

**DRAFT REGULATIONS IN RESPECT  
OF THE LIMITATIONS OF CONTROL  
AND EQUITY OWNERSHIP BY  
HISTORICALLY DISADVANTAGED  
GROUPS AND THE APPLICATION OF  
THE ICT SECTOR CODE**

**REPRESENTATIONS BY M-NET AND  
MULTICHOICE**

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## 1. INTRODUCTION

1.1 Electronic Media Network Limited t/a M-Net ("**M-Net**") and MultiChoice Proprietary Limited ("**MultiChoice**") thank the Independent Communications Authority of South Africa ("**the Authority**") for the opportunity to comment on 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*"<sup>1</sup>("Draft Regulations").

1.2 We made submissions to the Authority in the process leading up to the publication of the "*Findings Document and Position Paper on: Inquiry into Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Codes in the ICT Sector*" which preceded the publication of the Draft Regulations<sup>2</sup>. We believe that we had made constructive suggestions in order to assist the Authority in arriving at a sound regulatory framework. We hope that our input will continue to contribute constructively to this process, and request an opportunity to participate in the public hearings to be held in due course.

## 2. THE APPLICABLE LEGISLATIVE REGIME

2.1 The Draft Regulations are purported to be published in terms of:

2.1.1 section 4(3)(k) of the Independent Communications Authority of South Africa, Act, 2000 (Act No.13 of 2000), as amended ("**ICASA Act**") ; read with

2.1.2 sections 4, 9(2)(b) and 13(3)(a) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) as amended ("**EC Act**").

2.2 The EC Act as originally promulgated in 2005 ("**the Original EC Act**") served an important role whilst the Broad-Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003) ("**B-BBEE Act**") was in its infancy, and before the publication of generic or sectoral codes of good practice on broad-based black economic empowerment ("**B-BBEE**") ("**B-BBEE Codes**").

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<sup>1</sup> Published under, Government Gazette Number 43021, 14 February 2020

<sup>2</sup> Published under, Government Gazette Number 42234, Notice Number 85, 15 February 2019

- 2.3 The Original EC Act initially enjoined the Authority to promote the empowerment of historically disadvantaged persons, including women, the youth and people with disabilities,<sup>3</sup> primarily by legislating the minimum percentage of equity ownership to be held by persons from historically disadvantaged groups ("**HDGs**") in respect of applications for individual licences.<sup>4</sup>
- 2.4 On the other hand, the B-BBEE Act adopts a broad-based approach to the empowerment of "black" people<sup>5</sup> through a holistic range of measures of which ownership is only one factor – ultimately resulting in a B-BBEE contributor status level reflected as an output from compliance levels into balanced scorecard. In addition, the B-BBEE legislative regime under the auspices of the B-BBEE Act contains detailed provisions for the information communications and technology sector ("**ICT Sector**") already existing in the form of the ICT Sector codes published in terms of section 9(1) of the B-BBEE Act ("**ICT Sector Codes**").
- 2.5 In an attempt to align the provisions of the ICASA Act and EC Act, with those of the B-BBEE Act and the ICT Sector Codes, amendments were effected to the EC Act and the ICASA Act, which resulted in a shift of the Authority's mandate from the empowerment of HDGs primarily through equity ownership to B-BBEE in terms of the B-BBEE Act. This shift in mandate is evident from the following:
- 2.5.1 "*Broad-based black economic empowerment*" is defined in the EC Act and the ICASA Act as having the meaning assigned to that term in the B-BBEE Act, as set out below.<sup>6</sup>

*"...the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural*

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<sup>3</sup> s2(h) and s5(9)(b) of the Original EC Act

<sup>4</sup> s9(2)(b) of the Original EC Act. The provisions of s9(2)(b) applied, with the necessary changes, to the amendment and renewal of an individual licence (s10(2) and s11(3) of the Original EC Act)

<sup>5</sup> "Black people" is defined in s1 of the BBEE Act as meaning –

"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"

<sup>6</sup> s1 of the ICASA Act as amended with effect from 16 May 2014 and s1 of the ECA as amended with effect from 21 May 2014.

*areas, through diverse but intergrated socio-economic strategies that include, but are not limited to-*

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;*
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;*
- (c) human resources and skills development;*
- (d) achieving equitable representation in all occupational categories and levels in the workforce;*
- (e) preferential procurement from enterprises that are owned or managed by black people; and*
- (f) investment in enterprises that are owned and managed by black people;..."*

2.5.2 The object of the EC Act shifted from promoting the empowerment of historically disadvantaged persons (including black people) with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities,<sup>7</sup> to promoting B-BBEE, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities<sup>8</sup>. The EC Act's object therefore now extends to promoting the wider concept of B-BBEE, as defined in the B-BBEE Act.

