

Independent Communications Authority of South Africa

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Attention: Mr Peter Mailula

By email: PMailula@icasa.org.za

04 May 2020

Dear Sir

SUBMISSION 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 (“THE NOTICE”)

We refer to the above published as Notice 91 of 2020 in Government Gazette no 43021 on 14 February 2020.

Attached please find the written submissions of Liquid Telecommunications South Africa (hereinafter referred to as Liquid Telecom) in response to the Notice.

Liquid Telecom wishes to participate in any further written or oral hearings and processes that flow from the publication of this Notice. We therefore request that the Authority includes us should same be held following receipt of the written responses.

Kindly acknowledge receipt of this submission.

Yours faithfully



Valencia Risaba
Head: Regulatory Services

Submission
to
The Independent Communications Authority of South Africa
by
Liquid Telecom
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

INTRODUCTION

1. The Independent Communications Authority of South Africa ("**the Authority**"/"**ICASA**") published 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 in Government Gazette No. 43021, Notice 91 of 2020, on 14 February 2020. ("**the Notice**").
2. ICASA has invited interested persons to submit written comments on the Draft Regulations.
3. Liquid Telecommunications South Africa ("Liquid Telecom") extends its appreciation to the Authority for the opportunity to provide comments in response to the notice and for the extension of the closing date for written submissions from 03 April 2020 to 4 May 2020.
4. Liquid Telecom hereby submits its preliminary response to the Notice. It may no longer require highlighting, but for the sake of accuracy, Liquid Telecom points out that it previously operated under the name "Neotel", which name has been changed to Liquid Telecom after the acquisition of Neotel in 2017. Any historical references to Neotel in this submission are to the same company, however, reflect the situation prior to the change of name.
5. We would like to participate in any future processes in relation to the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code, including public hearings and workshops.
6. Our submission comprises three parts:
 - 6.1. Part A – General Comments;
 - 6.2. Part B – Specific Concerns;
 - 6.3. Part C – Conclusion

PART A: GENERAL COMMENTS

1. The purpose of 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 (hereinafter referred to as “the Draft Regulations”) is to promote equity ownership by HDGs, defined as black persons, women, persons with disabilities and the youth, and to promote Broad Based Black Economic Empowerment. We confirm Liquid Telecom’s support for the objectives and intent of the regulations.
2. The Covid-19 pandemic has caused devastating contractions in global economies, with South Africa facing the possibility of a forecasted 5%-7% recession in 2020 (according to the IMF). With the ICT sector being a key contributor to GDP, the growth and sustainability of the sector both during the pandemic and beyond is crucial. Liquid Telecom has no doubt that the Authority fully appreciates the critical role played by the ICT sector in the growth and sustainability of the country’s economy, which is driven by both local and international investment. It is therefore crucial, in regulating the industry, that the Authority should seek to ensure growth and sustainability as well as encourage transactions that result in growth in the sector. This should be achieved in conjunction with, and while also supporting the critical transformation and empowerment agenda.
3. We welcome the Authority’s exclusion of class licensees from any mandatory equity requirements as this will assist in promoting both growth and transformation of the ICT sector. We, however, implore the authority to consider developing an incentive system for class licencees, in terms of which compliant licencees would be eligible for some concessionary regulatory benefits as may be determined by the Authority. This would ensure that class licencees, as important participants in the industry, are not excluded from the transformation and empowerment agenda.
4. We note that the Authority has kept the minimum HDG equity requirement of 30%. We submit in light of the global economic contraction that is sure to follow from the Covid-19 pandemic there is currently a pressing need to pursue and secure investment driven growth for the ICT

sector. Increased efforts in this regard will be critical in ensuring the continued global competitiveness of the sector. In the circumstances, we propose that the Authority considers some flexibility in the 30% threshold, immediately in the aftermath of the pandemic and, for a specified period, provide for the consideration of factors such as the socio-economic impact of the transaction underlying a specific transfer of licence or other such transaction.

5. We have noted some persisting interpretation and application challenges in the Draft Regulations (to be elaborated upon in the specific comments section below), mostly relating to the definition and application of key concepts. We have also noted that potential challenges may result in the interpretation and application of some aspects of the Draft Regulations, primarily as a result of the fact that related ownership and control requirements lie in other legislation and regulations. Notwithstanding the aforementioned areas of potential challenge, we would like to emphasise that the achievement of substantive, and not only formal, transformation and empowerment should be the imperative of the Authority when implementing the final regulations to come out of this process. The regulation of ownership and control is a critical component for achieving this imperative.

