

GENERAL NOTICES • ALGEMENE KENNISGEWINGS

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE 91 OF 2020



INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

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 Independent Communications Authority of South Africa ("the Authority") hereby declares its intention to prescribe regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code ("Draft Regulations) in terms of 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 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. In developing these Draft Regulations, the Authority has taken into account 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 on 15 February 2019 ("Position Paper"). The Position Paper emanated from the section 4B inquiry that was initiated through the publication of the *Discussion Document: Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code in the ICT Sector in terms of section 4B of the ICASA Act 2000, as amended* published on

31 March 2017 ("the Discussion Document"). The inquiry culminated in the development of the Authority's position in respect of:

- a. the implementation of the ICT Sector Code in light of the EC Act's ownership requirements in respect of HDGs; and
 - b. the promotion of B-BBEE and equity ownership by HDGs as required in terms of the EC Act.
3. A copy of the Draft Regulations will be made available on the Authority's website¹ and the Authority's Library at 350 Witch-Hazel Avenue, Eco Point Office Park Eco Park, Centurion, (Ground Floor at Block C), between 09h00 and 16h00, Monday to Friday.
4. Interested persons are invited to make written representations with regard to the Draft Regulations which must be submitted to the Authority by no later than 16h00 on 3 April 2020 by post, hand delivery or electronically (in Microsoft Word) and marked specifically for attention:

Mr Peter Mailula - Project Manager/ Ms Fikile Hlongwane- Project Leader

Block B, 350 Witch-Hazel Avenue,

Eco Point Office Park Eco Park,

Centurion.

Where possible, written representations should also be emailed to: PMailula@icasa.org.za or FHlongwane@icasa.org.za. Enquiries should be directed to Mr Mailula on 012 568 3657/ Ms Fikile Hlongwane on 012 568 3197 between 09h30 and 16h00, Monday to Friday.

5. Written representation(s) received by the Authority pursuant to this notice, will be made available for inspection by interested persons at the Authority's library and copies will be obtainable upon payment of the prescribed fee.
6. At the request of any person who submits written representations pursuant to this notice, the Authority may determine that such representations or any

¹ <http://www.icasa.org.za>

portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be allowed to withdraw such presentations or portion (s) thereof.

7. Persons submitting written presentations are further invited to indicate, as part of their submissions, whether they require an opportunity to make oral representations.



DR. KEABETSWÉ MODIMOENG
ACTING CHAIRPERSON

DATE: 10 February 2020

1. DEFINITIONS AND INTERPRETATION

In these Regulations, any word or expression to which a meaning has been assigned to it in terms of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000) ("ICASA Act") and underlying statutes shall have the meaning so assigned unless the context otherwise indicates –

Affiliate means:

(a) in relation to a juristic person –

(i) any person who has a direct or indirect ownership interest or control interest in the juristic person;

(ii) any person in whom the juristic person has a direct or indirect ownership interest or control interest; or

(iii) any person in whom a person contemplated in subparagraph (i) has a direct or indirect ownership interest or control interest; and

(b) in relation to a natural person, a parent, spouse or child of the relevant natural person;

Authority means the Independent Communications Authority of South Africa established in terms of the ICASA Act;

B-BBEE means Broad-Based Black Economic Empowerment;

B-BBEE Act means the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);

Black People means 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;

Control as defined in the Competition Act.

**Control
Interest**

means, in the absence of proof to the contrary, that a person directly or indirectly:

- (a) has beneficial ownership of twenty percent (20%) or more of the issued share capital of the Licensee;
- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the Licensee or the ability to control, either directly, indirectly or through an affiliate the casting of a majority of those votes of the Licensee;
- (c) is able to appoint or veto the appointment of a majority of the directors of the Licensee;
- (d) in the case the Licensee is a subsidiary, is a holding company and of that subsidiary, as contemplated in section 3 (1) (a) of the Companies Act, 2008 (Act No. 71 of 2008);
- (e) in the case where the Licensee is a trust, has the ability to control a majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;
- (f) in the case where the Licensee is a close corporation, owns twenty percent (20%) or more of the members' interest, or controls or has the right to control the members' votes in the close corporation; or
- (g) has the ability to direct or cause the direction of the management or policies of the Licensee in a manner similar to any of paragraphs (a) to (f), whether through the direct or indirect ownership of issued share capital, by contract, by other securities, or otherwise.

