 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. Telkom also proposed that licensees be granted 5 years to comply with requirement of 30% BEE equity ownership, and further proposes an amendment of HDG requirements in the ECA to allow for progressive compliance by licensees.

18.3.9. Liquid Telecom submitted that it was of the view that in the current South Africa investment grading situation, a sector as critical as ICT and one which requires foreign and local investment should not be subjected to any further changes.

18.3.10. WAPA submitted that an equity ownership requirement without reference to the broad-based empowerment structure is an extremely blunt mechanism for attaining transformation. The Generic Codes 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.

18.3.11. Multichoice submitted that it was not necessary for the Authority to impose empowerment ownership obligations over and above those already existing under the B-BBEE legislative framework.

18.3.12. Primedia submitted that, 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.

18.3.13. 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.

18.3.14. NAB did not support the imposition of increased or extended HDG ownership obligations by the Authority. There are already extensive obligations in B-BBEE legislation. Compliance with the ICT Sector Code sets an overall compliance target of economic interests and voting rights by Black People at 30%. The Authority should therefore rather consider requiring compliance with the B-BBEE legislation.

18.3.15. Internet Solutions submitted that the ICT Sector Code's ownership target of 30% correlates with the ECA 30% minimum equity ownership requirement held by historically disadvantaged individuals. As such, the current 30% minimum HDI equity threshold is suitable as a required starting point for compliance, which can then be revised by the Authority at a later stage.

18.3.16. ACCSA was uncomfortable with picking a number without a study of compliance with the base line threshold. ACCSA

proposes that the Authority should focus on monitoring compliance.

Authority's Position

18.3.17. It is the Authority's position that the 30% equity ownership requirement should remain and will apply to applications for new licenses, and to applications to transfer, renew and amend licenses "at the door". The Authority will monitor compliance as required to ensure that the mandatory minimum equity ownership requirement is maintained over time.

18.4. Question 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%?[48]

18.4.1. Cell C disagrees that the Authority's approval should be sought. Although Cell C proposes that the requirement for 30% ownership by Black People should be maintained for five years after the Authority has increased the ownership requirement, the five-year lock-in should be subject to a remedy period which allows for Black shareholders to dispose of shares at their discretion as any shareholder would.

18.4.2. WAPA, ISPA and Tracker agreed that the Authority's prior approval should be sought. ISPA submitted that this requirement was consistent with the objectives and requirements of the ECA and ICASA Act. While Tracker provided that it agreed with the requirement, this was subject to it being applied across the board, failing which it would be unfair to existing licensees. Tracker further provided that,

[48] 2017 Discussion Document – par 5.1.5.1

although it agreed with the requirement, it stifled economic growth and freedom.

18.4.3. Vodacom maintained that the Authority should apply overall B-BBEE compliance levels when deciding to issue licences and not ownership percentages. Consequently, the Authority's approval should be sought where a change of shareholding will result in a reduction of licensee's overall B-BBEE compliance level.

18.4.4. ACCSA states that the Authority's approval should be sought. However, the licensees should be allowed to demonstrate what the plan would be in order to increase their shareholding to the 30% level and the timeframe this can be achieved in and the Authority can approve or reject this plan.

18.4.5. Telkom submitted that 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 the Authority should consider the shareholding disclosure requirements contained in Section 122 of the Companies Act, which requires 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.

18.4.6. MTN submitted that a B-BBEE certificate is valid for a period of 12 months, regardless of any changes that might occur, including in relation to Black ownership, during that period. If the Authority falls in line with the regulatory regime under the B-BBEE Act, its regulatory work will be simplified. It will not have to try and monitor fluctuations in Black ownership levels except at the measurement periods. The Authority will be well within its rights to stipulate, as licence conditions, penalties that will be applicable if a licensee falls below a stipulated B-

BBEE contributor level or the Black ownership dips below a set minimum threshold.

18.4.7. Liquid Telecom submitted that it is of the view that while equity ownership remains poorly defined, the discussion must rather centre on defining it for compliance purposes, rather than specifying a level under which a percentage cannot drop, without detailing how it is comprised and measured. It further submitted that this remains a lacuna that needs to be addressed to ensure certainty, reduce regulatory gaming and facilitate commercial transactions that result in growth and competition in the sector.

18.4.8. Primedia submitted that there is no ongoing general requirement for individual licensees to maintain a particular level of HDP or Black ownership. 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.

Authority's Position

18.4.9. The Authority agrees that the equity ownership level should not be permitted to fall below 30%. The Proposed Regulations will impose appropriate penalties in the event that a licensee's equity ownership falls below 30% as a deterrent to non-compliance.

18.5. Question 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?[49]

[49] 2017 Discussion Document – par 5.1.5.2

18.5.1. Tracker and ISPA agreed that the Authority's prior approval should be sought. While Tracker provided that it agreed with the requirement, this was subject to it being applied across the board, failing which it would be unfair to existing licensees. Tracker further provided that, although it agreed with the requirement, it stifled economic growth and freedom.

18.5.2. Cell C disagrees that the Authority's approval should be sought. Although Cell C proposes that the requirement for 30% ownership by Black People should be maintained for five years after the Authority has increased the ownership requirement, the five-year lock-in should be subject to a remedy period which allows for Black shareholders to dispose of shares at their discretion as any shareholder would.

18.5.3. Vodacom maintains that the Authority should apply overall B-BBEE compliance levels when deciding to issue licences and not ownership percentages. Consequently, the Authority's approval should be sought where a change of shareholding will result in a reduction of the licensee's overall B-BBEE compliance level.

18.5.4. Liquid Telecom referred to its answer to question 5.1.5.1.

18.5.5. For the same reasons given in 5.1.5.1 above, Primedia's view was 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 2010 Licencing Regulations.

18.5.6. Internet Solutions submitted that the Authority already has regulatory measures in place to address the issues in questions 5.1.5 on the basis that a change of shareholding in the licence triggers a notification and a licensee may not, without the prior written approval of the Authority, change its shareholding, which results in a reduction in the 30% threshold for equity ownership by HDGs.

Authority's Position

18.5.7. The Authority is of the view that prior notification is necessary where there is any anticipated dilution of equity ownership. A failure to notify the Authority would also incur appropriate penalties.

18.6. Question 5.2

How should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDG's from participating in share schemes?[50]

18.6.1. Vodacom submitted that the Authority should not prescribe a Black ownership requirement but should rather apply overall B-BBEE compliance levels. Overall B-BBEE compliance levels take into account the extent of the measured entity's Black ownership. 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.

[50] 2017 Discussion Document – par 5.2

18.6.2. Cell C submitted that the HDG equity requirement should be applied in the same manner as non-publicly traded entities and there should not be a separate framework for listed entities compared to unlisted entities. Cell C expressed the view that given sufficient time, listed entities will come up with a solution to the challenge of proving their equity ownership.

18.6.3. MTN submitted that the HDG equity ownership requirement could, and should, be applied to publicly traded entities in exactly the same way the ICT Sector Codes apply the measurement of the Black ownership target to publicly traded entities. MTN further submitted that in determining the extent of Black ownership in a publicly traded scheme, mandated investments should be excluded.

