

VODACOM PTY LTD

WRITTEN SUBMISSIONS ON NOTICE 91 OF 2020: ICASA'S DRAFT REGULATIONS IN RESPECT OF THE LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS (HDGS) AND THE APPLICATION OF THE ICT SECTOR CODES, GAZETTED ON 14 FEBRUARY 2020 IN GOVERNMENT GAZETTE NO 43021 (DRAFT REGULATIONS)

1 INTRODUCTION

1.1 Vodacom welcomes the opportunity to provide written submissions on the Draft Regulations. We also wish to confirm our willingness to participate in any further consultative processes including in oral hearings.

1.2 We note that the publication of the Draft Regulations follows from –

1.2.1 the section 4B inquiry that the Authority initiated by publishing the Discussion Document: Equity Ownership by Historically Disadvantaged Groups (HDG) and the Application of the ICT Sector Code in the ICT Sector, in Government Gazette No 40759 on 31 March 2017 (**Discussion Document**). Vodacom submitted a formal response to the Discussion Document in 2017 (**Vodacom 2017 Submission**) and also participated on 16 May 2018 in the public hearings conducted by ICASA into the various submissions made on the Discussion Document. On 28 May 2018, Vodacom submitted written responses to certain queries raised by the Authority at the hearings; and

1.2.2 the Findings Document and Position Paper on the Inquiry into Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code in the ICT Sector published in the Government Gazette on 15 February 2019 (**Findings Document**). The Findings Document did not call for submissions and Vodacom did not address any correspondence to the Authority in relation to the Findings Document.

1.3 We note further that the purpose of the Discussion Document was to determine-

1.3.1 how the Authority should approach the implementation of the ICT Sector Code in light of the existing Historically Disadvantaged Groups / Individuals ownership requirements; and

1.3.2 how the Authority can promote broad-based black economic empowerment (**BBBEE**) and equity ownership of HDGs as required in terms of section 9 and 13 of the Electronic Communications Act¹ (**ECA**).

¹ No 36 of 2005, as amended

- 1.4 As indicated in the Draft Regulations, the section 4B inquiry culminated in the development of the Authority's position in respect of –
 - 1.4.1 the implementation of the ICT Sector Code in light of the ECA's ownership requirements in respect of HDGs; and
 - 1.4.2 the promotion of BBBEE and equity ownership by HDGs as required in terms of the ECA.
- 1.5 Our submissions are divided into two parts
 - 1.5.1 The first part deals with general comments on meaningful transformation of the ICT Sector; and
 - 1.5.2 The second part deals with specific comments on the application of the BBBEE and HDG concepts.

2 MEANINGFUL TRANSFORMATION OF THE ICT SECTOR

- 2.1 We support meaningful and sustainable transformation of the ICT Sector, in accordance with the intent and spirit of the Broad-Based Black Economic Empowerment Act² (**BBEE Act**).
- 2.2 The primary intent and spirit of Broad-based Black Economic Empowerment is to measure the extent of commitment to the various elements and the transformational impact it has on a broad spectrum of black stakeholder groups i.e. shareholders, employees, suppliers, start-ups, and disadvantaged communities, and not just one of the groups i.e. shareholders.
- 2.3 In setting a minimum percentage for equity ownership by black shareholders, it is important to consider affordability and –financing capacity of a BBBEE deal. For large valued companies, like Vodacom whose current market cap is R224 billion are required to do a 30% BBBEE deal, it would effectively amount to a deal size of R67,5 billion. In today's uncertain economic times and prior to this unprecedented impact of Covid-19, such a multi-billion Rand deal would face various issues;
 - 2.3.1 the first issue with such a deal is “who can afford to participate in such a deal?”; and
 - 2.3.2 the second issue is the financing of such a deal. Interest rates range from 80% to 150% of the prime lending rate at the time of finalising the deal. Securing a favourable interest rate on the debt at this time is dependent on whether the company has a high growth rate, and if the company can retain such growth rate during the period of the deal. The higher growth rate allows for offsetting the cost of the debt, making the deal favourable

² Act 53 of 2003, as amended by the Broad-Based Black Economic Empowerment Amendment Act, 46 of 2013.

to the black investors. However, the growth rates for many companies, including Vodacom, are currently in single digits, which makes the ability to pay off debt exceptionally costly. In addition to challenges with current much lower growth rates, is downgrade of the country's debt servicing ability, with or without Covid19, which contributes to increases in the cost of debt.