2.5.3 The ICASA Act now empowers (but does not require) the Authority to make regulations on empowerment requirements to promote B-BBEE (as defined in the BBBEE Act).<sup>9</sup>

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<sup>7</sup> s2(h) of the Original ECA

<sup>8</sup> s2(h) of the ECA as amended with effect from 21 May 2014

<sup>9</sup> s4(3)(k) of the ICASA Act as amended with effect from 16 May 2014

- 2.5.4 The EC Act now empowers (but does not require) the Authority to make regulations 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 HDGs and to promote BBEE (as defined in the BBEE Act).<sup>10</sup>
- 2.5.5 In granting a licence under the EC Act, the Authority must now "*promote [BBEE] ... in accordance with the requirements of the ICT Charter*".<sup>11</sup> (Prior to the EC Act's amendment the Authority was required, in granting a licence, to promote the empowerment of historically disadvantaged persons in accordance with the requirements of the ICT Charter<sup>12</sup>).
- 2.5.6 In addition, in respect of applications for individual licences, the Authority's invitation for an individual licence must 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 s4(3)(k) of the ICASA Act.<sup>13</sup>
- 2.6 Given these amendments to the EC Act and the ICASA Act, we submit that it is not necessary for the Authority to impose empowerment obligations over and above those already existing under the B-BBEE Act read with ICT Sector Codes ("**B-BBEE Legislative Framework**") as the Authority appears to have done in the Draft Regulations particularly as regards individual licensees or applicants for individual licenses. These additional and conflicting requirements will create confusion and duplicate costs and effort for the Authority and individual licensees alike. Moreover, we are concerned that the additional and/or conflicting requirements in the Draft Regulations may render the Draft Regulations ambiguous and potentially void for vagueness.
- 2.7 It is against this background that we provide our specific submissions on the Draft Regulations below.

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<sup>10</sup> s13(3)(a) of the ECA as amended with effect from 21 May 2014

<sup>11</sup> s5(9)(b) of the ECA as amended with effect from 21 May 2014

<sup>12</sup> s5(9)(b) of the Original ECA

<sup>13</sup> s9(2)(b) of the ECA with effect from 21 May 2014. The provisions of s9(2)(b) apply, with the necessary changes, to the amendment, renewal and transfer (or transfer of control) of an individual licence (s10(2), s11(3) and s13(6) of the ECA with effect from 21 May 2014)

### 3. PURPOSE OF THE DRAFT REGULATIONS

- 3.1 Draft Regulation 2(1) states that the purpose of the Draft Regulations is to promote equity ownership by HDG's and to promote B-BBEE. In this regard, the stated intention of the Draft Regulations are to: (a) facilitate diversity and transformation in the ICT Sector by prescribing the implementation of the revised ICT Sector Code,<sup>14</sup> (b) prescribe the application of the HDG equity requirement; and (c) provide the manner in which to verify compliance with HDG and B-BBEE requirements.
- 3.2 As previously alluded to in these representations, the B-BBEE Legislative Framework deals with the promotion, compliance, measurement and monitoring of B-BBEE in a comprehensive and detailed manner. The Authority should avoid creating inefficiencies and confusion by introducing additional conflicting requirements in its regulations.
- 3.3 In this regard, we submit that the purpose of the Draft Regulations should be limited to the promotion of B-BBEE, which by implication would include equity ownership by Black People, and thus HDGs. This would eliminate unnecessary duplication of efforts and cost, in relation to, for example, verification, monitoring and compliance. We do not see the need for the verification of B-BBEE requirements as well as separately for, HDG equity ownership requirements.

### 4. B-BBEE AND HDG COMPLIANCE REQUIREMENTS, INCLUDING THE VERIFICATION AND MONITORING THEREOF

- 4.1 Draft Regulation 3 appears to apply to individual licensees who are making applications for transfers, renewals and amendments of their licences and to applicants for new individual licenses (collectively "**Affected Individual Licensees**") and imposes a minimum requirement of 30% ownership by HDGs on Affected Individual Licensees.
- 4.2 On the other hand, Draft Regulation 4 appears to apply to all licensees who are making all forms of applications to the Authority and applicants of all types of licences (including Affected Individual Licenses) and imposes the following 2 requirements: (i)

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<sup>14</sup> The ICT Sector Codes were originally published on 6 June 2012. The revised version was published and took effect on 7 November 2016.

a minimum of 30% ownership by black people; and (ii) a minimum level 4 B-BBEE status.