18.6.4. ACCSA submitted that when companies employ equity equivalent schemes (such as phantom share schemes) for their employees, it is not recognised towards the ownership target, even though these schemes are often more lucrative for employees and are more broad-based than pure ownership deals. Recognition needs to be made for the equity equivalent scheme and its implementation.

18.6.5. Kagiso Media was of the view that listed companies must also meet the 40% HDG equity ownership requirement. On a day-to-day basis, this might be difficult to calculate given that shares are traded openly and it is not possible “to pierce the corporate veil” to determine the race of the individuals behind private companies or blind trusts and the like. Consequently, Kagiso Media supports that Black-owned shares be ring-fenced through B-BBEE share schemes to safeguard B-BBEE shareholder value. Kagiso Media submits that the Authority should make it a requirement for publicly traded companies to provide the policy for such B-BBEE share schemes for approval by the Authority prior to registration with the JSE for listing. Further, Black People who subscribe to the B-BBEE share schemes must also demonstrate a level of influence in the

management and control of the operations of a listed company, perhaps through board representation for B-BBEE shareholders whether these participate by way of a special purpose vehicle, a trust or similar. This can be achieved through a mandatory requirement from the Authority for policies of B-BBEE share schemes to be constituted with a special purpose vehicle or a trust or similar vehicle where its members can nominate board representatives to the company board.

18.6.6. Tracker submitted that the Authority should find a way to treat all entities in the same manner.

18.6.7. Telkom referred to its answer to question 5.1.5.1.

18.6.8. MTN submitted that the HDG equity ownership requirement could, and should, be applied to publicly traded entities in exactly the same way the ICT Sector Codes apply the measurement of the Black ownership target to publicly traded entities. In terms of the measurement principles applicable to determining the extent of Black ownership in a publicly traded scheme, the ICT Sector Codes apply the following calculation methodologies:

18.6.8.1. When determining ownership in a measured entity, rights of ownership of mandated investments may be excluded.

18.6.8.2. “Mandated Investments” means “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.” This generally pertains to shareholding in publicly traded companies held by institutional shareholders such as, for example, banks, insurance companies and pension funds.

18.6.8.3. The maximum percentage of the ownership of any measured entity that may be so excluded is 40%.

18.6.8.4. A measured entity electing not to exclude mandated investments when it is entitled to do so, may either treat all that ownership as non-Black or obtain a competent person's report estimating the extent of Black rights or ownership measurable in the measured entity and originating from that mandated investment.

18.6.8.5. A measured entity cannot selectively include or exclude mandated investments and therefore an election to exclude one mandated investment is an election to exclude all mandated investments and vice versa.

18.6.9. Liquid Telecom was of the view that the HDG equity ownership requirement cannot effectively be applied to publicly traded entities and efforts should not be directed at doing so, save for where an individual licence is being applied for, transferred, renewed or amended, or the control of the licence, (they propose this should be defined as 51%) is being transferred.

18.6.10. Multichoice submitted that the HDG equity ownership requirement could be applied to publicly traded entities in exactly the same way the ICT Sector Codes apply the measurement of the Black ownership target to publicly traded entities.

18.6.11. Primedia was of the view that listed entities should be treated in a manner that takes cognisance of the realities of publicly traded entities. In this regard, Primedia's 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. The Authority should allow for licensees to apply the measurement principles outlined in the B-BBEE Codes when calculating levels of HDP ownership.

18.6.12. Internet Solutions submitted that HDG equity ownership requirements should apply uniformly irrespective of the manner in which the entity is trading.

18.6.13. The SACF and its members support a single framework for empowerment and advocate that the Authority aligns with the dispensation under the B-BBEE Codes which allows for:

18.6.13.1. foreign operations from the ownership of SA operations;

18.6.13.2. the exclusion of Mandated Investments (such as Pension Funds and Medical Aids) and government ownership; and

18.6.13.3. the inclusion of mandated investments. Where a company elects not to exclude mandated investment, a company can obtain a competent person's report to determine the "deemed" black shareholding derived from mandated investments.

Authority's Position

18.6.14. The Authority agrees that the minimum equity requirements must apply to all individual licensees, including listed entities. The Authority will engage with independent verification agencies to determine what proof would be adequate to demonstrate such ownership.

How should compliance with the HDG requirement be verified?

18.7. Question 6.4.1

What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?[51]

18.7.1. Vodacom submitted that it supported the use of verification certificates issued by accredited B-BBEE verification agencies to confirm an entity's proof of Black ownership and overall compliance, given that the Authority is bound to apply the Revised ICT Sector Code in respect of the assessment of overall B-BBEE compliance generally, which assessment includes the principles for the measurement of Black ownership.

18.7.2. Cell C submitted that the documentation required by a verification agency to calculate Black ownership under the B-BBEE Codes should be used to determine compliance with the minimum ownership requirements under the ECA (this usually includes the share certificates, share register, shareholders' agreement and memorandum of incorporation of the measured entity and each of its juristic shareholders).

18.7.3. Tracker and MTN agreed with Vodacom and suggested that valid B-BBEE certificates need to be submitted. MTN did however submit that these certificates reflect the status of Black People and not HDG and this creates a gap in the provisions of proof of equity ownership.

18.7.4. ACCSA submitted that a B-BBEE verification agency would need to be used by the Authority to confirm compliance, along with ownership certificates. Liquid Telecoms submitted that the verification certificates are valid for one year whilst the

[51] 2017 Discussion Document – par 6.4.1

Authority has appropriate triggers for the 30% for applications for a new licence, transfer of a licence, transfer of control in a licence, renewal of a licence and amendments to the licence. In the circumstances, the Authority should not concern itself with the scoring of an organisation at any other time.

18.7.5. Kagiso Media submitted that the proof which the Authority requires to confirm compliance with the HDG requirements for a trust should be the requirements which the Authority has published in the Composite Invitation to Apply for Individual Commercial Free to Air Television Broadcasting Service and Radio Frequency Spectrum Licence for Mux 3 Frequencies[52].

18.7.6. AT&T, BT, Orange BS proposed that the Authority should retain flexibility in determining the proof it requires on an individual case basis. Also, the Compliance Procedure Manual Regulations, Form 1, already requires licensees to submit information about ownership, this should be sufficient.

18.7.7. Liquid Telecom submitted that the Authority should adopt the approach under the B-BBEE Act in respect of verification, because transformation and empowerment is far more than just equity held at a particular point in time.

18.7.8. Multichoice submitted that the Authority should require licensees to submit copies of their B-BBEE certificates to the Authority on an annual basis.

18.7.9. Primedia suggested that the Authority specifically recognise that a B-BBEE 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

[52] Notice 162, Government Gazette No. 40652 dated 3 March 2017 at page 17

Codes should be accepted. 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.

18.7.10. NAB submitted that the Authority can require licensees to submit copies of their B-BBEE certificates on an annual basis.

18.7.11. Internet Solutions submits that the B-BBEE certificate should be deemed sufficient proof of B-BBEE compliance as it would reflect points, which determine whether the entity has met HDG requirements.

18.7.12. The SACF submits that the difference between black and HDG ownership provides the opportunity for verification agencies to provide one page HDG ownership certifications, and that a panel of qualified agencies would need to be approved and overseen by the Authority, and the complication of the extra certification would be obviated in time should the ownership framework evolve from HDG to black.

