



Project Manager: Mr Peter Mailula
Project Leader: Ms Fikile Hlongwane
Block B, 350 Witch-Hazel Avenue
Eco Point Office Park Eco Park
Centurion
Sent by email to PMailula@icasa.org.za and FHlongwane@icasa.org.za

Re: ICASA's
"Draft regulations in respect of the limitations of control and equity ownership by historically disadvantaged groups (HDGS) and the application of the ICT sector code"

We thank the Independent Communications Authority of South Africa ("the Authority") for the opportunity to submit comments on the Draft regulations in respect of the limitations of control and equity ownership by historically disadvantaged groups (HDGS) and the application of the ICT sector code ("Draft Regulations").

This submission has been prepared with the objective of informing the Authority of issues to bear in mind in its review and update of the Draft Regulations.

Introduction:

The Business Carrier Coalition ("BCC") is an industry coalition representing the interests of a number of international business telecommunications providers, namely AT&T, BT, Orange Business Services and Verizon. The BCC provides a forum for issues of common interest to its members to be raised and presented to relevant regulatory stakeholders across Europe, the Middle-East and Africa.

The BCC provides predominantly large business users (primarily local affiliates of multinational companies) with advanced electronic communications services across South Africa, (and beyond) either via class or individual licences.

As the BCC represents international telecommunications providers that have a limited local presence in South Africa, our comments focus specifically on concerns related to our specific business operations and licence types. For information, BCC members have different types of licences, some have individual licences, other class licences.



Commitment to diversity and principles of the Draft Regulations:

The BCC members are committed to diversity and strongly support inclusion globally as demonstrated in our respective company's policies and actions that focus on fostering an inclusive and diverse working environment relative to our employee hiring and supplier selection practices.¹ We firmly support the promotion of Broad-Based Black Economic Empowerment ("B-BBEE") and the country's corresponding equity ownership objectives for Historically Disadvantaged Groups ("HDGs").

Licences are not all the same:

Individual licences were initially designed by the legislator for large providers, to enable them to be granted rights to use scarce resources (*e.g.*, spectrum). As individual licences expanded to include rights to provide voice services and obtain numbers of the national numbering plan (these rights being held by Value-Added Network Service Providers ("VANS")), the Authority converted all existing licences (including VANS) into individual licences. Since 2004, individual licences have covered licensees that do not hold any rights to use scarce resources.

The members of the BCC are of the opinion that the regulation should not treat all individual licensees – regardless of whether their licence grants them rights to use scarce resources – in the same way. In our view, to promote B-BBEE in the ICT sector and avoid placing disproportionate compliance burdens on smaller operations, the Authority should focus the regulation on companies applying for scarce resources, in particular the ones granted by auction (*e.g.*, spectrum).

We understand that the Authority may be concerned that larger operators in South Africa might then use this approach to avoid compliance with B-BBEE obligations by restructuring their organization into a number of smaller operators in South Africa, each holding separate class licenses. We believe that the Authority could prevent this, and still catch larger operators in South Africa adopting this practice, by providing in the Draft Regulation that whether an operator in South Africa is required to comply with the B-BBEE obligation is determined by the operator's overall group size in South Africa (*i.e.*, the obligation attaches to the operator at South African group level, rather than to individual companies of the operator). This approach would be similar to the approach that taken in other countries², for example, in assessing the licence fee(s) that are payable by an operator in that particular jurisdiction.

A "one-size fits all" hard regulation could distort competition:

We believe that there is a risk that the Draft Regulations, being a "one-size fits all" hard regulation, would harm competition in the South African market. Larger operators in South Africa which carry out a wider range of business activities (*i.e.* electronic

¹ For more information, please see

- <https://www.verizon.com/about/our-company/diversity-and-inclusion>;
- <https://www.orange.com/en/Human-Inside/Our-commitment-to-society/pages/We-promote-digital-inclusion-and-socio-economic-development>
- <https://about.att.com/pages/diversity>

² ACM, in the Netherlands, considers companies at group level for payment of the licence fee.



communication services and other additional services) are likely to be in a better position to accumulate B-BBEE points through their more extensive local procurement activities. By requiring all providers, regardless of their size or business activity to meet level 4, the Draft Regulations favour those larger operators with their wider range of business activity, thereby potentially negatively impacting the ability of smaller operators to compete.