4.3 We respectfully submit that the provisions of Draft Regulations 3 and 4, appear to contradict each other insofar as it pertains to Affected Individual Licensees in the following respects:

4.3.1 Draft regulation 3 refers to 30% equity ownership by HDGs, whilst Draft Regulation 4 refers to 30% ownership by black people;

4.3.2 "HDGs" is defined more broadly than "black people":

4.3.2.1 HDGs is defined in Draft Regulation 1 as having the same meaning as *"Historically Disadvantaged Persons"* and that term is, in turn, defined 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"*.

4.3.2.2 "Black people" is defined in Draft Regulation 1 substantially in accordance with the definition used for that term in the B-BBEE Act being *"African, Coloured and Indian people who are citizens of South Africa by birth or descent or have become citizens of South Africa by naturalisation<sup>15</sup> 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"*.

4.3.2.3 Thus, for example, white women or white people with disabilities could potentially fall within the ambit of HDGs as proposed to be defined in the Draft Regulations. However, those groups of people are excluded from the definition of black people in terms of the B-BBEE Act and the Draft Regulations. We note that although the term is utilised in the EC Act, the EC Act does not define HDGs. In this regard, we submit that the introduction of a definition of a term used in the EC Act (being a statute duly promulgated by the South African Parliament and signed by the President of South Africa) by way of regulation effectively amounts to an

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<sup>15</sup> And not nationalisation as stated in the Draft Regulations

amendment of the EC Act, which we respectfully submit, the Authority does not have the legal competence to effect. In other words, the Authority is not legally competent to seek to amend provisions of the EC Act by way of sub-ordinate legislation, such as regulations, as any such amendments would need to be passed as an act of Parliament and signed by the President of South Africa. Furthermore, the Authority is not legally competent, by way of regulation, to exceed the ambit of the definition of black people as set out in the B-BBEE Act. In our view, therefore, the definition of HDG's should be deleted from the Draft Regulations, and the definition black people should be retained.

4.3.3 Different documents are required to be submitted for purposes of verification, monitoring and compliance with Draft Regulation 3 compared to Draft Regulation 4:

4.3.3.1 Draft regulation 3 refers to the submission of a "*certificate from a recognised and accredited verification agency*" (without defining same). In addition, it requires the submission of an "*independent assurance report*" (without defining same) for publicly trading/listed licensees as part of the annual compliance process indicating "*compliance with the HDGs equity requirement.*" any other supplementary information which the Authority deems necessary.

4.3.3.2 Draft regulation 4 refers to the submission of a "*B-BBEE verification certificate*" annually in terms of the Compliance Procedure Manuals Regulations demonstrating "*its B-BBEE status calculated on a flow through principle*" (our emphasis). In terms of the B-BBEE legislative Framework, a B-BBEE status cannot be calculated "*on a flow-through principle*". Rather, the flow-through principle is one of the calculation methodologies utilised in the ICT Sector Codes for purposes of calculating black ownership. Accordingly, the reference to the calculation of a B-BBEE status calculated "*on a flow-through principle*" appears to be misplaced and in breach of the B-BBEE Legislative Regime, and as such could be rendered unlawful and/or void for vagueness.

- 4.4 Therefore, we re-iterate our submission that to avoid confusion, inefficiency and ambiguity, the Draft Regulations should be limited to the promotion of B-BBEE in terms of the B-BBEE Legislative Framework, which by implication would include equity ownership by black people.
- 4.5 For monitoring and compliance purposes, licensees should be required to submit copies of their latest available and valid B-BBEE certificates prepared by verification agencies accredited in terms of the B-BBEE Legislative Framework to the Authority on an annual basis.
- 4.6 The advantage of accepting this recommendation is that wrapped into the B-BBEE contributor status level, is an assessment done by an accredited B-BBEE verification agency of the Black ownership level of a licensee, which might include complex structures such as publicly traded schemes, ownership by black participants in broad-based ownership schemes or co-operatives or employee share ownership programmes according to established and understood rules as per the ICT Sector Codes.
- 4.7 Furthermore, we note that 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, which we submit cannot be ignored by the Authority:<sup>16</sup>
- 4.7.1 When determining Ownership in a Measured Entity, rights of Ownership of Mandated Investments may be excluded.
- 4.7.2 "*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*"<sup>17</sup>. This generally pertains to shareholding in publicly traded companies held by institutional shareholders such as banks, insurance companies and pension funds.