18.7.13. Telkom proposes that ICASA adopt two methods of verification, namely the certificate from a rating agency accredited by the South African National Systems or a certificate of compliance issued by the external auditors of the relevant licensees. Telkom submits further, that an entity's HDG credentials can be verified annually in tandem with the release of the annual financial statements of a publicly listed licensee.

The Authority's Position

18.7.14. The Authority agrees that a certificate issued by a recognised and accredited verification agency will be appropriate to confirm compliance with empowerment requirements, particularly given the fact that going forward, licensees will be required to submit B-BBEE verification certificates on an annual basis to demonstrate B-BBEE compliance. The

Authority is of the view that verification agencies can also issue separate certificates verifying that an entity has achieved or maintained () the mandatory minimum equity requirement.

18.8. Question 6.4.2

What proof would in your view be appropriate to confirm the compliance of publicly traded entities with the HDG equity /ownership requirement?[53]

18.8.1. Cell C submitted that the same proof required by non-publicly traded entities should be used.

18.8.2. To this end, all stakeholders submitted that a valid B-BBEE certificate would be sufficient.

18.8.3. In addition, NAB submitted that the Authority can require licensees to submit copies of their B-BBEE certificates on an annual basis.

18.8.4. Internet Solutions submits that the B-BBEE certificate should be deemed sufficient proof of B-BBEE compliance as it would reflect points, which determine whether the entity has met HDG requirements.

18.8.5. Primedia suggested that publicly traded entities that hold licences should be required to show compliance with any applicable requirements through non-publicly traded shares.

18.8.6. ACCSA submitted that a competent person's report would suffice.

[53] 2017 Discussion Document – par 6.4.2

Authority's Position

18.8.7. The Authority agrees with stakeholders that a valid B-BBEE certificate would suffice for publicly traded entities to demonstrate compliance. The Authority notes Telkom's submission that 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 Stock Exchange News Service announcement. The Authority agrees that such information can be submitted by licensees as part of the annual compliance process.

What constitutes Ownership and what constitutes Control?

18.9. Question 7.7.1

Is the definition of a control interest as set out in 7.3 [of the 2017 Discussion Document] above still valid?[54]

18.9.1. ACCSA, Vodacom, Tracker agree that the definition of control is still valid.

18.9.2. Save for reference to the Companies Act, 61 of 1973, and to a beneficial ownership of more than 25%, Vodacom was 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 and in the Competition Act. Vodacom further submitted that 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 is not clear why a reference to such

[54] 2017 Discussion Document – par 7.7.1. The definition of "control interest" referred to is the definition in the 2003 Regulations.

percentage shareholding should be retained in the definition of “control”.

18.9.3. Cell C disagrees and submitted that the term was outdated and does not align with other legislation relating to “control”. Furthermore, a control test does not account for other circumstances or ways in which a person could acquire control. Cell C further submitted that as with the Competition Act, the concept should relate to control and not a control interest to ensure consistency and certainty across legislation in South Africa.

18.9.4. ISPA does not believe that the 2003 Regulations should have any application in the vastly-different telecommunications market of 2017. The 2003 Regulations were drafted specifically to address the market structure created under the vertical licensing framework imposed by the Telecommunications Act. The horizontal licensing framework created by the ECA does not distinguish between categories of services such as mobile and fixed and the concept of a “control interest” is no longer relevant. There is no longer a rationale for special treatment of juristic persons holding licences issued by the Authority. Rather, reference should be had to the provisions regarding “control” as set out in subsection 2(2) of the Companies Act and the body of law regarding this concept as it is applied to juristic persons in South Africa.

18.9.5. Vodacom submitted that the definition was fairly similar to the definition of control contained in the Companies Act and in the Competition Act. Vodacom further submitted that 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 is not clear why a reference to such percentage shareholding should be retained in the definition of “control”.

18.9.6. Telkom noted the uncertainty occasioned by the ambiguity in the ECA. It submitted that it was of the view that the definition of a control interest in the 2003 Regulations is still relevant since it is wide enough to cover a myriad of possibilities.

18.9.7. Liquid Telecom did not answer the question but submitted that the term "control" appears to have only reached some certainty in the context of broadcasting services, where, as per section 66(5) of the ECA, control is defined as a "20% shareholding" in a commercial broadcasting service licence.

18.9.8. WAPA did not agree that the definition was still valid. WAPA submitted 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 and the body of law regarding this concept as it is applied to juristic persons in South Africa.

18.9.9. Multichoice did not answer the question. However, it submitted that it noted that "control" is not defined in the ECA and that a regulation cannot be used to interpret the Act under which it was made.

18.9.10. Primedia disagreed. It submitted that the requirements set in terms of section 4 of the 2003 Regulations have been superseded by the requirements which have now been set in section 13 of the ECA. These provisions of the 2003 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 section 13(1) or 31(2A) nor section 1 (the general definitions section) of the ECA provides definitions of what constitute "ownership" and "control" for the purposes of the ECA. The definition of control as set out in the

2003 Regulations cannot be of any assistance in interpreting the meaning of the word "control" in sections 13(1) and 31(2A) of the ECA.

18.9.11. Internet Solutions submits that the current definition is valid for the purpose of the ECA, which is silent on the matter.

Authority's Position

18.9.12. The Authority is in favour of broadly defining the concept of "control" similar to that contained in the 2003 Regulations, which is similar to that contained in section 12 of the Competition Act as it is wide enough to capture direct and indirect control of a licence, de jure and de facto control and other measures of control not envisioned in the Companies Act definition of control.

18.9.13. The Authority intends to reintroduce the "bright line" of 20%, which has historical significance because it is a reasonable threshold to infer that an entity in the industry is likely to exercise control of a licensee.

18.10. Question 7.7.2

In your view, what constitutes control and how should the Authority define it? Set out the basis for your argument.[55]

18.10.1. Vodacom submits that control should be defined in the same manner as set out in the Companies Act or in the Competition Act. While ACCSA and WAPA submit that control should be defined as per the Companies Act.

18.10.2. Cell C submits that the definition of "control" should be defined with reference to the understanding of control that has

[55] 2017 Discussion Document – par 7.7.2

developed under the Competition Act in relation to the merger control to ensure consistency and certainty across legislation in South Africa. As stated above, the concept of control in the Competition Act is the most developed approach to an acquisition of control and therefore Cell C submits that it should be used as a basis from which to develop a definition and determination of control that uniquely suits the requirements of the Authority and the ECA.

18.10.3. Regulatory certainty is essential for participants in a regulated sector. All participants in the ICT Sector are also regulated by the provisions of the Competition Act.

18.10.4. It is important for the Authority to understand who will be the controlling mind(s) of a licence holder. In the 2011 Findings Document, the Authority expressed its preference for a definition of control that is expensive and which has a "multidimensional perspective" that takes into consideration more than mere financial interest.

18.10.5. It is more appropriate to adopt the expansive approach to an acquisition of control as set out in the Competition Act than to set an arbitrary shareholding level as the trigger for a change in control.

18.10.6. However, whilst there are similarities and useful aspects of the competition law regime around control that could be imported or applied for the purposes of the ECA, it is important that the concept of control and what constitutes a change in control for the purposes of the ECA and the Authority's licensing regime is bespoke to the specific requirements unique to the telecommunications regulatory regime. Therefore, it is submitted that guidance should be taken from the competition law approach considering the particular requirements of the ICT Sector.