DTI

means the Department of Trade and Industry;

EC Act

means Electronic Communications Act, 2005 (Act No. 36 of 2005)

ECNS

means Electronic Communications Network Services;

ECS	means Electronic Communications Services;
HDG	means historically disadvantaged groups and has the same meaning as "Historically Disadvantaged Persons" in these regulations;
Historically Disadvantaged Persons	means 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;
ICASA Act	means the Independent Communications Authority of South Africa Act, 2000 (Act No.13 of 2000);
ICT Sector	means the Information and Communication Technology Sector;
ICT BBEE Sector Codes:	means the Codes of Good Practice for Black Economic Empowerment, applicable to the ICT Sector, as published under the B-BBEE Act;
Issued Share Capital	means with respect to any person, all shares, interests, participations or rights or other equivalents (however designated, whether voting or nonvoting, ordinary or preferred) in the equity or capital of such person, now or hereafter issued;
intermediate company	means a company between the parent company and the operating company and it has direct shareholding in the operating company.
Juristic Person	means any company, close corporation, voluntary association, partnership, joint venture, trust, or other enterprise or unincorporated organisation; government (or any agency, instrumentality or political subdivision thereof).
Licensee	means a person issued with a licence to provide services in terms of chapter 3 of the EC Act;
Ownership Interest	means any direct or indirect ownership of issued share capital of five per cent (5%) or more in a licensee;

Person	means both a juristic person and a natural person, provided that when two or more persons act in concert as a partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of the issued share capital of a licensee, such partnership, syndicate or group shall be deemed a single "person" for the purpose of these regulations;
PFMA	means Public Finance Management Act 1 of 1999;
Revised ICT Sector Code	means the Amended Information and Communication Technology Sector Code (the ICT Sector Code) in terms of section 9 (1) of the B-BBEE Act issued under Government Notice 1387 in Government Gazette 40407 of 7 November 2016;
SMME	means a Small, Medium and Micro-sized Enterprise;
Subsidiary	has the meaning determined in accordance with section 3 of the Companies Act, 2008 (Act No. 71 of 2008);
Transfer	means assign, cede, sell, convey, settle, alienate, or otherwise transfer, in whole or in part, whether or not for value, any interest in a licence or licensee from one person to a different person;
Transfer of a Control Interest	shall have the same meaning as "transfer" except that such transfer of a control interest shall occur when a control interest in a Licensee is transferred from one person to a different person;

2. PURPOSE OF THE REGULATIONS

(1) The purpose of these Regulations is to promote equity ownership by HDGs and to promote B-BBEE. In achieving this, these regulations will: -

- (a) facilitate diversity and transformation in the ICT sector by prescribing the implementation of the Revised ICT Sector Code;
- (b) prescribe the application of the HDG equity requirement; and

- (c) provide the manner in which to verify compliance with HDGs and B-BBEE requirements.

3. APPLICATION OF 30% HDG EQUITY REQUIREMENTS (SECTION 9(2)(b) OF THE EC Act)

- (1) A Class licence is exempted from the application of the 30% HDG equity requirement;
- (2) Wholly owned state entities which are subject to the PFMA are exempted from the application of section 9 (2) (b) of the EC Act;
- (3) On any application, an Individual Licensee is required to provide the Authority with proof, by way of a certificate from a recognised and accredited verification agency, confirming its ownership equity held by the HDGs, which may not be lower than 30%;
- (4) The Authority may request any other supplementary information from an Individual Licensee which it deems necessary in order to verify the ownership equity held by HDGs at any given time during the licence period;
- (5) An Individual Licensee must ensure that its ownership equity held by HDGs is not lower than 30% at any given time during the licence period.
- (6) The 30% HDG equity requirement is applicable to all individual licensees, regardless of their size or income level.
- (7) The 30% HDGs equity requirement applies to all sorts of applications pertaining to individual licences, including new applications, transfers, renewals and amendments.
- (8) Publicly trading/listed licensees must submit an independent assurance report indicating compliance with HDGs equity requirement. The report must be submitted by Individual licensees as part of the annual compliance process.