- 2.3.3 Thirdly, in the current circumstances, the economic benefit black people would derive from participation in a deal would depend on the discount to share price offered by the company doing the deal, and the equity contribution by the black investors. The manner in which economic benefit flows from a debt funded deal, is through the dividend. The dividend, must first service the interest levied by the banks, and then service the administration cost of the investment vehicle necessary to run the operations, before paying out the remainder dividend (known as a "trickle" dividend).
- 2.4 In our view, the focus should rather be on the entire scorecard, designed to achieve meaningful, sustainable transformation of the sector and the economy at large. This, in our view, will have a far more positive impact than merely achieving a 30% black equity ownership, especially in the current circumstances. The benefit of focusing on the entire scorecard, is that if a company is 'under index' in one element (for example equity ownership) the company is incentivised to 'over index' in the other elements in order to secure a higher BBBEE contributor level (and as such attain Public and Private Sector business).
- 2.5 The case in point, is the granting of BBBEE facilitator status to Telkom, which resulted in them moving from a BBBEE Level 4 to a BBBEE Level 2 contributor status, by merely being granted 52% deemed black ownership recognition. This "improvement" in BBBEE status levels came at no cost to Telkom for the ownership recognition nor required any additional investments into any of the other elements necessary to attain the BBBEE Level 2 status.
- 2.6 In Vodacom's case, because of being slightly under-indexed for equity ownership and its effect on the scorecard, we have substantially increased our investment in the other elements such as Skills Development, Preferential Procurement, Supplier Development and Enterprise Development. In Annexure A attached, we include a table to demonstrate the substantial investments, in order achieve meaningful, and sustainable transformation to the benefit of black people, designated groups and black businesses, both large and small (SMMEs).
- 2.7 The transformational impact of Broad-based Black Economic Empowerment should benefit all black stakeholders groups.

3 APPLICATION OF BBBEE AND HDG CONCEPTS

- 3.1 Our submissions to the Draft Regulations, as with the 2017 Vodacom Submissions, are based on our view that the Authority is required to implement BBBEE in accordance with the BBBEE Act; that the concept of HDG ownership overlaps with BBBEE; and that HDG ownership should no longer be a self-standing requirement in the ECA.
- 3.2 The BBBEE Act was promulgated in 2003 and came into effect in 2004. At that time, section 10(1)(a) of the BBBEE Act only required organs of state and public entities to "*take into account and where reasonably possible*" apply any relevant code of good practice issued in terms of the BBBEE Act; and there was no legal obligation placed on such entities to apply any codes of good practice issued in terms of the BBBEE Act when determining their procurement policies or the qualification criteria for the issuing of licences, concessions or other authorisations. However, the BBBEE Act was amended by the Broad-Based Black Economic Empowerment Amendment Act, 46 of 2013 (**BBBEE Amendment Act**), which had the effect of amending section 10(1) to make it mandatory for organs of state and public entities to apply any relevant code of good practice issued in terms of the BBBEE Act when amongst other things, determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law.
- 3.3 The objectives of the BBBEE Act have a broader focus than increasing black ownership. The BBBEE Act states that its objectives are to facilitate broad-based black economic empowerment by—
- 3.3.1 promoting economic transformation in order to enable meaningful participation of black people in the economy;
 - 3.3.2 achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
 - 3.3.3 increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
 - 3.3.4 increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
 - 3.3.5 promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
 - 3.3.6 empowering rural and local communities by enabling access to economic activities and infrastructure, ownership and skills;

- 3.3.7 promoting access to finance for black start-ups, small, medium and micro enterprises, cooperatives and black entrepreneurs, including those in the informal business sector; and
- 3.3.8 increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and cooperatives and enhancing their access to financial and nonfinancial support.
- 3.4 The BBBEE Act places an obligation on every organ of state and every public entity to apply any relevant code of good practice issued in terms of the BBBEE Act in, amongst other things, determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law³. The Authority is bound by such provision as it is an organ of state in terms of the BBBEE Act, and this is acknowledged in Draft Regulation 7 which states "*In line with section 10 of the BBBEE Act, the applicable ICT Sector Codes will apply in the granting of individual licences and class licences*". In addition, the Amended ICT Sector Code issued as a code of good practice in terms of section 9(1) of the BBBEE Act on 7 November 2016⁴ (**ICT Sector Code**) provides that all persons, organisations and entities operating in the ICT Sector in South Africa, and public entities listed in schedule 1, schedule 2 and schedule 3 of the Public Finance Management Act⁵, are measurable under the ICT Sector Code. The Authority is listed in Schedule 1 of the Public Finance Management Act. As such, the ICT Sector Code is a "relevant code of good practice" for purposes of section 10(1) of the BBBEE Act and must be applied by the Authority.
- 3.5 2014 Amendments to the ECA
- 3.5.1 The Electronic Communications Act (**ECA**)⁶ was amended in April 2014 to incorporate the following provisions relating to empowerment –
- 3.5.1.1 a definition of "broad-based black economic empowerment" was introduced and this concept is defined as having the meaning assigned to it in the BBBEE Act;
- 3.5.1.2 the definition of "ICT Sector Charter" was substituted and is defined as a sector code on broad-based black economic empowerment issued in terms of the BBBEE Act. This therefore refers to the ICT Sector Code;
- 3.5.1.3 Section 2(h) was amended to provide that one of the objectives of the ECA is to "*promote broad-based black economic empowerment*". The effect of this