18.10.7. What is key, however, to ensuring regulatory certainty for ICT market participants is that, in addition to introducing a clear definition and understanding of the meaning of an acquisition or change of control, there are defined time periods during which the Authority will complete its assessment of any acquisition of control. A lack of certainty as to how long it will take for an acquisition of control over a licence holder to be considered and approved by the Authority is a disincentive to investment in the ICT Sector.

18.10.8. Kagiso Media disagrees with the characterization of "control" of broadcasting services being the 20% shareholding in a commercial licensee referred to in section 66(5) of the ECA, as is stated in paragraph 7.2 of the Notice.

18.10.9. The Authority (and its predecessor, the IBA) has always recognised that the appropriate threshold ought to be a 25% shareholding to trigger deemed control.

18.10.10. Kagiso Media agrees that the position adopted by the Authority in 2011 Findings Document and as confirmed by it in 2013 Final Report as set out above ought to be implemented such that outside of the context of cross-media control, a deemed-controlling stake in a commercial broadcasting entity ought to be pegged at 25% of the shareholding and above.

18.10.11. Tracker submitted that control should be defined as per the definition of "control interest" in the 2003 Regulations.

18.10.12. ISPA does not believe that the 2003 Regulations should have any application in the vastly-different telecommunications market of 2017. The 2003 Regulations were drafted specifically to address the market structure created under the vertical licensing framework imposed by the Telecommunications Act. The horizontal licensing framework created by the ECA does not distinguish between categories

of services such as mobile and fixed and the concept of a "control interest" is no longer relevant. There is no longer a rationale for special treatment of juristic persons holding licences issued by the Authority. Rather, reference should be had to the provisions regarding "control" as set out in subsection 2(2) of the Companies Act and the body of law regarding this concept as it is applied to juristic persons in South Africa.

18.10.13. Liquid Telecom did not wish to make any further submission on this point and the 30% threshold requirement as whether correctly, or incorrectly, it has been interpreted by the courts as a minimum, immediate threshold and until amended through legislation or further case law, it stands. Liquid Telecom submitted that the Authority should use this opportunity to properly define the issue of "control" in the application of section 13(1) and 31(2)(a) and section 9(2)(b) of the ECA.

18.10.14. Multichoice and Primedia noted that "control" was not defined in the ECA and that a regulation cannot be used to interpret the Act under which it was made. Multichoice submitted that the most meaningful approach is to focus on control over the two organs of a company, namely the general meeting and the board of directors.

18.10.15. Multichoice also proposes that a person would control a licensee in the following circumstances:

18.10.15.1. in the case of a licensee which is a company – that person –

18.10.15.1.1. is 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

18.10.15.1.2. has the right to appoint 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; or

18.10.15.1.3. that licensee is a subsidiary of that company; or

18.10.15.2. in the case of a licensee which is a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or

18.10.15.3. that person has the ability to materially influence the policy of the licensee in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a) or (b).

18.10.16. Primedia submitted that 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, this should be decided by a court.

18.10.17. Internet Solutions submits that ownership of a majority voting interest (50%), which in turn is the condition for controlling a financial interest in the business constitutes control. Internet Solutions provided further that this definition is not exhaustive

as control is exercised in many forms, including management control, a B-BBEE measurable element; and that the Authority has to take into consideration the ICT Sector Code and apply its management control key measurement principles when constructing the said definition.

Authority's Position

18.10.18. The Authority favours adopting a definition of control that is similar to the 2003 Regulations and the Competition Act (except for the bright line threshold of 20% and not 50%). However, the Authority would be cautious to exclude certain categories of transactions from the control definition in the Proposed Regulations.

18.10.19. Although a direct change of control could only occur at licensee level as it contemplates control of an incorporated entity, the Authority favours both a direct and indirect definition of control, so that control of a licence at all levels of a corporate structure is captured.

18.11. Question 7.7.3

Are you of the view that the Authority should define ownership?

18.11.1. Vodacom, ACCSA and Tracker are of the view that the Authority should not define ownership.

18.11.2. ACCSA submitted that including a definition for ownership would just add to legislation stipulated in the Companies Act.

18.11.3. Cell C is of the view that the Authority should define ownership.

18.11.4. ISPA's submissions in respect of the definition of control apply equally to the definition and interpretation of the concept of ownership within the context of the Authority's processes.

18.11.5. Telkom submitted that it was 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.

18.11.6. Liquid Telecom is of the view that the Authority should use all relevant regulations to define “equity ownership”. The term is not defined in the ECA or the regulations and its relevance arises in the context of sections 13(1) and 9(2)(b)) of ECA.

18.11.7. WAPA submitted that the Authority, when 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.

18.11.8. Primedia submitted that section 9(2)(b) of the ECA which provides that the Authority must, in inviting applications for individual licenses, include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30% or impose such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act. Section 13(3) of the ECA 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 HDGs and to promote B-BBEE.

18.11.9. Internet Solutions is of the view that the Authority may provide a definition of what constitutes ownership should it opt to promulgate regulations to promote B-BBEE. However, the Authority has to take into consideration the ICT Sector Code and apply its ownership key measurement principles when constructing the said definition. Any other approach by the Authority which fails to take cognisance of the B-BBEE ICT Sector Codes would result in confusion and inefficiencies.

Authority's Position

18.11.10. Authority is of the view that ownership is relevant to the equity ownership requirement and that a flow-through principle of ownership should apply. For example, if a Black shareholder owns 50% of a subsidiary, which in turn holds 20% of the shares in a licensee, the effective ownership of the Black shareholder in the licensee would be measured as 10%.

18.11.11. The Authority might consider referring to this as an "ownership interest" rather than "ownership", as was done in the 2003 Regulations, as ownership theoretically only has a direct dimension and does not directly capture indirect ownership.[56]

18.11.12. For example, a licensee is the only owner of a licence and a shareholder of the licensee cannot be an "indirect owner" of the license. This is different to the concept of control, which can have an indirect dimension, as recognised in both company law and competition law.

18.11.13. The concept of "ownership interest" can be direct or indirect and might better capture the equity requirement.

18.12. Question 7.7.4

In your view, what constitutes ownership and how should the Authority define it? Set out the basis for your argument.[57]

18.12.1. Vodacom submits that 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, among others, that an owner of

[56] The rights of ownership include the right to use property, to enjoy the fruits, to consume the property and also to possess and dispose of the property. These rights are all "direct" concepts because only a direct owner, whether natural or juristic, can exercise these rights.
[57] 2017 Discussion Document – par 7.7.4

property has an exclusive right of possession of the property and a right to freely dispose of the property.

18.12.2. ACCSA submits that including a definition for ownership would just add to legislation stipulated in the Companies Act.

18.12.3. Cell C submits that ownership should be defined in accordance with the principles of ownership in South African property law.

18.12.4. Tracker submitted that ownership should be defined as per the 2003 Regulations.

Authority's Position

18.12.5. As explained above, the Authority intends to define the concept of an "ownership interest" and not "ownership" in the Proposed Regulations.

18.13.Question 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?[58]

18.13.1. Vodacom submits that a transfer of 100% share capital in a licensee will constitute a transfer of both ownership and control. Vodacom further submits that 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.

