

04 May 2020

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Per email: FHlongwane@icasa.org.za
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Dear Ms Hlongwane

RE: INTERNET SOLUTIONS SUBMISSION ON DRAFT LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR CODES REGULATIONS

Please find the attached Internet Solutions' submission in respect of the Draft Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Codes Regulations.

Please do not hesitate to contact the writer hereof should you have any questions.

Yours sincerely,



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1. Introduction

Internet Solutions, the division of Dimension Data Proprietary Limited ("**Internet Solutions**") is a leading service provider operating in the information communication and technology sector (the "**ICT Sector**").

Internet Solutions welcomes the publication of the Draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Codes as gazetted in *Government Gazette* No. 43021, General Notice 91 on 14 February 2020 ("**Draft Regulations**"), as published by the Independent Communications Authority of South Africa ("**ICASA**") on 14 February 2020 under *Government Gazette* No. 43021 (the "**Gazette**"). ICASA, in the *Gazette*, invited interested parties to submit written representations to ICASA on the Draft Regulations by no later than 16h00 on 3 April 2020. This date was subsequently extended to 4 May 2020. Internet Solutions, as a key stakeholder in the ICT sector, is an interested party under the *Gazette* and appreciates the opportunity to make written submission to ICASA in respect of the Draft Regulations.

Interested parties were asked in the *Gazette* to state whether they require an opportunity to make oral representations should ICASA elect to hold public hearings on the Draft Regulations. It is Internet Solutions' hope that ICASA will proceed to hold a public hearing so as to enable all parties to properly ventilate their issues relating to the Draft Regulations. Internet Solutions therefore requests that ICASA hold public hearings on the Draft Regulations, and that Internet Solutions be given an opportunity to make oral presentations at these public hearings.

There has been minimal transformation within the ICT sector, and accordingly, intervention by ICASA is critical to achieving this important objective. Internet Solutions recognises that there is a need to bridge the divide and ensure that there is a meaningful participation by historically disadvantaged groups ("**HDGs**") in the ICT sector. That being said, it is common cause that any laws or regulations promulgated by ICASA in facilitating transformation within the ICT sector must be in line with ICASA's powers as prescribed in the Electronic Communications Act, 36 of 2005 (the "**ECA**") and other relevant statutes. While we had assumed that ICASA would, in the Draft Regulations, align the requirements of the ECA with those of the Broad-Based Black Economic Empowerment Act ("**B-BBEE Act**") and the ICT Sector Codes ("**Sector Codes**") to expeditiously facilitate transformation in the ICT sector, we note that this has not necessarily been the case. Internet Solutions notes with concern the deviation of amending the ownership requirements applicable to licensees under the ECA to regulate equity ownership by HDPs and HDGs, as well as equity ownership by black people. While

these submissions will deal with a number of issues arising from the Draft Regulations, our main focus will be on the provisions which have a significant impact on the ownership requirements to be adhered to by licensees.

Internet Solutions does not intend to make an exhaustive submission on the Draft Regulations. We will only address specific issues which, in our view, require reconsideration by ICASA.

2. MAIN CONCERNS IN THE DRAFT REGULATIONS

2.1 Application of HDGs Equity Requirement

The Draft Regulations define "historically disadvantaged persons" ("**HDPs**") and HDGs as *"black persons, women and persons with disabilities and youth, who before the Constitution of the Republic of South Africa, 1996 came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion."* Internet Solutions notes that the Draft Regulations have seemingly reduced the scope of the current definition of HDGs and HDPs in the Licensing Processes and Procedures Regulations, 2010, published on 14 June 2010 under *Government Gazette* Number 33293, ("**Procedure Regulations**"), which define HDPs as *"South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds."*