³ Section 10(1)(a) of the BBBEE Act.

⁴ Government Gazette No 40407.

⁵ Act 1 of 1999, as amended.

⁶ Act No 36 of 2005, as amended.

amendment was to remove the reference to promoting the "*empowerment of historically disadvantaged persons, including Black People*";

- 3.5.1.4 Section 5(9)(b) was amended to remove the reference to promoting the "*empowerment of historically disadvantaged persons*". The amended section 5(9)(b) now provides that the Authority must, in granting a licence, *promote broad-based black economic empowerment, including the empowerment of women and the youth and persons with disabilities, in accordance with the requirements of the ICT Charter*;
- 3.5.1.5 Section 9(2)(b) was amended to provide that the Authority may "include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under Section 4(3)(k) of the ICASA Act"⁷; and
- 3.5.1.6 Section 13(3)(a) was amended to provide that the Authority may restrict ownership or control of an individual licence in order to "*promote the ownership and control of electronic communication services by historically disadvantaged groups, and to promote broad-based black economic empowerment.*"

3.6 Explanatory Memorandum on Changes to ECA

- 3.6.1 When the Electronic Communications Amendment Bill, 2013, was gazetted for comment on the above changes to the ECA, it included a Memorandum on the Objects of the Electronic Communications Amendment Bill (**Memorandum**), which set out explanatory notes on why certain amendments were being proposed. In regard to the changes relating to empowerment, the Memorandum states as follows –
- 3.6.1.1 Objects of the Bill – "The objects of the Bill are to amend the Electronic Communications Act, 2005, so as to align the Act with broad-based black economic empowerment initiatives....";
- 3.6.1.2 Regarding the Amendment to section 2(h) – "The amendment seeks to replace the phrase "historically disadvantaged individuals" with the term "broad-based black economic empowerment"";
- 3.6.1.3 Regarding the Amendment to section 9 – "The focus of the Act has been changed from the empowerment of "historically disadvantaged individuals" to broad-based black economic empowerment. Therefore, the required equity ownership by historically disadvantaged groups in section 9(2)(b) has been retained for the time being provided that broad-based black economic empowerment requirements

⁷ The underlined sections reflect the changes that were made to section 9(2)(b).

prescribed by ICASA under section 4(3)(k) of the ICASA Act may **replace** it in due course."

3.6.2 The Independent Communications Authority of South Africa Act (**ICASA Act**)⁸ was also amended in 2014 and incorporated the following provisions relating to empowerment –

3.6.2.1 a definition of "broad-based black economic empowerment" was introduced and is defined as having the meaning assigned to it in the BBBEE Act; and

3.6.2.2 section 4(3)(k) was amended to provide that the Authority "*may make regulations on empowerment requirements to promote broad-based black economic empowerment*".

3.7 The amendments to section 9(2)(b) of the ECA, as underlined in paragraph 3.5.1.5 above, have the effect that the 30% HDG requirement is not mandatory and the Authority is entitled, by virtue of the provisions of section 4(3)(k) of the ICASA Act, to apply other conditions in promoting BBBEE in lieu of the 30% HDG ownership requirement. The Authority's discretion in this regard was acknowledged by the High Court in the matter of Telkom SA SOC Limited v Dr Mncube NO⁹, where the Court stated that "*To the extent that there is a discretion, it appears that such discretion relates only to a higher percentage **or** such other conditions as may be prescribed under section 4(3)(k) of the ICASA Act.*"

3.8 As previously submitted under the Vodacom 2017 Submissions, the Memorandum indicates that the amendments to the ECA were made with the intention that the Authority promotes BBBEE in terms of the BBBEE Act and shifts from focusing on the empowerment of historically disadvantaged individuals to BBBEE. BBBEE and the ICT Sector Code seek to benefit "black people"¹⁰, which is a narrowly defined term and quite different from the term historically disadvantaged individuals or groups. If the Authority carries out its objective of promoting BBBEE, it would have to promote the benefits to black people and not historically disadvantaged individuals or persons. We remain of the view, as indicated in the 2017 Vodacom Submissions, that the terms historically disadvantaged persons or individuals and HDGs are no longer relevant to, and should have no further application in the context of, the ECA.

