



**Draft Regulations in Respect of the Limitation of Control and Equity  
Ownership of Historically Disadvantaged Groups (HDGS) and the  
Application of the ICT Sector Code:  
Government Gazette No 43021 dated 14 February 2020.**

**Submission due date: 4 May 2020**

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## 1. Background and Introduction

On 14 February 2020 the Authority published the Draft Regulations in Respect of the Limitation of Control and Equity Ownership of Historically Disadvantaged Groups ("HDG's") and the Application of the Amended ICT Sector Code (Government Gazette No. 43021).

The Draft Regulations introduce new equity ownership requirements for HDG's in addition to the Amended ICT Sector Code. In terms of the Draft Regulations, Individual Licensees are required to have a minimum equity ownership of 30% by HDG's on *any application including* applying for an individual license, amending an individual license, applying for a transfer of an individual license or the renewal of an individual license. Individual licensees are also required to ensure that their ownership equity held by HDG's is not lower than 30% at any time during the licence period. A Licensee who is found to be in contravention of HDG not lower than 30% at any time during the license period is liable to fine not exceeding the greater of R5 000 000 or 10% of the Licensee's annual turnover.

As a separate and additional obligation, the Draft Regulations also require that all licensees (including individual licensees) must on any application have a minimum of 30% ownership by black people and have a minimum level 4 B-BBEE Contributor status. Licensees are required to maintain a minimum 30% "ownership equity" by HDG.

Mobile Telephone Networks Pty Ltd ("MTN") would like to thank the Independent Communications Authority of South Africa ("the Authority") for the opportunity to comment on the Draft Regulations. MTN commends the Authority for following a rigorous consultative process which culminated in the Draft Regulations.

In addition to making these written submissions, MTN would appreciate an opportunity to make oral submissions at public hearings should the Authority convene a hearing.

According to its B-BBEE verification certificate issued on 28 May 2019 and expiring on 27 May 2020, MTN's Black equity ownership is currently at 41.41%. A copy of the verification certificate is attached marked "MTN1". MTN hopes that our level 2 B-BBEE Contributor status is a testament to the fact that MTN is committed to transformation and empowerment of black people in the ICT sector. The submissions are made in the interests of rational, transparent, lawful and certain regulation for the entire ICT sector.

## **2. The Legal Framework to Regulate Broad-Based Black Economic Empowerment**

### *The B-BBEE Act*

The Broad-Based Black Economic Empowerment Act No. 53 of 2003, as amended ("B-BBEE Act") sets out the objectives of government's intervention to promote empowerment of Black People. Section 9 of the B-BBEE Act delegates to the Minister of Trade and Industry the power to prescribe codes of good practice. The codes of good practice may specify:

- Broad-based black economic empowerment ("B-BBEE") targets aimed at achieving the objectives of the B-BBEE Act<sup>1</sup>; and
- The period within which those targets must be achieved.<sup>2</sup>

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<sup>1</sup> B-BBEE Act section 9(3)(a)

<sup>2</sup> B-BBEE Act section 9(3)(b)

Once the codes of good practice are issued, every organ of state and public entity (including the Authority) is obliged to apply it until it is amended, replaced or repealed<sup>3</sup>.

The Minister may, if requested to do so, permit a public entity (including the Authority) to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in the codes of good practice. Where no such permission has been sought or granted, no organ of state or public entity may impose criteria different from that imposed by the B-BBEE Act and the relevant codes of good practice.

#### The ICASA Act

Section 4(3)(k) of the Independent Communications Authority Act No. 13 of 2000 ("ICASA Act") permits, but does not oblige, the Authority to make regulations on empowerment requirements to promote B-BBEE.

In the event of a conflict between the ICASA Act and any other law–

- relating to the regulation of broadcasting, electronic communications and postal services - the ICASA Act prevails<sup>4</sup>; and
- relating to B-BBEE - the B-BBEE Act prevails<sup>5</sup>.

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<sup>3</sup> B-BBEE Act section 10

<sup>4</sup> ICASA Act section 24

<sup>5</sup> B-BBEE Act section 10(1) read together with ICASA Act section 24

## The ECA

Section 2(h) of the Electronic Communications Act No. 26 of 2005 (“ECA”) require the Authority to promote B-BBEE, with attention to the needs of women, opportunities for youth and challenges for persons with disabilities.

The Authority is required to promote B-BBEE when granting a licence<sup>6</sup>. The Authority is empowered to “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 historically disadvantaged groups and to promote B-BBEE”<sup>7</sup>. The Authority is required to impose minimum HDG equity ownership, not below 30%, in its notices inviting applications for individual licences<sup>8</sup>.

The Authority has interpreted the power conferred under section 9(2)(b) of the ECA as including the converse and has extended its power to require at least 30% HDG equity ownership to the transfer of individual licences under section 13(1) of the ECA<sup>9</sup>. Furthermore, the Authority extended its powers beyond applications for an individual license.