Internet Solutions notes with concern that the HDGs or HDPs qualifying criteria imposed by the Draft Regulations requires a black person, woman, youth or person with a disability to have been disadvantaged by unfair discrimination on the specific basis of race, gender, disability, sexual orientation or religion prior to the commencement of South Africa's Constitution in 1996. This may, for example, exclude black persons, women and persons with disabilities and youth from the definition of HDPs if they were not disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion prior to 1996 or if they were born after 1996. It is also important to note that while all black people (Africans, Indians and Coloureds), women or people with disabilities would have qualified as HDPs/HDGs had the Draft Regulations adopted the definition of HDPs in the Procedure Regulations, they would all now have to demonstrate unfair discrimination on the basis of race, gender, disability, sexual orientation or religion before 1996 in terms of the additional qualification introduced in the Draft Regulations. This will now require evidence on a case by case basis - which may prove to be too cumbersome for a licensee to obtain and share with ICASA in the manner contemplated in the Draft Regulations. It is clear that the new definition of HDG or HDP is narrow, subjective and has the potential, for example, of excluding a large

number of black persons, women, persons with disabilities and youth from the definition of HDPs if they cannot demonstrate that they were previously disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion prior to 1996. This is particularly problematic where black people are concerned as South African black people were by law historically disadvantaged on the basis of race. This has led to several measures being put in place by the government post 1994 to redress this historical disadvantage. Accordingly, requiring a black person to demonstrate disadvantage by unfair discrimination (which is what is currently contemplated in the Draft Regulations) would undermine that which is common cause in South Africa and appears to Internet Solutions to be the antithesis of contemporary legal principles under South African law.

Internet Solutions also notes that the Draft Regulations do not specifically prescribe the criteria which must be applied by licensees (when calculating HDG or HDP ownership) in determining whether a black person, woman, youth or person with a disability was previously disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion prior to the commencement of South Africa's Constitution in 1996. As noted above, the Procedure Regulations define HDPs as "*South African citizens who are Black people, women or people with disabilities and that Black people are defined to include Africans, Indians and Coloureds.*" In terms of the Procedure Regulations, a person automatically falls within the category of an HDP where that person is black, a woman, or a person with disabilities. The Procedure Regulations do not include a reference to these persons having been disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion prior to 1996. Therefore, Internet Solutions is not misplaced in assuming that the additional qualification wording included in the Draft Regulations may exclude black people, women, youth, or people with disabilities from qualifying as a previously disadvantaged group unless they can prove that they were previously disadvantaged prior to 1996. It is unclear which criteria ICASA will apply in determining the unfairly discriminated persons and groups on the basis of race, gender, disability, sexual orientation or religion vis-à-vis persons and groups who were not unfairly discriminated before 1996. Given the uncertainty on the criteria that must be applied in demonstrating previous disadvantage pursuant to unfair discrimination, it is currently unclear how Internet Solutions would be able to definitively establish which of its shareholders would constitute HDGs/HDPs as defined in the Draft Regulations. Should a factual determination be required in respect of each individual shareholder, this would, in our view, amount to an insurmountable administrative burden for licensees.

Internet Solutions also notes that the investigations required to determine whether a shareholder is an HDP/HDG, in the manner contemplated in the Draft Regulations, would amount to a significant (and likely constitutionally impermissible) infringement of the privacy rights of shareholders. In this context, Internet Solutions notes that there are significant penalties contemplated in the Draft Regulations pertaining to the disclosure of inaccurate, false or misleading information by a licensee concerning its shareholding. For this reason, Internet Solutions believes that expanding the definition of HDPs/HDGs under the Draft Regulations would introduce significant constitutional issues for licensees (in addition to the aforementioned administrative burden).

Not only does the additional qualification (i.e. that persons must have been disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion before 1996) introduced in the Draft Regulations limit the extent to which black persons, women and persons with disabilities and youth may qualify as HDPs/HDGs, it also precludes every black person, woman, youth and person with disabilities, who was disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion post 1996 from qualifying as HDPs/HDGs. As such, the exclusion introduced in the Draft Regulations implies that unfair discrimination on the basis of race, gender, disability, sexual orientation or religion could have only occurred before 1996, and not post 1996 since it deems the said groups to have been advantaged post 1996. It is Internet Solutions' submission that this is not an outcome which furthers the objective of transforming the ICT sector. On the contrary, this limitation has the potential to curtail transformation because of its exclusionary construct (i.e. excluding persons that otherwise would have qualified but for the exclusion of individuals that have been disadvantaged by unfair discrimination after 1996). Internet Solutions has difficulty reconciling such a requirement given the historic discrimination against all black people, by law, on the basis of race as well as the ongoing discrimination still faced by black persons, women, youth and persons with disabilities. In particular, requiring a black person to demonstrate disadvantage by unfair discrimination (as is the requirement in the Draft Regulations) appears to go against the very essence of what is common cause in South Africa. Moreover, the reference to 1996 seems particularly arbitrary if one considers the fact that unfair discrimination and the effects of unfair discrimination did not disappear after 1996.