[58] 2017 Discussion Document – par 7.7.5

18.13.2. Cell C agrees that an acquisition of 100% of the issued share capital of a capital of a licensee will usually be both a transfer of control and a transfer of ownership. The two concepts are, however, distinct. As mentioned above, it is Cell C's position that it would be most appropriate to align the assessment of a transfer of control of a licensee with the merger control provisions of the Competition Act. This permits an assessment of a broader range of circumstances than a transfer of ownership.

18.13.3. ACCSA does not answer the question but comments that both a transfer of control and a transfer of ownership indicate substance over form, which needs to be taken into account.

18.13.4. ISPA believes that the true legal nature of service licences issued by the Authority is poorly understood. Does the question pertain to transfer or change of control of a licensee, or transfer or change of control of a licence? This can only be properly considered once a firm definition and understanding of "control" has been reached. It is not necessary, however, to consider this to respond to this question practically; what can be said is that the effect in respect of the use of the licences is the same in respect of a transfer of 100% share capital as it is for a transfer of ownership. It follows that the same process and criteria should be employed in dealing with each type of corresponding application.

18.13.5. Tracker submitted that in privately owned companies, control and ownership vest in a 100% shareholder, whilst in a publicly listed entity it amounts to transfer of ownership and not necessarily a transfer of control.

18.13.6. Telkom submitted that it was of the view that this should constitute a change of ownership. Should any of the conditions of a control interest as defined in the 2003 Regulations be met, such a transfer could simultaneously constitute a transfer of control.

18.13.7. Liquid Telecom submits that until the 30% threshold is amended through legislation or further case law, it stands.

18.13.8. WAPA submitted that 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.

18.13.9. Primedia submitted that 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. 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. 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.

18.13.10. Internet Solutions is of the opinion that a transfer of 100% share capital may amount to a transfer of ownership and a transfer of control.

Authority's Position

18.13.11. The Authority is of the view that a transfer of 100% of the issued share capital in a licensee amounts to both a direct transfer of ownership and a direct transfer of control of the licensee. It also results in the indirect transfer of control of the licence, which is directly controlled by the licensee.

Application of the ICT Sector Codes

18.14.Question 8.1

The ECA requires the Authority to promote B-BBEE and the B-BBEE 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.[59]

18.14.1. Kagiso Media referred to its answer to question 5.1.2.

18.14.2. ISPA does not perceive this to be a role that the Authority should be fulfilling. The Authority exercises its powers in respect of transformation over licensees and achieves its transformation objectives through the impact of those powers on licensees.

18.14.3. Vodacom referred to its answer to question 5.1.4.

18.14.4. Cell C submitted that the regulations under the ECA should be retained or amended to create specific Black ownership requirements so that the Authority can apply and promote the ownership provisions of the BEE Act and Generic Codes, in order to make them applicable to licenses issued by the Authority. These ECA regulations requiring such level of Black ownership to be issued with a licence under the ECA to be achieved in accordance with the recognised principles of the Codes will aid in achieving this ownership in a manner which aligns with the B-BBEE Act and the Generic Codes.

18.14.5. ACCSA submitted that it has advised the Authority against the role of the DTI and it is not certain what the intent would be in doing so. Furthermore, and simply from a resource perspective, it is not clear how and to what end this duplicate

[59] 2017 Discussion Document – par 8.1

role would be served. Procedures are in place as determined by the B-BBEE Act and this is the regulatory ambit of the DTI.

18.14.6. As a general point, Telkom proposed the harmonisation of definitions between the various Acts and regulations. The definition of HDGs in the 2013 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 B-BBEE Act defines 'Black People' as Africans, Coloureds and Indians, but does not define HDGs. Telkom further proposed that the Authority's regulations harmonise the various definitions and concepts by making sure that the various legislative amendments are effected and towards consistency.

18.14.7. MTN submits that the Authority has no authority to create a parallel Black ownership regulation scheme for the ICT Sector outside of the B-BBEE Act and the ICT Sector Codes. To the extent that the ICASA Act and/or the ECA oblige or empower the Authority to do so, they are unlawful. The Authority should apply the requirements as set out in the ICT Sector Codes.

18.14.8. Tracker submitted that, by imposing the HDG policy, the Authority implicitly promotes it. The B-BBEE Act compels organs of state and public entities to apply the applicable sector codes. In order to prevent confusion and promote equality, the Authority should do the same.

18.14.9. Internet Solutions is of the view that the Authority should promote B-BBEE and the B-BBEE Act requirements when appointing suppliers, granting or transferring licences, as well as when it is making concessions. This means that the Authority has to conclude business dealings with B-BBEE-compliant suppliers, which will then compel any B-BBEE non-compliant supplier to be compliant to maintain its level of

business success. In addition, the Authority should enforce the 30% HDI shareholding when transferring, ceding or renewing licences as is currently the case.

18.14.10. 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 B-BBEE Act which has a broader focus and application. The B-BBEE Act and resultant Codes of Good Practice have adopted a significantly different approach to empowerment from that of the regulations promulgated in terms of the ECA, in that the B-BBEE 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.

18.14.11. Consequently, the SACF cautions the Authority against morphing the flexible framework under the B-BBEE Act which 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. The Authority's regulations are secondary legislation emanating from powers derived through primary legislation empowering it to make regulations. For this reason, SACF submits that the Authority cannot adopt or make the ICT Sector code a set of regulations as compliance with the Codes must remain voluntary.

18.14.12. The SACF did, however, advocate that the Authority may prescribe the minimum level of compliance that it may require to consider an application, with B-BBEE Status Level 4, which is the minimum established by the PPPFA for any public-sector procurement.

Authority's Position

18.14.13. The Authority agrees that compliance with the B-BBEE Codes is not compulsory and that entities may choose whether to comply or not. However, parties wishing to do any business with government or other private entities who contract with government, whether directly or indirectly, are compelled to comply if they wish to remain a supplier of choice in the supply chain. This is because, while B-BBEE compliance is a voluntary procurement driven framework for business entities, it is compulsory for organs of state and public entities such as the Authority, particularly when licensing. As such, the Authority is compelled to apply B-BBEE and require stakeholders in the industry to comply with its B-BBEE requirements should they wish to operate in the sector.

18.14.14. While the current empowerment framework in the ICT Sector focuses solely on the ownership interest of HDGs in licensees, for the reasons set out more fully in paragraph 17 above, the Authority is of the view that a mandatory minimum equity ownership requirement is not in conflict with the tenets of empowerment under the B-BBEE Act and accordingly will retain a minimum equity ownership target going forward.

18.14.15. In addition to this, it is the Authority's position that the Revised ICT Sector Code can be applied in conjunction with a mandatory minimum equity ownership requirement. To this end, the Authority is of the opinion that a mandatory minimum B-BBEE Status Level Six will be compulsory for all licensees which status level must be maintained for the duration of the licence. The Authority disagrees with the view that this stance is unlawful.

18.15.Question 8.2

Should the Authority apply the Codes to all applications i.e. including service, spectrum, type-approval and number applications?[60]

18.15.1. WAPA, AT&T, BT, Orange BS, ISPA and Cell C submitted that they do not believe that it is necessary to apply the ICT Sector Codes to all applications.