3.9 Trumping Provisions in BBBEE Act

3.9.1 The BBBEE Act provides that in the event of any conflict between the BBBEE Act and any other law in force immediately prior to the date of commencement of the BBBEE

⁸ Act No 13 of 2000, as amended.

⁹ An unreported judgment, JDR 0338 (GP).

¹⁰ defined in the BBBEE Act as being 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 before 27 April 1994; or on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date

Amendment Act, the BBBEE Act prevails if the conflict specifically relates to a matter dealt with in the BBBEE Act¹¹. As indicated in the Vodacom 2017 Submissions, we are of the view that the references to HDG in the ECA conflict with the BBBEE Act, and that the BBBEE Act prevails over the HDG references in the ECA for the following reasons–

- 3.9.1.1 the concept of HDG is broader than the definition of "black people" as utilised in the BBBEE Act, and the reference to HDG should instead refer to the term "black people";
- 3.9.1.2 the Memorandum states that the object of the changes to the ECA relating to empowerment was to align the ECA with broad-based black economic empowerment initiatives and in regard to the amendments to section 9(2)(b) that the *"focus of the Act has been changed from the empowerment of historically disadvantaged individuals to broad-based black economic empowerment"*; and
- 3.9.1.3 the Authority has an obligation to apply the ICT Sector Code when determining the qualification criteria for the award of licences under the ECA. The ICT Sector Code sets targets and measurement criteria for ownership by black people. The Authority is therefore required to apply the measurement principles for ownership by black people as set out in the ICT Sector Code. The ICT Sector Code also measures BBBEE compliance in terms of 4 other elements and not just ownership. The ICT Sector Codes are required to be applied in their entirety and an entity does not have a discretion to apply only selected portions of the ICT Sector Codes.
- 3.10 Furthermore, it is evident from the Memorandum that the reason why the reference to HDG ownership was not removed from section 9(2)(b) of the ECA is because it was contemplated that the Authority would prescribe regulations addressing compliance with broad-based black economic empowerment in terms of its powers under section 4(3)(k) of the ICASA Act which would replace the HDG ownership requirements in section 9(2)(b), and until such time that it did so, the HDG provisions would continue to apply. We are of the view that even though the amended section 9(2)(b) provides the Authority with a discretion, the intention of the amendment, as evidenced by the Memorandum, was to move away from the 30% HDG ownership requirement and for the Authority to deal with matters of broad-based black economic empowerment only in accordance with the BBBEE Act and the ICT Sector Code. This is also clear from the fact that section 4(3)(k) of the ICASA Act was amended to provide the Authority with power to *"make regulations on empowerment requirements to promote broad-based black economic empowerment"* and no longer to promote ownership by HDGs.
- 3.11 We note that in terms of the Findings Document, the Authority has agreed that the ECA requires BBBEE to apply but that in the Authority's view, the concepts of HDG and BBBEE

¹¹ Section 3(2) of the BBBEE Act.

can co-exist. For the reasons set out in paragraph 3.6 to paragraph 3.9, we respectfully disagree that the Authority's position on these matters is correct.

4 VIOLATIONS OF THE RULE OF LAW AND THE DOCTRINE OF LEGALITY

4.1 The rule of law is a foundational principle in our constitutional democracy,¹² and is entrenched in section 1(c) of the Constitution. The rule of law has many facets: central amongst these is the principle that a State must be governed by law, and not by Ministerial (or other government official) fiat. In the context of legislation, the Constitutional Court, in the decision on *Fedsure Life Assurance*, has explained how the rule of law means that legislation must be clear and certain, and that it must operate prospectively and not extinguish existing rights:

“Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to ‘give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed’; and

As Innes CJ reasoned in *Curtis*:

‘The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.’¹³

4.2 In another important decision in *Veldman*, the Constitutional Court explained that the doctrine of legality meant that the exercise of public power could not be arbitrary-

“It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”¹⁴

4.3 Hence, all law, including the Draft Regulations once promulgated, must comply with the requirements of the rule of law in order to pass constitutional muster. If not, once enacted by the Authority,¹⁵ the Draft Regulations can be declared unconstitutional by a Court, which means it then has no legal effect.