PART B: SPECIFIC COMMENTS

This part of our submission raises comments on specific provisions of the draft Regulations:

Construction and application of legal conceptual framework:

6. Key to the successful attainment of the purpose of the Draft Regulations is a clear construction and application of the key concepts of ownership and control. A thorough purposive application of the Draft Regulations, will require the consideration of concepts dealt with in various other legislation such as the Companies act, the Competition Act and the B-BBEEA as well as the ICT Sector Code.
7. Ownership is not defined in the ECA. Further, in applying the Draft Regulations, regard needs to be had to definitions of ownership and control proffered by the Companies and the Competition act. The Companies Act intends to legislate, amongst others, the interrelation and

independence of control in companies whereas the Competition Act legislates towards competition.

8. The HDG requirement in the Draft Regulations is conceived from the ECA, which primarily assesses empowerment narrowly, only on the element of ownership, whereas B-BBEE assesses empowerment across a broad range of elements, including effective ownership, in determining the BEE level of an entity.
9. There appears to be an absence of alignment and/or clarity on how such alignment is to be achieved in the context of application of the Draft regulations. We propose, as one way of achieving alignment, that the final draft of the regulations specifically adopt and align to one set of tests that is broader than the one contemplated in the ECA and the Draft Regulations, in the computation of Ownership and Control.
10. The proposal in 9 above would recognise and address the fact that, while the ECA and the Draft Regulations inadvertently seek to enforce a mandatory minimum target, a wider scope of factors is more useful in evaluations conducted in terms of the B-BBEEA and the ICT Sector Codes.
11. It is critical that clarity is provided on the interrelation and applicability of the various regulatory instruments, so as not to negate any of them. We propose that the Authority considers the incorporation of other flexible computations of ownership, such as the modified-flow through principle, which we note has been excluded from the Findings Document and Position Paper on the inquiry into Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Codes in the ICT Sector, published on 15 February 2019. Such flexibility would enable the consideration of both direct and indirect control and would recognize integrity in ownership while also supporting and encouraging much needed sector investment and growth.
12. Liquid Telecom further proposes the exclusion of Control Interest as it is not clear why the definition was included or its materiality in applying the regulations.
13. The Draft Regulations also do not define “Ownership Equity” and provide no reference to other applicable legislation where a definition may be sourced, as such this absence of the term “ownership equity” makes it unclear how the Authority will regulate this

Trigger for applicability (Section 9 (2)(b) of the EC Act)

14. The trigger for the 30% HDG requirement in the Draft Regulations is in respect of the following regulatory or compliance processes:
 - 14.1. new applications (per Section 9 of the ECA),
 - 14.2. Renewals of licence (per Section 11 of the ECA),
 - 14.3. Transfers of Control (per Section 13 of the ECA), and
 - 14.4. Amendments of I-ECNS and I-ECS licences (per Section 9 of the ECA).
15. Under the revised ICT Sector Code, holders of I-ECNS and I-ECS licences are required to hold a minimum level 4 certification, with a minimum of 30% ownership by “black people” (African, Coloured and Indian SA citizens) at all times during the term of the licence and submit annual verification of compliance.
16. Further, the current Radiofrequency Spectrum Regulations require all licensees to maintain a 30% ownership by HDGs throughout the subsistence of their spectrum licences. A spectrum licence is valid for a period of 12 months and is renewable on an annual basis. There appears to be misalignment between the abovementioned regulatory instruments in that, while the Draft Regulations would effectively allow for a period of 24 months for a non-compliant licensee to comply, a reading of the ICT Sector Code and the Spectrum Regulations would not have the same effect, and would require a licensee to meet the compliance threshold throughout the persistence of its licence.
17. Clarity must be provided in relation to the potential conflict resulting from the converging periods as indicated in 16 above.
18. We also propose that the magnitude and extent of the underlying transaction or other trigger as mentioned in 14 above be considered and where justifiable, taking into account the socio-economic impact of such proposed transaction, a longer transitional period be allowed by the Authority. Such flexibility in approach would encourage both local and international investment into the sector.

Applicability to listed entities

We are of the view that the HDG equity ownership requirement cannot practically be applied to listed entities. Clarification of the Authority's intentions in this regard is critical in the light of a compelling for economic investment and growth both in the sector and for the bigger economy.

Recognition of previous shareholding by HDGs

We are of the view that, subject to such conditions as the Authority may determine to support the objectives of the regulations and to support sector investment and growth, the final regulations must include a mechanism to recognise a portion of HDG shareholding after the incumbent HDG lost shareholding through the sale or transfer of shares by some other means.

PART C: CONCLUSION

Liquid Telecom reiterates its support for the purpose and intent of the Draft Regulations. We submit that, when considering the final regulations, it is critical that the authority has regard for the extensive and wide ranging impact of the current Covid-19 pandemic on the sector and on both the country's the global economy. Regulation of ownership and control of licenced entities must be targeted at objectives of encouraging investment, taking into considering the evolving nature of sector itself and the economy. The authority must strive to balance the key objectives of empowerment and transformation with those of creating and sustaining a globally competitive South African ICT sector.