18.15.2. Vodacom submitted that the Authority should apply the ICT Sector Code to all applications for licenses for service and spectrum, in terms of its obligations under section 10(1) of the B-BBEE Act. However, the ICT Sector Code should not be applied to type-approval and number applications as such applications do not fall within the ambit of section 10(1) of the B-BBEE Act.

18.15.3. AT&T, BT, Orange BS submitted that that approach would be overly prescriptive and may have unintended consequences on the ability of licensees to continue to provide services to customers. It proposed that a comprehensive regulatory impact assessment was necessary to evaluate all potential business impacts, as well as any potential unintended consequences, before making the ICT Sector Code applicable to applications.

18.15.4. ISPA submitted that this would amount to unnecessary duplication of effort as the ECA is explicit that a service licence under Chapter 3 of the ECA is required before a radio frequency spectrum licence or allocation of numbering resources will be considered by the Authority. Consequently, if compliance is enforced at service licence level, it does not have to be enforced for applications which require the holding of the service licence.

[60] 2017 Discussion Document – par 8.2

18.15.5. Given that licensees (who should already be compliant) can apply for spectrum, type approval and numbers, Cell C submitted that there was no need to refer to individual applications which cannot be made by anyone other than the licensee.

18.15.6. ACCSA did not answer the question but sought clarity on the definition for number applications and type-approval, as the uncertainty surrounding these terms results in Constitutional concerns.

18.15.7. Liquid Telecom submitted that, at a high level, the Authority could possibly consider the same BEE criteria for the issue / award of new high demand spectrum assignments only as it would for an individual licence application. To apply the criteria to general spectrum and links necessary for continued service operation may result in severe, deleterious and unintended outcomes to current operations.

18.15.8. Tracker submitted that the Authority should apply the Codes to Service and Spectrum applications, but not type-approval and number applications. It will have a detrimental effect on foreign investment and economic sustainability.

18.15.9. WAPA submitted that 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. 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. 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 fewer applications for

certification, in turn leading to less consumer choice and a rise in the cost of telecommunications equipment.

18.15.10. Primedia submitted that it 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 B-BBEE 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 to foreign entities with no presence in South Africa, which will not be subject to the B-BBEE regime. Such authorisations are not necessarily even issued to licensees but instead to equipment providers.

18.15.11. Primedia submitted that 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 B-BBEE certificates to the ICT Sector Council in terms of section 10(4) of the B-BBEE Act. Accordingly, it may be appropriate for the Authority to liaise with the Council in relation to this information.

18.15.12. NAB submitted that the Authority can require licensees to submit copies of their B-BBEE certificates on an annual basis. NAB further submitted that where the Authority is faced with two applications, the B-BBEE scorecard of the applicants should be a consideration in determining who to grant the licence to.

18.15.13. Internet Solutions is of the view that the Authority should apply B-BBEE ICT Sector Codes on licence transfer, cession, or renewal, as well as when the licensee changes its

shareholding structure for whatever purpose but not on type approvals as this would impose unnecessary regulatory restrictions.

Authority's Position

18.15.14. The Authority agrees that it would be overly cumbersome to apply B-BBEE requirements to every application submitted to the Authority, particularly type-approval applications where the applicant need not be a licence holder, and number applications where the applicant would have to already have a service licence.

18.15.15. It is the Authority's position that B-BBEE requirements will be imposed on all applications for service licences. Such a licensee will be required to submit, on an annual basis, a B-BBEE verification certificate confirming that it has maintained the necessary minimum equity ownership level and B-BBEE Status Level.

18.16. Question 8.3

Should the Authority require B-BBEE certificates to be submitted as part of licensees' annual compliance requirements?[61]

18.16.1. Tracker, WAPA, NAB, Liquid Telecom, MTN, ACCSA, Vodacom and Cell C submitted that the Authority should require B-BBEE certificates to be submitted as part of a licensee's annual compliance requirements.

18.16.2. SACF stated that the Authority should require B-BBEE certificates. However, while the HDI requirement remains, the SACF proposes that the Authority publishes a practice note setting out exactly what proof it requires.

[61] 2017 Discussion Document – par 8.3

18.16.3. However, Cell C provided that the certificate should only be in respect of the ownership element and only if the measurement principles under the B-BBEE Act and the Generic Codes are used.

18.16.4. Although AT&T, BT, Orange BS did not expressly answer the question, it submitted that form 1 of the Compliance Procedure Manual Regulations already required licensees to submit information about ownership. Consequently, this could be reviewed in order to determine if more information is required.

18.16.5. ISPA submitted that, to the extent that a licensee elects to comply with transformation requirements through the ICT Sector Code and not in terms of the ECA, then the submission of B-BBEE certificate should be required.

18.16.6. WAPA submitted that 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 B-BBEE certificates should be required.

18.16.7. Internet Solutions is of the view that it is an unnecessary exercise to require the submission of B-BBEE certificates as part of licensee's annual compliance requirements on the basis that B-BBEE certificates do not form part of licence terms and conditions.

18.16.8. Primedia is of the view that certificates should not be required without a clear understanding of what the Authority will do with the information contained in them. Primedia notes that entities covered by the ICT Sector Code are already required to submit their B-BBEE certificates to the ICT Sector Council in terms of section 10(4) of the B-BBEE Act. Accordingly, Primedia submitted that it may be appropriate for the Authority to liaise with the Council in relation to this information.

Authority's Position

18.16.9. Currently, licensees are only required to submit information related to their HDG shareholding. The Proposed Regulations will require licence holders to submit a B-BBEE verification certificate on an annual basis confirming that it has maintained the mandatory minimum equity ownership levels and the minimum B-BBEE Status Level.

General

18.17.Question 9.3.1

What should be the minimum level of B-BBEE certification?[62]

18.17.1. Vodacom submits that the minimum overall B-BBEE compliance level should be level 4 based on the current ICT Sector Code.

18.17.2. Cell C submitted that the minimum requirement should remain 30% ownership in the hands of Black People in order to be issued with a licence under the ECA or for the renewal of such a licence or to acquire control of an entity which holds a licence issued under the ECA, or to take ownership of a licence issued under the ECA.

18.17.3. AT&T, BT, Orange BS submitted that the Authority should not be the one to determine the minimum level of certification as there are incentives for licensees to achieve the best possible B-BBEE scores. Thus, licences should be determined on the best score.

[62] 2017 Discussion Document – 9.3.1

18.17.4. ISPA submitted that this should be determined with reference to a sliding scale which takes into account size, revenue and other relevant factors.

18.17.5. ACCSA submitted that the baseline reports published by the ICT Sector Council be used to inform a minimum level, rather than just picking a level without more information.

18.17.6. Mutlichoice submitted that the minimum Level 4 B-BBEE score should apply under section 9(2)(b) of the ECA.

18.17.7. Tracker submitted that the Authority should only apply HDG ownership until such time as there is a clearer understanding of the new Codes, and a reasonable time frame for licensees to obtain an acceptable B-BBEE level. Failure to set reasonable requirements will result in financial loss in companies, loss of employment of staff and will stifle economic growth.

18.17.8. Primedia submitted that no minimum level of B-BBEE certification should be stipulated.

18.17.9. Internet Solutions submits that the Authority should not impose any minimum B-BBEE certification on the basis that entities are not obliged to get B-BBEE certified. It is and should remain an optional exercise.