¹² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (“*Fedsure Life Assurance*”) at paras 57-59.

¹³ *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) at paras 26-27 (footnotes omitted).

¹⁴ *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (“*Pharmaceutical Manufacturers*”) at para 85 (emphasis added).

¹⁵ The Draft Regulations cannot be challenged in Court unless and until it is promulgated.

4.4 In the paragraphs below, we detail a number of instances where the Draft Regulations violate the rule of law for the reasons that –

4.4.1 they are irrational and arbitrary in a number of respects. The principle of legality means that law that is arbitrary is unconstitutional.¹⁶; and

4.4.2 they are materially vague in a number of respects. The extensive degree of vagueness in the Draft Regulations means that it offends the rule of law, and may be declared unconstitutional as a consequence.

5 COMMENTS ON DEFINITIONS IN THE DRAFT REGULATIONS

5.1 It is trite that the purpose of regulations is to give procedural effect to the provisions in legislation; the purpose of regulations is not to interpret and give meaning to legislation. It is not competent for regulations to purport to interpret or to give meaning to terms found in primary legislation.¹⁷ The Authority has sought to define the terms "HDG", "Historically Disadvantaged Groups", "Affiliate", "Ownership Interest", "Control Interest" and "Transfer of Control Interest" for the purpose of interpreting or giving meaning to the provisions of the ECA. The Authority is not legally able to do so, and in doing so is acting *ultra vires*.

5.2 "Historically Disadvantaged Persons" – the Authority has introduced a definition which it then seeks to use to give meaning to the term "HDG". Section 9(2)(b) and section 13(3)(a) of the ECA are the only pertinent provisions of the ECA that make reference to "historically disadvantaged groups". Section 9(2)(b) makes reference to a "*percentage of equity ownership to be held by persons from historically disadvantaged groups*", and section 13(3)(a) provides that the Authority may restrict ownership or control of an individual licence in order to "*promote the ownership and control of electronic communication services by historically disadvantaged groups*". It is clear that the intention in defining the terms "Historically Disadvantaged Persons" and "HDG" is to give meaning to the term "historically disadvantaged groups" as used in section 9(2)(b) and section 13(3)(a). As indicated above, the Authority is not empowered to give meaning to the ECA through regulations, so such definitions should be removed from the Draft Regulations.

5.3 "Affiliate" and "Control Interest" –The purpose of these definitions is left entirely unclear in the Draft Regulations. The term "Control Interest" is used in the definition of "Affiliate" in the definitions section of the Draft Regulations, but the term "Affiliate" is not used in any of the Draft Regulations. These definitions should be removed.

¹⁶ *Pharmaceutical Manufacturers*.

¹⁷ See *Moodley & Others v Minister of Education and Culture* 1989 (3) SA 221 (A) at 233; *National Lotteries Board v Bruss NO & Others* 2009 (4) SA 362 (SCA) at par. 37; and *Islamic Unity Convention v Minister of Telecommunications & Others* 2008 (3) SA 383 (CC), at par. 57.

- 5.4 Transfer of a Control Interest – The term is not used in the Draft Regulations. The defined term should be removed.
- 5.5 Retaining definitions that play no role in the provisions of the Draft Regulations, and appear to have been intended in some unspecified way to affect or interpret terms in the legislation, which would be incompetent, renders the Draft Regulations vague and contrary to the rule of law.

6 COMMENTS ON DRAFT REGULATIONS

6.1 Draft Regulation 3(3)

- 6.1.1 This Draft Regulation provides that in respect of any application for an individual licence, the applicant must provide the Authority with proof of a minimum 30% equity ownership by HDGs. The proof must be in the form of a certificate from a recognised and accredited verification agency.
- 6.1.2 The Draft Regulation is arbitrary, vague and irrational and cannot be consistently and clearly applied, for the following reasons -
- 6.1.2.1 as submitted in paragraph 2 above, the Authority is required to apply the provisions of the BBBEE Act and the ICT Sector Codes, and the concept of HDG ownership is no longer relevant;
- 6.1.2.2 there are no accredited HDG verification agencies, but only accredited BBBEE verification agencies who are accredited by the South African National Accreditation Service ("**SANAS**") to measure BBBEE compliance (including BBBEE ownership) in terms of the BBBEE Codes and other sector codes published in terms of the BBBEE Act. Accreditation is a detailed process undertaken by SANAS in accordance with prescribed rules. There is currently no legislation governing any process to accredit agencies to conduct HDG verification; and
- 6.1.2.3 the ICT Sector Code contains detailed principles and methodology to measure all the BBBEE elements, including ownership, and BBBEE verification agencies rely on these principles and methodology as the primary resource for assessing BBBEE compliance. No principles and methodology exist in law to assess the 30% HDG equity ownership.

