



Independent Communications Authority of South Africa
350 Witch-Hazel Avenue,
Eco Park, Centurion.

Attention: Mr Peter Mailula, Ms Fikile Hlongwane

By email: PMailula@icasa.org.za FHlongwane@icasa.org.za

4 May 2020

Dear Mr Mailula and Ms Hlongwane,

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

1. The National Association of Broadcasters (NAB) is a leading representative of South Africa's broadcasting industry, representing the interests of all three tiers of broadcasters. Our members include the public broadcaster, commercial and community broadcasters, signal distributors, and associate members.
2. On 14 February 2020 the Authority published the draft regulations in respect of the limitations of control and equity ownership by historically disadvantaged groups and the application of the ICT Sector Code. The NAB understands that these draft regulations follow from the Findings Document and Position Paper which was published on 15 February 2019.

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Equity thresholds

3. The NAB notes that the regulation 3 provides for a 30% (thirty percent) equity ownership threshold in respect of HDGs and regulation 4 provides for a separate requirement of 30% (thirty percent) equity ownership threshold in respect of black people pursuant to the Broad-based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act).
4. The NAB notes that the above requirements are outlined separately in the draft regulations which effectively requires licensees to adhere to the requirement in respect of HDGs and the requirements in respect of B-BBEE.
5. The NAB supports the principles of transformation and diversity, however, the current wording of the draft regulations may cause confusion due to the overlap in the definition of HDGs and black persons as will be illustrated below.
6. The regulations define HDGs with reference to “Historically Disadvantaged Persons” as *black persons*, women and persons with disabilities and youth, who before the 1996 Constitution of the Republic of South Africa came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion.
7. Furthermore, the B-BBEE Act defines ‘black people’ as African, Coloured and Indian people who are citizens of South Africa by birth or descent or who have become citizens of South Africa by nationalization 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.
8. Notably, black persons fall wholly within the scope of both the HDG and B-BBEE requirements. It is therefore not clear whether an entity will be deemed to comply with the regulations where it submits a single report or the same data for purposes of both HDG and B-BBEE requirements. The NAB



recommends that the Authority clarify this aspect to avoid any future dispute in this regard.

Definition of control interest

9. The NAB notes that Draft Regulations propose that the threshold in the definition of 'control interest' be pegged at 20% (twenty percent). The NAB further notes with concern that this threshold is not in line with the Authority's position outlined in the 2013 Final Report on the Review of Broadcasting Regulatory Framework towards a Digitally Converged Environment wherein the adopted threshold was 25% (twenty five percent).

10. The rationale for this variation is not apparent from the Draft Regulations nor is it clear whether the Authority thoroughly considered and assessed the implications of the proposed threshold. The NAB therefore respectfully recommends that the Authority engage more extensively on this aspect.

Application to class licences

11. The NAB notes that whilst regulation 3(1) correctly exempts class licences from the HDG requirements as they are owned by the community represented through a non-profit organisation, regulation 4 requires *all* applicants to have a minimum of 30 percent ownership by black people and have a minimum level 4 B-BBEE status. The NAB further notes that regulation 10 effectively requires class licences to comply with the applicable ICT sector codes published pursuant to section 10 of the B-BBEE Act.

12. The NAB submits that the enterprises with an annual turnover of R10 million or less are deemed "Exempted Micro-Enterprises" (EME) in terms of paragraph 4.1 of the Generic Codes of Good Practice which are incorporated by reference in the ICT Sector Code. Furthermore, the ICT Sector Code does not prescribe a minimum ownership threshold for such enterprises. The NAB respectfully recommends that regulation 4(1) be revised to include the words



“subject to the provisions of the ICT Sector Code” after to the words “B-BBEE status”.

Indirect ownership interest

13. The NAB notes that the draft regulations proposes a calculation of indirect ownership in regulation 6. The NAB recommends that for the avoidance of uncertainty, the definition of ownership be revised to comprehensively outline factors to be taken into consideration when determining indirect ownership, and regulation 6 be deleted as a stand-alone provision. The NAB further recommends that the Authority engage broadcasting service licensees as this will potentially impact their license conditions.

Contraventions and penalties

14. The NAB notes that as an alternative to a fine, the regulations provide for a period of imprisonment between one week and 24 (twenty-four) months. The NAB further notes that section 17H (offences and penalties) of the ICASA Act 13 of 2000, as amended provides for imprisonment only in the event of contravention with either the confidentiality provisions (section 14C), the restriction on use of name, or description implying connection with the Authority (section 16A), or in the event of failure to adhere to the decisions of the Authority pursuant to section 17E.

15. The NAB therefore respectfully submits that the inclusion of a period of imprisonment in the draft regulations as a consequence of non-compliance with these regulations is *ultra vires*, as it does not follow the approach outlined in section 17E in particular. It is only after a licensee has repeatedly failed to comply with these regulations, following engagements with the Authority, that imprisonment may be imposed. The NAB therefore respectfully recommends that the period of imprisonment be removed and only the fine be retained.



Concluding remarks

16. The NAB wishes to also remind the Authority that the process has been ongoing since 2004 when the Authority published the Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences. The process continued further (thirteen years later) in 2017 with the publication of the Discussion Document on *inter alia* the implementation of the ICT Sector Code in light of the ownership requirements in respect of HDG's stipulated in the Electronic Communications Act 36 of 2005, as amended (ECA). To date this process has not culminated in the publication of final regulations notwithstanding intervening legislative developments.

17. Furthermore, it is the NAB's view that a legislative amendment is necessary in order to completely align the ECA with the B-BBEE Act as the ECA still refers to HDG's, which the NAB respectfully submits was an oversight when the ECA was amended in 2014.

18. In conclusion, the NAB members remain committed to advancing economic empowerment and we look forward to engaging further with the Authority in this process.

Yours Sincerely

Nadia Bulbulia
Executive Director

Sent electronically