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<sup>16</sup> Paragraph 3.7 of Mended Code Series 100, Statement 100

<sup>17</sup> Schedule 1, Part 2 of the ICT Sector Codes

- 4.7.3 The maximum percentage of the Ownership of any Measured Entity that may be so excluded is 40%.
- 4.7.4 A Measured Entity electing not to exclude Mandated Investments when it is entitled to do so, may either treat all of that Ownership as non-Black or obtain a competent person's report estimating the extent of Black rights of Ownership measurable in the Measured Entity and originating from that Mandated Investments.
- 4.7.5 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 visa versa.
- 4.8 Additional calculation methodologies also utilised in the ICT Sector Codes, which we submit cannot be ignored by the Authority, given its obligation to abide by the B-BBEE Legislative Framework include, (i) the continuing consequences principle; (ii) the modified flow-through principle; (iii) sale of the assets statement; (iv) the principles for the calculation of black ownership pertaining to multinational businesses.
- 4.9 In addition to our comments above, we are concerned that the imposition of any requirements in addition to a 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:
- 4.9.1 Section 10(1) which requires the Authority (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;
- 4.9.2 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;

- 4.9.3 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 the Authority 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
- 4.9.4 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 particular objectively verifiable facts or circumstances applicable to the organ of state necessitates a deviation.
- 4.10 Given our submissions above, we recommend that the Draft Regulations 3 and 4 should be amended as follows:
- 4.10.1 Draft Regulation 3 should be deleted<sup>18</sup>;
- 4.10.2 Draft regulation 4 should be re-worded as follows:
- "(1) *On any application, applicants must have:*
- (a) a minimum of 30% of its rights of Ownership<sup>19</sup> held by black people, calculated and determined in accordance with the measurement principles set out in the ICT BBBEE Sector Codes; and*
- (b) a minimum level 4 B-BBEE status.*
- (2) *Each application must be accompanied by accompanied by the latest valid B-BBEE verification certificate issued by an accredited B-BBEE verification agency.*
- (3) *A Licensee must ensure that for the duration of its licence it must maintain:*

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<sup>18</sup> This should be accompanied by a deletion of the definitions for "HDG" and "Historically Disadvantaged Persons" as set out in paragraph 4.3.2.3

<sup>19</sup> We would suggest that the term "Rights of Ownership" should bear the meaning ascribed to it in terms of the ICT Sector Codes

(a) a minimum of 30% of its rights of Ownership<sup>20</sup> held by black people, calculated and determined in accordance with the measurement principles set out in the ICT BBBEE Sector Codes; and

(b) a minimum level 4 B-BBEE status.

(4) A Licensee must submit its latest B-BBEE verification certificate issued by an accredited B-BBEE verification agency annually in terms of the Compliance Procedure Manual Regulations, 2011."

## 5. TRANSFER OF CONTROL OR TRANSFER OF OWNERSHIP IN A LICENSEE

We note that "control" is not defined in the EC Act. Although regulations cannot amend primary legislation, we note that the Draft Regulations attempt in Draft Regulation 5 to define the transfer of ownership or control in a licensee to the transfer of 100% of the issued share capital in a licensee. Given the provisions of Draft Regulation 5, which explicitly references the transfer of no less than 100% of the issued share capital in a licensee, we respectfully submit that the definitions of the terms "Affiliate", "Control" and "Control Interest" appear to contradict the provisions of Draft Regulation 5, seem to be misplaced and seem to serve no purpose, particularly, since those terms reference the transfer of less than 100% of the issued share capital of an entity. These terms should thus be deleted from the Draft Regulations

## 6. INDIRECT OWNERSHIP INTEREST

Draft regulation 6 does not seem to serve any particular purpose and should in our respectful submission be deleted.

## 7. CONTRAVENTIONS AND PENALTIES

7.1 Draft regulation 8(1) refers to the submission of false, misleading or inaccurate information as an offence and refers to a penalty of a fine of up to R5 000 000 or of imprisonment of up to 24 months. We respectfully submit that the imposition of possible imprisonment of up to 24 months is *ultra vires* the Authority's powers given the provisions of sections 17H(2)(a) and 17H(3) of the ICASA Act which refers only to

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<sup>20</sup> We would suggest that the term "Rights of Ownership" should bear the meaning ascribed to it in terms of the ICT Sector Codes

a fine not exceeding R5 000 000 in the respect of the provision of false or misleading information. No reference is made to imprisonment of any nature for the offence of the provision of false or misleading information.

- 7.2 Draft regulation 8(2), which refers to the imposition of a fine not exceeding the greater of R5 000 000 or 10% of the Licensee's annual turnover is also *ultra vires* 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 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.