6.2 Draft Regulation 3(5)

- 6.2.1 This Draft Regulation provides that the Licensee will be required to maintain the minimum 30% HDG ownership at any given time during the licence period. The Draft Regulation is arbitrary, vague and irrational and cannot be consistently and clearly applied for the following reasons –

- 6.2.1.1 the Draft Regulations do not indicate how compliance will be monitored on a day to day basis;
- 6.2.1.2 only publicly traded licensees are required to submit an independent assurance report indicating compliance with HDG equity requirements on an annual basis;
- 6.2.1.3 no provision is made for a breach of the regulation to be remedied. Non-compliance may arise for a variety of reasons, including matters outside the control of the Licensee. Draft regulation 8(2) provides that a person who contravenes regulation 3(5) is liable to a fine not exceeding the greater of R5,000,000 and 10% of the Licensee's annual turnover. The proposed consequences are severe and arbitrary, and a licensee should have a reasonable opportunity to remedy a breach, subject to the breach and potential remedies reasonably being within the control of the licensee.
- 6.3 Draft Regulation 3(6)
- 6.3.1 This Draft Regulation provides that the 30% HDG equity ownership requirement will apply to all applications relating to an individual licence, including applications for transfers, renewals and amendments. This Draft Regulation is vague. It does not indicate how the 30% HDG equity ownership requirement will apply in relation to applications for transfers, renewals or amendments.
- 6.3.2 It is also broad and incoherently vague in its reference to "all sorts of applications pertaining to individual licences". Save for applying in relation to applications for renewals, transfers, and amendments, it is not clear under what other circumstances it could have application.
- 6.3.3 It is also vague and irrational to provide that the 30% HDG equity ownership requirement should be applied to applications for an amendment to an existing individual licence, as an amendment could relate to any condition of the licence and not necessarily to conditions relating to HDG or BBBEE requirements.
- 6.4 Draft Regulation 4(1)
- 6.4.1 This Draft Regulation states that applicants for both class and individual licences are required to have a minimum 30% ownership by black people and a minimum level 4 BBBEE status. We submit that this Draft Regulation is arbitrary and irrational for the reasons set out below.
- 6.4.2 The Authority does not indicate why it provides for both a minimum 30% ownership by black people and a minimum level 4 BBBEE status. The ICT Sector Code, with which the Authority is required to comply as explained in paragraph 2 above, measures compliance with all the BBBEE elements, including ownership, and provides for the

determination of a BBBEE compliance level based on the assessment of compliance with all the BBBEE elements. Neither the BBBEE Act nor the ICT Sector Code prescribes a minimum BBBEE compliance level or minimum black ownership percentage.

6.4.3 In terms of section 10(3) read with section 9(6) of the BBBEE Act, the imposition of such minimum qualification requirements would constitute a deviation from the requirement of section 9(1) of the BBBEE Act to apply the ICT Sector Codes and would require the prior consent of the Minister of Trade and Industry. ICASA is not empowered to impose such requirements without the Minister's consent. The Authority is also requested to provide reasons why –

6.4.3.1 it seeks to impose a minimum black ownership percentage notwithstanding that ownership is measured within the context of determining a BBBEE compliance level; and

6.4.3.2 it seeks to impose both a a minimum black ownership percentage and a minimum BBBEE compliance level.

6.4.4 The requirement to have a minimum 30% HDG equity ownership is made redundant by a requirement for a minimum 30% black ownership. This is because the definition of HDG in the Draft Regulations includes black people. Thus, if a licensee meets the requirement for 30% ownership by black people, it will have achieved the requirement for 30% HDG equity ownership. In contrast, a licensee seeking to benefit women and disabled people who are not black under the HDG equity ownership requirement, would have to have a higher overall percentage of HDG ownership in order to meet the minimum HDG and black ownership requirements. We are of the view that it is irrational to require a minimum 30% HDG equity ownership requirement in chapter 3, and also 30% black ownership requirement in chapter 4, which in effect makes chapter 3 entirely irrelevant.

6.4.5 Furthermore, as submitted under paragraph 2 above, the term HDG and the requirement for HDG equity ownership were not intended by the legislature to continue to apply once the Authority introduced regulations to address BBBEE (as contemplated by the language in section 9(2)(b) of the ECA and section 4(3)(k) of the ICASA Act), and also conflicts with the BBBEE Act. We recommend that HDG ownership requirements be removed from the Draft Regulations.