If however the Authority believes the B-BBEE principles are best, and therefore should be, promoted through a hard regulation stipulating a specific level to be attained, we urge the Authority:

- To consider setting the requirement at level 5 rather than level 4; and
- To provide smaller operators additional time to implement appropriate procurement processes which will enable them to accumulate B-BBEE points in the same way as larger operators. We consider these would require at least 5 years to implement.

Promoting B-BBEE through soft regulation would be more effective:

The BCC believes that to encourage wide adoption of B-BBEE and the equity ownership objectives for HDGs, it is preferable to keep the B-BBEE code in its current form, that is as a soft regulation, rather than transforming it into a hard regulation in the manner contemplated by the Draft Regulations.

A prescriptive approach by the Authority of the B-BBEE by transforming this soft regulation in a hard one will increase compliance costs, costs that will undoubtedly ultimately be passed on to the consumer. Instead, ICASA could promote B-BBEE by keeping the fundamental principle of a soft regulation and still have a larger positive impact on the entire population. For instance:

- The Authority could grant discounts to companies (commensurate with the B-BBEE level achieved) for fees payable to the Authority, such as:
 - application fees;
 - licence fees;
 - contribution to the Universal Service fund.
- In public procurements, a bidder with a better B-BBEE score may be awarded the bid even where it is up to 10% more expensive than the next best bid. The Authority could adopt a similar approach in auctions for scarce resources (such as spectrum) and grant the right to use those scarce resources to bidders with a better B-BBEE score even if their bid is up to 10% less than the highest bid.
- The Authority could adopt the Competition Commission's suggestion³ to allow the most compliant (at least level 4) B-BBEE small commercial enterprises to access licensed spectrum not used by mobile operators in rural areas "in a similar manner to television white space". This could foster competition, encouraging smaller companies to provide cheaper services in geographic areas that are not currently covered and increase the availability of wireless services in areas mainly populated by black people.

³ See, section 741.3 of the Competition Commission's "Data Services Market Inquiry Final Report" dated 2 December 2019 (<http://www.compcom.co.za/data-market-inquiry/>) "That ICASA consider models and regulatory changes to allow at least non-profit community networks, and possibly small commercial enterprises to access licensed spectrum not used by mobile operators in rural areas in a similar manner to television white space".



AT&T



Business
Services

verizon^v

ICASA regulation should be consistent with the B-BBEE Code of Practice as they evolve:

In section 4 of the Draft Regulations, where it references a 30% equity ownership be held by black people, we suggest the Authority add “in line with the B-BBEE Code of Practice”.

Request for clarification:

As we understand, the levels (as set out in the Draft Regulations) are not intended to apply to class licensees. We believe that the Authority should accordingly make a clear statement to this effect. If however these compliance requirements are intended to be mandatory and to apply to class licensees, then the BCC members ask the Authority to clarify exactly what 50% compliance in the first year entails in terms of HDG ownership and B-BBEE level.

We would appreciate the Authority also clarifying:

- How the term “licensee” is intended to be interpreted in Section 4 of the Draft Regulations; and
- Whether Section 9 is intended to include class licences during the transition period.
- In addition to that, there are good policy and market reasons to exclude entirely class licences which are license categories designed with low or no barriers to entry that benefit a large section of licensees and to avoid placing disproportionate compliance burdens on smaller operators.

In conclusion, we recommend the Authority take a light-touch approach in establishing the compliance framework for the promotion of B-BBEE and corresponding equity ownership objectives for HDGs. We believe this would be more conducive to broad adoption by licensees.

It would be beneficial for us to have the opportunity to make oral submissions via teleconference in this regard.

Respectfully submitted on May 4, 2020

For more information, please contact:

- For AT&T: Dominique Baroux at baroux@att.com or +33 1 4188 4538
- For BT: Leona Mentz at leona.mentz@bt.com or +27 11 798 5181
- For Orange Business Services: Frederique Imbrechts at frederique.imbrechts@orange.com or +32 2643 9425
- For Verizon: Salomon Grunberg at salomon.grunberg@verizon.com or +41 (22) 580 7138