In the event of a conflict between the ECA and any other law –

- relating to the regulation of broadcasting or electronic communications – the ECA prevails<sup>10</sup>; and
- relating to B-BBEE – the B-BBEE Act prevails<sup>11</sup>.

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<sup>6</sup> ECA section 5(9)(b)

<sup>7</sup> ECA section 13(3)(a)

<sup>8</sup> ECA section 9(2)(b)

<sup>9</sup> Notice 881 of 2014 GG No. 38087 10 October 2014

<sup>10</sup> ECA section 94

<sup>11</sup> B-BBEE Act section 10(1) read together with ECA section 94

### 3. Authority's Power to Regulate B-BBEE

The Authority is required to apply the Amended ICT Sector Code and may not impose requirements that exceed or fall short of those in the Amended ICT Sector Code<sup>12</sup>, unless it has been granted special approval by the Minister of Trade and Industry<sup>13</sup>.

It is therefore safe to interpret section 4(3)(k) of the ICASA Act as relating only to instances where the Authority wishes to impose B-BBEE requirements that exceed the Amended ICT Sector Code. To hold otherwise will result in an absurdity that could not have been intended - that the Authority, may issue B-BBEE regulations separate from and in parallel with the Amended ICT Sector Code, and which regulations will be unenforceable<sup>14</sup> and trumped by the Amended ICT Sector Code in any event<sup>15</sup>.

However, even in that case – where the Authority wishes to impose B-BBEE requirements that exceed the Amended ICT Sector Code – the Authority is constrained. It must first seek the approval of the Minister of Trade and Industry before such regulations can be put into effect<sup>16</sup>. We are respectfully of the view that the exercise by the Minister of Trade and Industry of the powers under section 9(6) of the B-BBEE Act is not a mere formality. An imposition of requirements exceeding those in the applicable sector code is in effect an amendment of the applicable sector code, in which case the Minister must first hear affected and interested parties<sup>17</sup>.

The ECA does not confer on the Authority any powers to regulate B-BBEE beyond what the Authority is empowered to do under section 4(3)(k) of the ICASA Act. In fact,

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<sup>12</sup> B-BBEE Act section 10(1) read with 10(3)

<sup>13</sup> B-BBEE Act section 9(6)

<sup>14</sup> If the regulations covered the same field as that covered by the ICT Sector Code they will be superfluous.

<sup>15</sup> ICASA Act section 24 read with B-BBEE Act section 10(1) and (3)

<sup>16</sup> B-BBEE Act section 9(6)

<sup>17</sup> B-BBEE Act section 9(5)

the ECA confers no powers to regulate B-BBEE at all but imposes an obligation to promote B-BBEE. This is clear from the wording of sections 2(h), 5(9)(b) and 13(3)(a) of the ECA as follows:

- Under section 2(h) the primary purpose is the regulation of electronic communications in the public interest, and (secondary purpose) to promote B-BBEE, “with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities.” Our reading of this section is that it is electronic communications that the Authority is empowered to regulate and that it must do so in the public interest, while at the same time promoting (but not regulating) B-BBEE.
- Section 5(9)(b) is much clearer, as it imposes an obligation on the Authority to promote B-BBEE when granting a licence and makes it clear that the Authority must do so (promote B-BBEE) “in accordance with the requirements of the Amended ICT Sector Code.”
- Under section 13(3)(a) what the Authority is empowered to do by regulation is to set a limit or restriction on the ownership or control of an individual licence. The Authority is empowered to do so in order to, inter alia, promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote B-BBEE. There is no separate power under section 13(3)(a) for the Authority to regulate B-BBEE. As an aside observation, the language of section 13(3)(a) is potentially confusing. The reference to “historically disadvantaged groups” is rather dated.<sup>18</sup> In the

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<sup>18</sup> The term “Historically Disadvantage Individual” (HDI) predates the B-BBEE Act and it used to refer to a South African citizen (a) who, due to the apartheid policy, had no voting rights in the national elections prior to the

empowerment parlance the term has been replaced by “black people” as defined in the B-BBEE Act. Therefore, the term should be read to mean “black people”, and we would encourage the Authority to use “black people” in all its official documents in order to avoid confusion. This is because “black people” will be a more accurate reference as there is legislation and a detailed regulatory framework that sets out how the equity ownership of “black people” is to be measured for the purposes of B-BBEE.

Section 9(2)(b) presents a problem. It introduces a power to stipulate a percentage ownership of not less than 30% in a notice inviting parties to apply for an individual licence. This notwithstanding, we submit that this power – assuming it is lawful for a moment – is not a broad power to regulate but limited to instances when the Authority invites applications for individual licences.