6.5 Draft Regulation 4(3)

6.5.1 This Draft Regulation requires a Licensee to submit a BBBEE verification certificate annually demonstrating its BBBEE status *calculated on a flow-through basis*. The Draft Regulation is vague and illogical because BBBEE status refers to overall compliance

as measured in terms of all the elements of the applicable BBBEE Codes, while the flow through principle applies only to the measurement of the ownership element.

6.5.2 If the Authority intended through this Draft Regulation to require that the 30% black ownership requirement should be measured only on the basis of the flow through principle, then we submit that -

6.5.2.1 the Authority is not entitled to impose such a requirement without the approval of the Minister of Trade and Industry in terms of section 10(3) read with 9(6) of the BBBEE Act; and

6.5.2.2 there is no justification for the Authority to limit the assessment of black ownership by excluding a licensee's entitlement to apply the modified flow through principle and such a limitation would be vague and irrational.

6.6 Draft Regulation 4(4)

6.6.1 In terms of this Draft Regulation, a Licensee must ensure that it maintains a minimum of 30% ownership by black people at any given time during the licence period. The Draft Regulation is arbitrary, vague and irrational and cannot be consistently and clearly applied for the following reasons –

6.6.1.1 the Draft Regulations do not indicate how compliance will be monitored on a day to day basis;

6.6.1.2 no provision is made for a breach of the regulation to be remedied. Non-compliance may arise for a variety of reasons, including matters outside the control of the Licensee. Draft regulation 8(2) provides that a person who contravenes regulation 3(5) is liable to a fine not exceeding the greater of R5,000,000 and 10% of the Licensee's annual turnover. The proposed consequences are severe and arbitrary, and a licensee should have a reasonable opportunity to remedy a breach, subject to the breach and potential remedies reasonably being within the control of the licensee.

6.7 Draft Regulation 6

6.7.1 This Draft Regulation provides that "*for purposes of these regulations an "indirect" ownership interest in a Licensee shall be calculated by use of a multiplier as reflected in Annexure A*". The Draft Regulation is vague and irrational, and it is not clear what the purpose of this Draft Regulation is. The term "indirect ownership interest" is used in the definition of "Affiliate" in the Draft Regulations, but the term Affiliate is not used in any of the Draft Regulations.

6.7.2 Furthermore, there is no link in the Draft Regulations to the application of Annexure A.

6.7.3 The Authority is requested to clarify the intended purpose of Draft Regulation 6 and Annexure A.

6.8 Draft Regulation 9(2)

6.8.1 This Draft Regulation provides that existing licensees are required to comply with the regulations within 24 months of the regulations being published, with a requirement for 50% compliance in the first year.

6.8.2 The imposition of the requirements set out in the Draft Regulations on licences which exist on the date the regulations are promulgated are ultra vires the ECA for the following reasons –

6.8.2.1 section 9(2)(b) of the ECA applies only to applications for new licences in terms of section 9(1) of the ECA, and does not apply to existing licences; the relevant empowering provision is accordingly restricted to new licences;

6.8.2.2 section 13(3)(a) of the ECA has application only to the letting, assignment or transfer of an existing licence and the transfer of control of a licensee;

6.8.2.3 similarly, section 10(1)(a) of the BBBEE Act provides that every organ of state and public entity must apply any relevant code of good practice issued in terms of the BBBEE Act in determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law; it does not require that organs of state or public entities should apply a code of good practice in relation to an existing licence;

6.8.2.4 no explanation is given for why the Draft Regulations are made to apply to licences which have already been granted on particular terms and conditions, nor are there any reasons why existing licensees are required to comply with the requirements within the time periods set out in this Draft Regulation; and

6.8.2.5 the Draft Regulation constitutes an amendment to the terms of an existing licence. Amendments to licences must be conducted in accordance section 10 of the ECA. The Authority has not complied with section 10 in relation to the Draft Regulations.