This then means that the additional qualification imposed in the Draft Regulations has the potential to reduce licensee's existing HDG or HDP equity ownership in two respects: firstly, in instances where a licensee's equity ownership structure comprises of black persons, women, persons with disabilities and youth, who were born before 1996 but who cannot prove that they were disadvantaged by unfair discrimination, and secondly, where the licensee's

HDG or HDP equity ownership structure comprises of black persons, women, persons with disabilities and youth, who were born or disadvantaged by unfair discrimination post 1996.

In addition, ICASA has also seemingly broadened the definition of HDGs and HDPs by including persons that experienced unfair discrimination based on sexual orientation and religion as additional categories of people that can qualify as HDGs and HDPs (subject to demonstrating disadvantage on the basis of unfair discrimination). In this regard, it is our view that an argument can also be made that the broadened definition allows certain persons that currently do not fall within the ambit of the definition of HDGs under the ECA and its regulations to be considered as HDGs under the Draft Regulations. This is because the Draft Regulations may also be interpreted to broaden the ambit of HDGs when contrasted against the current definitions under the ECA. In essence this means, for example, that gay white males may qualify as HDGs and HDPs so long as they can prove that they were unfairly discriminated against on the ground of sexual orientation before 1996. The same notion would apply to Jewish males who were unfairly discriminated against on the grounds of religion before 1996. Similarly, this would exclude gay white males from qualifying as HDGs and HDPs where they were born after 1996 or experienced unfair discrimination after 1996. We note, however, that broadening the definition of HDG and HDP in this fashion (and calculating HDG/HDP ownership on this basis) may prove to be particularly challenging for licensees as this will require licensees to obtain from shareholders information relating to sexual orientation and religion as well as disclosures relating to unfair discrimination experienced prior to 1996. Internet Solutions submits that these disclosures may well be considered to be overly invasive and to undermine the privacy rights of shareholders (for example, a constitutional challenge may arise where a licensee requires details concerning the sexual orientation of its shareholders in order to disclose and utilize these details for purposes of calculating HDG or HDP equity ownership).

We therefore note with concern that the negative implications of the Draft Regulations, as identified above, could be far-reaching and could have a number of unintended consequences. We therefore suggest resolving these challenges prior to the publication of the final version of the Draft Regulations.

2.2 Application of B-BBEE Requirements

Internet Solutions notes that the Draft Regulations impose a mandatory minimum percentage of 30% equity ownership by black people and a level 4 B-BBEE status, both of which must be maintained at all times during the licence period. The requirement to maintain a minimum percentage of 30% equity ownership by black people and a level 4 B-BBEE status appears to be in addition to the 30% equity ownership requirements applicable in respect of HDGs. As stated above, Internet Solutions fully supports the empowerment of black people. However, the imposed 30% black equity ownership in the Draft Regulations seems to be in conflict with the requirements in the ICT Sector Code.

Internet Solutions is also concerned that the Draft Regulations do not recognise the modified flow-through principle (one of the ownership principles in the ICT Sector Codes) which requires licensees to trace the extent of black ownership in a measured entity. This appears to follow from ICASA's previous findings in the "*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*"¹ (the "**Position Paper**") issued by ICASA, wherein ICASA states that 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, [ICASA] recognises that a definition of "ownership interest" is relevant only insofar as it forms part of the definition of control.*"² ICASA has further stated in the Position Paper that, "*in assessing whether the equity ownership target has been met, [ICASA] is satisfied that all ownership principles in the B-BBEE Codes, except for the Modified Flow-Through Principle, may be applied*"³ (our emphasis).