18.17.10. The SACF is of the view that the Authority should apply a minimum of a Level 4 compliance with the B-BBEE ICT Sector Codes as a pre-qualifying requirement 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.

18.17.11. The SACF makes the point that many licensees do not meet the legislated equity target, as recognised by the Authority in the 2017 Discussion Document, and that it be prudent for the

Authority to investigate the challenges faced by these licensees to drive compliance before considering revising the targets upwards.

Authority's Position

18.17.12. The Authority's position is that going forward all licensees will need to submit B-BBEE verification certificates on an annual basis in order to confirm compliance. The Authority will also require licensees to achieve a mandatory minimum B-BBEE Status Level. Mere compliance will not be sufficient.

18.17.13. Stakeholders have submitted that a B-BBEE Status Level Four is an optimum level of compliance.

18.17.14. The diagram below demonstrates the fact that more points are required to obtain a Level 4 Status under the Revised ICT Sector Code than are required under the B-BBEE Codes.

18.17.15. Accordingly, given that the B-BBEE Status Level of individual licences will be assessed in conjunction with the minimum equity ownership requirements, the Authority is of the view that the mandatory minimum level of compliance will be a B-BBEE Status Level Six.

Comparison of Revised ICT Sector Code against B-BBEE Codes

B-BBEE STATUS	ICT SECTOR QUALIFICATION	GENERIC CODES	B-BBEE RECOGNITION LEVEL
Level One Contributor	>/= 120 points	>/= 100 points	135%
Level Two Contributor	>/= 115 but < 120 points	>/= 95 but < 100 points	125%
Level Three Contributor	>/= 110 but < 115 points	>/= 90 but < 95 points	110%
Level Four Contributor	>/= 100 but < 110 points	>/= 80 but < 90 points	100%
Level Five Contributor	>/= 95 but < 100 points	>/= 75 but < 80 points	80%
Level Six Contributor	>/= 90 but < 95 points	>/= 70 but < 75 points	60%
Level Seven Contributor	>/= 75 but < 90 points	>/= 55 but < 70 points	50%
Level Eight Contributor	>/= 55 but < 75 points	>/= 40 but < 55 points	10%
Non-Compliant Contributor	< 55 points	< 40 points	0%

18.18.Question 9.3.2

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?[63]

18.18.1. Vodacom submitted that only the ICT Sector Code should be applied. SACF also advocated for the application of the ICT Sector Code alone, citing the reduced cost of compliance and the established framework that comes with B-BBEE. However, SACF warns that it would be illegal for the Authority to make something voluntary compulsory by putting it into regulations. The SACF further pointed out that the judgment on the "once

[63] 2017 Discussion Document – par 9.3.2

empowered always empowered rule" as it is used in the mining industry is being taken on review.

18.18.2. ACCSA submitted that the HDI requirements should be mandatory forming part of the licensing conditions.

18.18.3. ISPA supports a movement away from the blunt HDG requirement to application of the ICT Sector Code, which achieves the same objectives while ensuring alignment between transformation in the ICT Sector and transformation in every other sector of South Africa. ISPA does not support the application of the HDG requirement to class licences.

18.18.4. Cell C submitted that an entity's B-BBEE score under the Generic Codes should not generally apply to the ECA and should be used for the purposes of the ECA, as ownership should be the only measure considered by the authority.

18.18.5. MTN submitted that B-BBEE was an ongoing commitment, and the ongoing compliance is proved with a B-BBEE verification certificate. The B-BBEE verification certificate is valid for 12 months, and therefore "reverification" can be done annually in line with each entity's B-BBEE measurement period. The Authority will be well within its rights to require progressive achievement of certain targets up to that which is required in the ICT Sector Codes as an ongoing licence condition.

18.18.6. Primedia was of the view that such requirements would be inappropriate in the context of class licensees given the scope and scale of their operations.

18.18.7. NAB submitted that the Authority should require all existing and new applicants to comply with the ICT Sector Code as an alternative to the minimum 30% HDG ownership.

18.18.8. Internet Solutions is opposed to the application of the HDG 30% threshold and B-BBEE ICT Sector Codes to all

applications and processes. It submits that these requirements should apply solely to licence transfer, cession, or renewal as well as when there are changes in the licensee's shareholding structure.

Authority's Position

18.18.9. In principle, it is the Authority's position that its minimum mandatory equity requirement and minimum B-BBEE Status Level Six will be triggered:

18.18.9.1. on application for a licence,
18.18.9.2. on transfer of a licence;
18.18.9.3. on renewal of a licence; and
18.18.9.4. on amendment of a licence

18.18.10. In addition to this, licensees will on an annual basis be required to confirm that they are maintaining the mandatory minimum requirements by submitting a B-BBEE verification certificate.

18.18.11. Outside of these regulatory processes, the Authority does not foresee the need to apply empowerment requirements.

18.19.Question 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[64].

18.19.1. Vodacom submits that the Authority should only apply the ICT Sector Code and refers to its response to question 5.1.4 above to provide reason for this submission.

[64] 2017 Discussion Document – par 9.3.3

18.19.2. Cell C submits that the regulations under the ECA should be retained or amended to create specific Black ownership requirements so that the Authority can apply and promote the ownership provisions of the BEE Act and Generic Codes, in order to make them applicable to licenses issued by the Authority. These ECA regulations requiring such level of Black ownership to be issued with a licence under the ECA to be achieved in accordance with the recognised principles of the Codes will aid in achieving this ownership in a manner which aligns with the BEE Act and the Generic Codes. An entity's BEE score under the Generic Codes should not generally apply to the ECA and should be used for the purposes of the ECA, as ownership should be the only measure considered by the authority.

18.19.3. ACCSA is of the view that the Authority should select one framework and implement it. ACCSA submitted that the concept of HDG includes groups who statistically are no longer potentially disadvantaged except relative to their male counterparts. Further, B-BBEE employs a number of fictions which can create a better picture of ownership by Black People than what it actually is. These considerations are, however, counterbalanced by the benefit of consistency. ACCSA also points to equity equivalent schemes which many multinationals employ to gain recognition in B-BBEE but will come up short when considering a mandatory ownership threshold.

18.19.4. ISPA supported a movement away from the blunt HDG requirement to application of the Code, which achieves the same objectives while ensuring alignment between transformation in the ICT Sector and transformation in every other sector of South Africa. As set out above, ISPA does not support the application of the HDG requirement to class licences.

18.19.5. MTN submitted that such a regulatory scheme would be unworkable and unlawful. The Authority should only apply the ICT Sector Codes.

18.19.6. Liquid Telecom submitted that the provisions in the ECA relating to ownership by HDGs need to be clarified in the context of the provisions on the application of B-BBEE and the ICT Sector Code, so as to give the ICT Sector certainty on how B-BBEE will be applied in relation to licence applications, licence transfers, and changes in control of licence holders.