6.8.3 Infringements of Vodacom's Property Rights - Constitutional Protection Against the Arbitrary Deprivation of Property

6.8.3.1 Section 25(1) of the Constitution provides a range of protections against a person's (including a juristic person's) property rights. It reads-

"25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

*(2) Property may be expropriated only in terms of law of general application—
(a) for a public purpose or in the public interest; and*

- (b) *subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
- (3) *The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—*
 - (a) *the current use of the property;*
 - (b) *the history of the acquisition and use of the property;*
 - (c) *the market value of the property;*
 - (d) *the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
 - (e) *the purpose of the expropriation.*
- (4) *For the purposes of this section—*
 - (a) *the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and*
 - (b) *property is not limited to land.*
- (5) *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
- (6) *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
- (7) *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*
- (8) *No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).*
- (9) *Parliament must enact the legislation referred to in subsection (6).*

6.8.3.2 In the *First National Bank* decision,¹⁸ the Constitutional Court set out the structure of analysis for direct application of the property clause in the form of a set of questions, as follows-

- 6.8.3.2.1 Does the law or conduct complained of affect "property" as understood by section 25?
- 6.8.3.2.2 Has there been a deprivation of the property by the law or conduct?
- 6.8.3.2.3 If there has, is the deprivation consistent with the provisions of section 25(1)?
- 6.8.3.2.4 If not, is the deprivation justified under section 36 of the Constitution?
- 6.8.3.2.5 If it is, does it amount to an expropriation in accordance with section 25(2)?

¹⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ("**First National Bank**") at para 46 (emphasis added).

- 6.8.3.2.6 If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- 6.8.3.2.7 If not, is the expropriation justified under section 36?
- 6.8.4 For the reasons set out below, Vodacom contends that its right to property will be infringed by the Draft Regulation 9(2).
- 6.8.5 Existing individual licences constitute constitutionally protected "property" for purposes of protection under the property clause of the Constitution, consistent with the assessment of the content of the concept of property by the Constitutional Court.¹⁹
- 6.8.6 The provisions of Draft Regulation 9(2) envisage the following "substantial interference" with Vodacom's rights under its existing individual licences –
- 6.8.6.1 the unilateral imposition by the Authority of substantial new conditions prior to the expiry of the existing licence which are materially onerous to the Licensee, and non-compliance with which may expose it to a significant fine; and
- 6.8.6.2 the removal of the expectation of renewal of an individual licence, in line with international best practice and invariable historical practice, as long as its conditions of award remain fulfilled and the relevant fees are paid.
- 6.8.7 The above instances constitute "substantial interference" with the existing use and enjoyment of individual licences as to amount to "deprivation" of property in line with the tests for this term accepted by the Constitutional Court.²⁰
- 6.8.8 For such deprivation to be constitutional, it must not be "arbitrary", lest it violate section 25(1) of the Constitution.²¹
- 6.8.9 The test for arbitrariness depends on the importance of the property deprived. When it comes to existing individual licences, the degree of deprivation is significant, and the nature of the property at issue lies at the core of the functioning of the whole ICT sector, which is fundamental to the realisation of open democracy, a foundational constitutional value. Accordingly, the property lies close to the heart of constitutional values, which means that, for the deprivation to be "non-arbitrary", it must occur with "sufficient reason" such that there is a proportional relationship between the objects and the means

¹⁹ In *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape & Others* 2015 (6) SA 125 (CC) ("**Shoprite Checkers**") at paras 37-70, the Court held that a commercial trading licence which allows for the selling of wine in a grocery store constituted "property" as defined in section 25 of the Constitution.

²⁰ See in particular *FNB* (above) at para 57, *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 (1) SA 530 (CC) at paras 32 and 45, and *Shoprite Checkers* (above) at paras 73-76.

²¹ The deprivation must also be in terms of a "law of general application", but we accept that the Draft Regulations, if enacted, would constitute a law of general application.

chosen – the means chosen must not disproportionately interfere with the property to achieve the objects sought to be achieved.²²

6.8.10 In the instant case, the arbitrariness test fails. Even if the test were one of mere rationality (the test for arbitrariness applicable when the property at issue is less closely related to constitutional values) the rationality test is failed in important respects. Examples of the respects in which the Draft Regulation is arbitrary for lack of rationality are set out in the above paragraphs, and are not repeated here.

6.8.11 For these reasons, the interference with Vodacom's individual licence rights amounts to an arbitrary deprivation of property, which violates Vodacom's property rights which are protected under section 25(1) of the Constitution. Moreover, this violation is not justifiable under section 36 of the Constitution – principally because the Draft Regulations will not satisfy the requirement that they represent the least restrictive means to achieve its purpose.²³ For these reasons, the Draft Regulations, if enacted, would be susceptible to being declared unconstitutional as amounting to an arbitrary deprivation of property rights.

²² See in particular *Shoprite Checkers* (above) at para 21.

²³ Section 36 of the Constitution, contains a general limitations clause which allows any limitation of a right in the Bill of Rights (which would include section 25), to be justified if the limitation is considered "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors*".