The Draft Regulations' reference to 30% equity ownership by black people suggests that the Draft Regulations do not make provision for any mechanism by which the 30% equity ownership requirement may be achieved, other than the actual equity ownership by black people and that alternative mechanisms, such as the recognition of (i) the continuing consequences principle; (ii) the modified flow-through principle, and (iii) the sale of assets to a black-owned entity, will not be accepted by ICASA. If this is correct, this will undoubtedly prejudice licensees such as Internet Solutions that have expended significant resources to

¹ Government Gazette No. 42234, 15 February 2019, Notice No. 85

² Position Paper, paragraph 17.24

³ Position Paper, paragraph 17.20

align their ownership structures with the principles set out in the ICT Sector Codes. We are of the view that the Draft Regulations ought to have aligned black ownership (as contemplated in the Draft Regulations) with the ICT Sector Codes (rather than seeking to deviate from the ownership requirements in the ICT Sector Codes via the Draft Regulations).

Notional ownership forms a big part of Internet Solution's B-BBEE shareholding, as is the case with other licensees. ICASA's proposed approach to measuring equity ownership, instead of notional ownership, to determine B-BBEE compliance (as is the current approach in the ICT Sector Codes) will have an adverse effect on Internet Solutions and other licences and will significantly reduce Internet Solutions' ownership by black people.

Internet Solutions is also concerned that the reference to equity ownership by both black people and HDGs/HDPs introduces unnecessary uncertainty, given that black people (by definition) fall within the definition of HDGs/HDPs.

Internet Solutions is of the view that ICASA is obligated to recognise all ownership principles as set out in the B-BBEE ICT Sector Codes and the B-BBEE Codes and cannot draw any distinction between actual ownership and notional ownership in its recognition of B-BBEE compliance. In particular, Internet Solutions is concerned that the imposition of any requirements in addition to a minimum level 4 B-BBEE status as recommended in the Draft Regulations would contravene the following provisions of the B-BBEE Act and would thus be unlawful:

- Section 10(1) which requires ICASA, as an organ of state, to apply the ICT Sector Codes in determining the qualification criteria for the issuing of licences, concessions or other authorisations;
- Section 10(3) which states that an enterprise in a sector in respect of which the Minister of Trade and Industry (the "**Minister**") has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code. In the current circumstances, that means that all licensees may only be measured for compliance with the requirements of B-BBEE in terms of the ICT Sector Codes;
- Section 9(6) which states that organs of state or public entities may only specify qualification criteria for procurement and other economic activities (including licensing) which exceed those set out in codes of good practice, if permitted to do so by the Minister, by way of a notice in the Government Gazette. This means that ICASA can only deviate from the ICT Sector Codes in determining qualification criteria for the

issuing of licences, concessions or other authorisations, if permitted by the Minister by way of a notice in the Government Gazette; and

- Section 10(2) which states that the Minister may allow an organ of state to deviate from applying the relevant code of good practice if objectively verifiable facts or circumstances applicable to the organ of state necessitates a deviation.

It is not legally competent for ICASA to deviate from (or amend) the ICT Sector Codes in the manner contemplated in the Draft Regulations. As the Minister has promulgated the ICT Sector Codes, all licensees (and ICASA itself) are required to adhere to the provisions of the ICT Sector Codes. By deviating from the ICT Sectors, Internet Solutions is of the view that the Draft Regulations:

- do not demonstrably improve the participation of black people and HDGs in the ICT Sector; and
- introduce significant uncertainty for licensees that have undertaken significant efforts to achieve the principles set out in the ICT Sector Codes.

Internet Solutions is also concerned that the requirement to achieve 50% compliance with the requirements of the Draft Regulations within a period of twelve months is unreasonable and untenable.

2.3 Control interest under the Draft Regulations

The ECA does not currently define the term "control" or elaborate upon what amounts to "control" under the ECA. Internet Solutions notes, however, that the Draft Regulations define a "control interest" to mean *"in the absence of proof to the contrary, that a person directly or indirectly: (a) has beneficial ownership of twenty percent (20%) or more 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 the ability to control, either directly or 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) in the case the Licensee is a subsidiary, is a holding company of that subsidiary, as contemplated in section 3(1)(a) of the Companies Act, 2008 (Act No. 71 of 2008); (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 twenty percent (20%) or more of the members interest, or controls or has the right to control the members' vote 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 securities or otherwise.”