18.19.7. Multichoice submitted that section 10 of the B-BBEE Act obliges the Authority to apply the ICT Sector Codes in determining qualification criteria for the issuing of licenses in terms of the ECA. Further, given that promoting B-BBEE is an object of the ECA as a whole and that section 5(9)(b) of the ECA, which obliges the Authority in granting a licence to promote B-BBEE in accordance with the requirements of the ICT Sector Code, applies to the licensing framework as a whole (including both class and individual licenses), the obligations on licensees to submit copies of their B-BBEE certificates to the Authority on an annual basis should apply to the granting of both individual and class licences. Furthermore, a Level 4 B-BBEE contributor status, which constitutes a 100% recognition level, would be an appropriate requirement for all new class and individual licence applications.

18.19.8. Tracker submitted HDG ownership requirements should apply until such time as there is a clearer understanding of the new Codes, and a reasonable time frame for licensees to obtain an acceptable B-BBEE level. Failure to set reasonable requirements will result in financial loss in companies, loss of employment of staff and will stifle economic growth.

18.19.9. Primedia submitted that the approach that is taken in the B-BBEE Act and in the Codes of Good Practice is to assess B-BBEE holistically and not to focus on any one element of B-

BBEE, which Primedia views as the preferable approach. The Authority should, in line with section 10(1)(a) of the B-BBEE Act, take B-BBEE into account when evaluating competing applications to determine which of the competing applicants should be selected. A particular B-BBEE level should be one of the areas which applicants should be asked to make undertakings which could then be stipulated in their licences.

18.19.10. NAB submitted that the Authority could require all existing and new applicants to comply with the ICT Sector Code as an alternative to the minimum 30% HDG ownership. In its oral submission NAB accepted that the two requirements can co-exist. However, it pointed out that the challenge would be the burden on the Authority to implement and monitor both.

18.19.11. Internet Solutions is opposed to the Authority's proposal on the basis stated in its responses to questions 5.1.2, 8.2, 9.3 and 9.3.2 above.

18.19.12. The SACF is of the view that the narrow-based empowerment through the imposition of HDI equity targets was an early attempt at transformation but that it has severe limitations. For this reason, amongst others, the SACF advocates for the streamlining of the ICT regulations with the requirements for nationwide approach to transformation as applied under the B-BBEE dispensation in order to reduce the costs of regulatory compliance and address the uncertainty as to which requirements apply.

18.19.13. 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.

Authority's Position

18.19.14. The Authority acknowledges that the B-BBEE Act requires the Authority to apply the Revised ICT Sector Code. The Authority also acknowledges that the Legislature has elected to retain the 30% equity requirement set out in the ECA. The Authority further is of the view that there is no conflict between these provisions and therefore intends to apply both in licensing.

18.20. Question 9.3.5

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?[65]

18.21. Question 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?[66]

18.21.1. ACCSA agreed that the Authority should impose timeframes. ACCSA proposed that timeframes for compliance be implemented. A period of 12 months should suffice, as this gives entities sufficient time to align with compliance. However, the implementation of the timeframe needs to be established by the Authority and clarity needs to be provided on whether the timeframe is applicable from date of gazette or date of application.

[65] 2017 Discussion Document – par 9.3.5 – This is a repetition of question 9.3.2
[66] 2017 Discussion Document – par 9.3.6

18.21.2. Vodacom submitted that the Authority does not have the power to impose timeframes for compliance on existing licenses, which have been issued on the basis of particular terms and conditions. Vodacom further submitted that if the Authority imposes an overall B-BBEE compliance on the issue of new licenses, it would in effect be applying a time frame for compliance on such new licenses.

18.21.3. Although Cell C proposes that the requirement for 30% ownership by Black People should be maintained for five years after the Authority has approved an application under 5.1.4 (b), the five year lock-in should be subject to a remedy period and certain exceptions so that the lock-in is not to the detriment of Black shareholders who will not be able to enjoy the capital value of those shares for five years and allows for Black shareholders to dispose of shares at their discretion as any shareholder would.

18.21.4. Internet Solutions questioned what licensees are required to comply with in light of the fact that, as per their interpretation of the empowering provisions, the Authority does not have powers to regulate ownership limitations on existing licensees other than in instances where there is a licence transfer, cession, or renewal as well as when there are changes in the licensee's shareholding structure (This is the legal standpoint, which the Authority has promoted with respect to HDG 30% threshold since its inception. In addition, Internet Solutions submits that compelling existing licensees, irrespective of type, to comply with empowerment requirements is impractical and has no legal basis.

18.21.5. Tracker submitted that reasonable time frames be imposed given moving B-BBEE targets and taking into consideration the interests of businesses as well as employees, and not only transformation at the cost of businesses.

18.21.6. Given that most licensees do not comply with the HDG requirement., Telkom is of the view that the Authority should approach the Minister and Parliament for an appropriate amendment to the ECA to allow licensees involved in M&As adequate time to comply given that it takes no less than a year, at best, to have regulatory approvals for any M&A in the sector.

Authority's Position

18.21.7. The Authority is of the view that the minimum mandatory equity ownership will apply to all individual licences, both new and existing. In addition, the mandatory minimum B-BBEE Status Level will apply to all new and existing licences, both class and individual. Effecting such changes to the terms and conditions on which such licences were issued may require legislative amendments in addition to consultation with all affected parties.

18.21.8. The Authority understands that the intended changes may have a significant impact particularly on licensees who are presently not compliant with the current HDG ownership requirement. As such, the Authority is in favour of setting timeframes for existing licensees to be fully compliant and might consider "sliding-scale" principles used in other regulatory contexts to front-load compliance. For example, the sliding-scale principle might stipulate that a licensee would need to be 80% compliant within the first 50% of the duration of the licence.

18.21.9. All licensees would need to be fully compliant "at the door", in line with the High Court decision in *Vodacom / Neotel*.

18.22.Question 9.3.7

What in your view would be an appropriate timeframe? Provide the rationale informing the period required to ensure compliance.[67]

18.22.1. Cell C submitted that the five-year lock-in should be subject to a remedy period and certain exceptions so that the lock-in is not to the detriment of Black shareholders who will not be able to enjoy the capital value of those shares for five years and allows for Black shareholders to dispose of shares at their discretion as any shareholder would. Cell C further proposed 2 to 3 years to enable licensees to meet the relevant thresholds of ownership.

18.22.2. Vodacom referred to its answer to question 9.3.6 above.

18.22.3. Internet Solutions indicated that it could not respond to this question on the basis that regulatory processes, such as licence transfer, cession, or renewal as well as changes in the licensee's shareholding structure, should trigger the 30% HDG threshold requirement. It indicated further that all individual licences are due for renewal in 2029 and that any licensee, which may be B-BBEE non-compliant at the time, would then be required to comply with 30% HDG threshold requirement or lose its operating licence.

18.22.4. With reference to its response to question 9.3.6, Tracker submitted that typically, private equity and business investors invest in private entities for between 5 – 7 years. This time frame will allow for change of ownership to be taken into consideration at the time of exit of such private equity and business investors.

[67] 2017 Discussion Document – par 9.3.7

18.22.5. SACF stated that its members are generally level 3 or 4 on the B-BBEE scorecard. NAB also stated that most licensees are already compliant or exceed the B-BBEE scorecard. However, further engagement on the timeframes is required.

18.22.6. ACCSA proposed 12 months. However, individual licensees should be afforded an opportunity to set out their own roadmaps and commit to a particular framework.

Authority's Position

18.22.7. The Authority might consider a timeframe that takes into account the average period for transactions to be completed and is open to considering submissions on what period is feasible for operators.