- The first challenge is that the provision flies in the face of the B-BBEE Act by purporting to allow the Authority to exceed the requirements of the Amended ICT Sector Code without going through the process under section 9(6) of the B-BBEE Act, which is impermissible.
- The second difficulty is that it is inconsistent with section 5 of the ECA. An individual licence is a licence granted in terms of section 5(2). Section 5(9)(b) requires the Authority to promote B-BBEE “in accordance with the requirements of the Amended ICT Sector Code” when granting a licence, it

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introduction of the 1983 Constitution (Act No. 100 of 1983) or the Interim Constitution (Act No. 200 of 1993), and/or (b) who is a woman, and/or (c) who has a disability, provided that such person obtained citizenship before the Interim Constitution came into effect. The term “Historically Disadvantaged Group” referred to a grouping of HDIs. (See National Treasury 2001 Preferential Procurement Regulations)

does not empower or require the Authority to exceed the requirements of the Amended ICT Sector Code.

- Thirdly, the requirements seem to apply to the granting of individual licences only. Unless there is a sound explanation for singling out the granting of individual licences and imposing different requirements for it, the provision may be irrational and therefore liable to be set aside <sup>19</sup>.
- Fourthly, the requirement is vague and unmeasurable to the extent that it requires the ownership to be by “historically disadvantaged groups”. If the historical definition of “historically disadvantaged groups” is adopted (as it is in the Draft Regulations) it will include white women, among others, who are not included in the definition of black people in the B-BBEE Act. If the historical definition of “historically disadvantaged groups” is adopted, then the concept is not defined anywhere in the ECA making it impossible to measure. Either way, the B-BBEE Act and the codes of good practice regulate the measurement of equity ownership by black people – and will therefore be of no assistance in measuring ownership by “historically disadvantaged groups”. Therefore, if ownership by “historically disadvantaged groups” is to be verified in the same manner as is required by the B-BBEE Act and the Amended ICT Sector Code in respect of black people, a parallel verification process akin to that under the B-BBEE Act will have to be developed, at a significant cost to the industry.

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<sup>19</sup> Constitution sections 1(c), 2, and 36

Lastly, on 30 October 2015, the then Minister of Trade and Industry, Dr Rob Davies announced that s3(b) of the Broad-Based Black Economic Empowerment Amendment Act, 2013 (Act, No 46 of 2013), also known as the Trumping Provision, which commenced with effect from the 24 October 2015. The Trumping Provision stipulates that in the event of any conflict between the B-BBEE Act and any other law in force immediately prior to the date of commencement of the B-BBEE Act, where such conflict relates to a matter dealt with in the B-BBEE Act as amended, the B-BBEE Act shall prevail. This Trumping Provision was inserted to safeguard the objectives and spirit of transformation.

#### **4. Specific Comments**

##### **4.1. HDG Equity Ownership Requirement**

The Draft Regulations seek to, amongst other things, amend the equity ownership requirements applicable to individual licensees under the ECA to include a minimum 30% equity ownership by HDPs and HDGs.<sup>20</sup>

We note that the Draft Regulations define HDGs and HDPs 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.*"<sup>21</sup>

This definition goes beyond the definition of black people in the B-BBEE Act as it includes white women, among others, who are not included in the definition of black

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<sup>20</sup> Draft Regulations, section 3

<sup>21</sup> Draft Regulations, section 1

people in the B-BBEE Act. In this regard it is our respectful submission that the Draft Regulations are contrary to the B-BBEE Act, the B-BBEE Act trumps it<sup>22</sup>, and is therefore unenforceable. Furthermore, we submit that it is not competent for the Authority, by way of regulation, to attempt to introduce definitions to terms used in authorising statutes being the ECA and the ICASA Act. In summary, therefore, it is not competent for the Authority to (i) define HDG's beyond the definition of Black People in terms of the B-BBEE Act; and (ii) to introduce a definition for HDG's (which is used in the ECA and the ICASA Act) by way of regulation or sub-ordinate legislation.

Furthermore, we note that the effect of section 3 of the Draft Regulations is to create a parallel verification process akin to, but not necessarily the same as, that under the B-BBEE Act and the Amended ICT Sector Code. The Draft Regulations require on any application, that an individual licensee must provide proof to the Authority in the form of a "certificate from a recognised and SANAS accredited verification agency"<sup>23</sup>. It also makes provision for any other "*supplementary information*" which the Authority may request in order to verify the ownership equity held by HDGs at any given time during the licence period.<sup>24</sup> Finally, publically trading or listed licensees must submit "*an independent assurance report indicating compliance with HDG's equity requirement*"<sup>25</sup>. We are of the view that this parallel verification process, which requires the submission of vague and undefined certifications and documents will be costly and inefficient for the industry, as well as the Authority. The Authority should instead rely on the systems and processes already implemented and utilised through

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<sup>22</sup> B-BBEE Act section 10(1) and (3) read together with ECA section 94

<sup>23</sup> Draft Regulations, section 3(3)

<sup>24</sup> Draft Regulations, section 3(4)

<sup>25</sup> Draft Regulations, section 3(8)

the Amended ICT Sector Code for purposes of verifying the black ownership of individual licensees.