4. APPLICATION OF B-BBEE REQUIREMENT ON LICENCES

- (1) On application, all applicants must have a minimum of 30% ownership by black people and have a minimum level 4 B-BBEE status.
- (2) Each application must be accompanied by a B-BBEE verification certificate.
- (3) A Licensee must submit a B-BBEE verification certificate annually in terms of the Compliance Procedure Manual Regulations, 2011 demonstrating its B-BBEE status calculated on a flow through principle.
- (4) A Licensee must ensure that its ownership equity held by black people is not lower than 30% at any given time during the licence period.

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

One hundred percent (100%) transfer of the issued share capital in a Licensee amounts to both a direct transfer of ownership and a direct transfer of control of a Licensee, save for where the provisions of the shareholder agreements or the incorporating documents of the Licensee indicate otherwise.

6. INDIRECT OWNERSHIP INTEREST

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.

7. APPLICATION OF THE ICT SECTOR CODES

In line with section 10 of the B-BBEE Act, the applicable ICT Sector Codes will apply in the granting of individual and Class licences.

8. CONTRAVENTIONS AND PENALTIES

- (1) A person that submits false, misleading or inaccurate information is guilty of an offence and subject, on conviction to a fine not less than R50 000 (Fifty thousand Rand) but not exceeding R5 000 000 (Five million Rand) or

imprisonment of not less than 1 (one) week but not more than 24 (twenty-four) months.

- (2) A Licensee that contravenes regulations 3(5) and 4(4) is liable to a fine not exceeding the greater of R5 000 000 (five Million Rand) or 10% of the Licensee's annual turnover.

9. TRANSITIONAL PERIOD

- (1) All applications received prior to the promulgation of these regulations will be assessed in terms of the prior regulatory framework and will be required to comply with these regulation 24 months after being licensed.
- (2) Compliance by existing licensees with these Regulations is required within twenty-four (24) months of these Regulations being published with 50% compliance in the first year.

10. SHORT TITLE

These Draft Regulations are called 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 and shall commence upon publication in the Government Gazette.

ANNEXURE A

OWNERSHIP CALCULATIONS

The following examples illustrate the method of calculating ownership interests held indirectly in a Licensee through one or more intermediate juristic persons as prescribed by regulation 1(2):

Example 1: If Company **A** (the indirect owner) were to own forty percent (40%) of the share capital of Company B (the intermediate company) and Company B were to own seventy percent (**70%**) of the share capital in a Licensee, then, for purposes of this regulation, Company A would be deemed to hold twenty eight percent (28%) of the issued share capital in that licensee.

Company **A's** interest in the Licensee is calculated by multiplying Company **A's** interest in Company B by the percentage interest Company B holds in the Licensee. ($40\% \times 70\% = 28\%$). Under the regulations, Company **A** would be deemed to hold a control interest in the Licensee.

Example 2: Company A holds a forty percent (40%) interest in Company **B** and Company B holds a forty percent (40%) interest in Company C. Company C holds a seventy percent (70%) direct interest in the Licensee. Company **A's** interest in the Licensee would be eleven-point two percent (**11.2%**).

Company A's interest in the Licensee is calculated by multiplying Company A's interest in Company B by the percentage Company B holds in Company C. The resulting percentage interest is then multiplied by the percentage interest Company C holds in the licensee. ($40\% \times 40\% = 16\%$; $16\% \times 70\% = 11.2\%$).

Under the regulations Company **A** would be deemed to hold an ownership interest in the licensee but because such ownership interest falls below twenty five percent (**25%**), the indirect interest would be deemed non-controlling; provided, however, the indirect owner did not exercise control in fact over the licensee as prescribed in paragraph (g) of the definition of control interest.

EXAMPLE 1

Company A: owns 40% in Company B

Company B: owns 70% in a Licensee

$$40\% \times 70\% = 28\%$$

Company A would be deemed to hold a 28% ownership interest in the Licensee

EXAMPLE 2

Company A: owns 40% in Company B

Company B: owns 40% in Company C

$$40\% \times 40\% = 16\%$$

Company A would be deemed to Hold a 16% ownership interest in Company C.

$$16\% \times 70\% = 11.2\%$$

Company A would be deemed to hold a 11.2% ownership interest in Licensee.