This definition must be read alongside the following definitions in the Draft Regulations which pertain to "control":

- **“Affiliate”** to mean “(a) in relation to a juristic person – (i) any person who has a direct or indirect ownership interest or control interest in the juristic person; (ii) any person in whom the juristic person has a direct or indirect ownership of control interest; or (iii) any person in whom a person contemplated in sub-paragraph (i) has a direct or indirect ownership interest; and (b) in relation to a natural person, a parent, spouse or child of the relevant natural person”⁴;
- **“Issued Share Capital”** to mean “with respect to any person, all shares, interests, participations or rights or other equivalents (however designated, whether voting or non-voting, ordinary or preferred) in the equity or capital of such person, now or hereafter issued”⁵;
- **“Ownership Interest”** to mean “any direct or indirect ownership of issued share capital of five per cent (5%) or more in a licensee”⁶;
- **“Transfer”** to mean “assign, cede, sell, convey, settle, alienate, or otherwise transfer, in whole or in part, whether or not for value, any interest in a licence or licensee from one person to a different person”⁷; and
- **“Transfer of a Control Interest”** to mean “...the same meaning as ‘transfer’, except that such transfer of a control interest shall occur when a control interest in a Licensee is transferred from one person to a different person”.

Internet Solutions has not been able to identify a purpose of the above definitions, as they are not used in the body of the Draft Regulations. However, Internet Solutions is concerned that the inclusion of the above definitions is evidence of an intention to amend the current interpretations of "control" under the ECA. While Internet Solutions does not, for the purposes

⁴ Draft Regulations, section 1

⁵ Draft Regulations, section 1

⁶ Draft Regulations, section 1

⁷ Draft Regulations, section 1

of this submission, seek to advance a view concerning the meaning of control under the ECA, Internet Solutions notes that:

- the ECA is an act of Parliament;
- amendments to the ECA need to be passed by Parliament and thereafter signed by the President of South Africa;
- it is only lawfully competent for ICASA to publish regulations pursuant to the provisions of the ECA and the Independent Communications and Authority of South Africa Act, 2000; and
- it is not lawfully competent for ICASA to amend the provisions of the ECA (including those provisions pertaining to control) in the manner contemplated in the above definitions set out in the Draft Regulations.

Should ICASA wish to amend the requirements applicable to control, as contemplated in the ECA, Internet Solutions is of the view that this would be properly achieved by way of an amendment to the ECA by a duly passed act of Parliament.

3. Conclusion

The Draft Regulations have, in many instances, narrowed the definition of HDPs and HDGs by introducing a requirement that persons must demonstrate that they have been disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion ought to have been born prior to 1996 to qualify as HDPs/HDGS. Internet Solutions is opposed to the use of the current definition of HDPs/HDGs in the Draft Regulations due to its unintended and foreseen negative consequences. In particular, the Draft Regulations, amongst other things:

- do not provide a criteria which licensees will be required to apply in determining whether its shareholders (women, youth or people with disabilities) were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion;
- suggest that a licensee must embark on burdensome investigations to determine whether a shareholder is an HDP/HDG, which would likely amount to a significant (and likely constitutionally impermissible) infringement of the privacy rights of shareholders;

- suggest that black people, women, youth and persons with disabilities, who cannot prove disadvantage by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion prior 1996 do not qualify as HDPs/HDGs (as the Draft Regulations suggest that this unfair discrimination must have occurred after 1996); and
- seemingly broaden the definition of HDGs and HDPs by including persons that experienced unfair discrimination based on sexual orientation and religion as additional categories of people that can qualify as HDGs and HDPs (subject to demonstrating disadvantage on the basis of unfair discrimination), which could include, for example, gay white males and Jewish males.

The Draft Regulations also exclude ownership recognition principles that are set out in the ICT Sector Codes. The exclusion or non-recognition of the continuing consequences principle; the modified flow-through principle, and sale of assets to a black-owned entity as ownership principles will have an adverse effect on the ICT Sector.

Internet Solutions is of the opinion that the Draft Regulations in their current form fall short of ICASA's objective to diversify and transform the ICT sector in a number of respects. Internet Solutions therefore proposes that the Draft Regulations be redrafted to take account of the matters raised in these submissions.

Once again, we appreciate the opportunity to make a written submission and the intervention by ICASA to diversity and transform in the ICT sector. We look forward to making oral presentations at public hearings.