#### 4.2. B-BBEE Requirements

The Draft Regulations provide that "[o]n application, all applicants must have a minimum of 30% equity ownership by black people and have a minimum level 4 B-BBEE Contributor status"<sup>26</sup> (our emphasis). In addition, a licensee (including an individual licensee) "must ensure that its ownership equity held by black people is not lower than 30% at any given time during the licence period" (our emphasis).<sup>27</sup> Accordingly, in addition to the requirements relating to equity ownership by HDGs, the Draft Regulations seek to introduce a 30% equity ownership requirement by black people, as well as a minimum level 4 B-BBEE Contributor status requirement for individual licensees (although the 2 latter requirements are also applicable to class licensees).

In order to demonstrate compliance with the level 4 B-BBEE Contributor status requirement, licensees will be required to submit an annual B-BBEE verification certificate for purposes of demonstrating a licensee's B-BBEE Contributor status "calculated on a flow through principle".<sup>28</sup>

We note that the definition of "black people" under the Draft Regulations is substantially the same as the definition in the B-BBEE Act and will thus be determined with reference to the provisions of the B-BBEE Act (read together with the Amended ICT Sector Code). However, we are concerned about the reference to the B-BBEE

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<sup>26</sup> Draft Regulations, section 4(1)

<sup>27</sup> Draft Regulations, section 4(4)

<sup>28</sup> Draft Regulations, section 4(3),

Contributor status having to be "*calculated on a flow-through principle*". Strictly articulated, this provision in the Draft Regulations is not accurately drafted as it is not possible to calculate a "*B-BBEE Contributor status*" on "*a flow-through principle*".

The flow-through principle is one of the calculation methodologies used in the Amended ICT Sector Code for purposes of determining the extent of black equity ownership in a measured entity. However, it is not the only calculation methodology referenced in the Amended ICT Sector Code. Other methodologies include, for example, the continuing consequences principle, the modified flow-through principle and the exclusion principle. The application of these principles and methodologies should not be excluded from the measurement of B-BBEE Requirements imposed by any regulations issued by the Authority. Any such exclusion would, in our respectful submission be contrary to the B-BBEE Act, and since the B-BBEE Act trumps it<sup>29</sup>, would therefore be unenforceable. Accordingly, in our view the B-BBEE requirement on licensees should simply be a minimum level 4 B-BBEE Contributor status and a minimum 30% black equity ownership as determined in terms of the Amended ICT Sector Code.

#### **4.3. Contraventions and Penalties**

The Draft Regulations states that a person that submits false, misleading or inaccurate information is guilty of an offence and subject, on conviction to a fine of up to R5 000 000 (five million Rand) or of imprisonment of up to 24 months.<sup>30</sup> The imposition of possible imprisonment of up to 24 months is beyond the Authority's

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<sup>29</sup> B-BBEE Act section 10(1) and (3) read together with ECA section 94

<sup>30</sup> Draft Regulations, section 8(3)

powers in light of the provisions of sections 17H(2)(a) and 17H(3) of the ICASA Act which refer only to a fine not exceeding R5 000 000 (five million Rand) in the respect of the provision of false or misleading information. These sections of the ICASA Act do not refer to imprisonment of any form for the offence of the provision of false or misleading information.

The Draft regulations also states that a licensee which contravenes the requirement to maintain a minimum 30% HDG equity requirement at any time during its licence period or which contravenes the requirement to maintain a minimum 30% black equity ownership requirement at any time during its licence period, is liable to a fine not exceeding the greater of R5 000 000 (five million Rand) or 10% of the licensee's annual turnover. This too, is, in our respectful submission beyond the Authority's powers because in terms of section 17H(3)(ii) of the ICASA Act, the only offences which would be capable of a penalty of the greater of R5 000 000 (five million Rand) or 10% of annual turnover is the offences of providing a service without a licence or registration as required by the ICASA Act or if a licensee fails to obtain the prior written permission of the Authority before transferring a licence.

## **5. Conclusion**

Accordingly, it is our respectful submission that in its current form, the Draft Regulations go beyond the powers of the Authority to regulate B-BBEE.

The purpose of the Draft Regulations would be well served by way of the imposition of B-BBEE requirements for licensees to simply maintain a minimum level 4 B-BBEE Contributor status and a minimum 30% black equity ownership calculated, assessed and verified in terms of the Amended ICT Sector Code.