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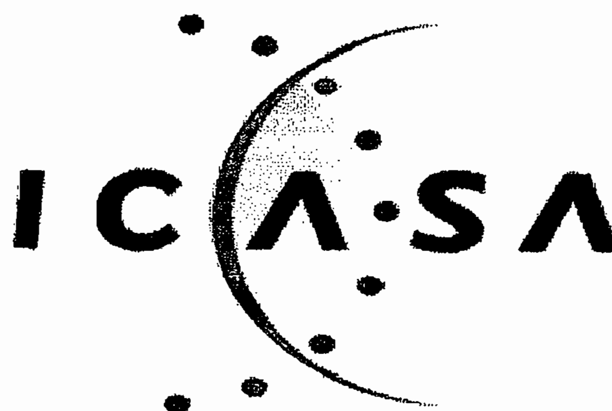

FINDINGS DOCUMENT

ON

THE REVIEW OF OWNERSHIP AND CONTROL OF COMMERCIAL SERVICES AND LIMITATIONS ON BROADCASTING, ELECTRONIC COMMUNICATIONS SERIVCES AND ELECTRONIC COMMUNICATIONS NETWORK SERVICES

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I. Introduction

1. On 17 November 2009 the Authority published a discussion document on Ownership and Control published in Government Gazette No 32719, inviting stakeholders and the general public to submit written comments. Thereafter public hearings took place on the 05th to the 07th May 2010.

2. The latter discussion document raised a number of ownership and control issues as a way to locate a review of the recommendations tabled in the 2004 document and the regulations promulgated under the repealed Telecommunications Act, 106 of 1996 within a broader context, taking into account the implications of section 13 and chapter 9 of the Electronic Communications Act, 36 of 2005 (ECA).

3. The submissions have been considered and a Findings Document has been developed. The primary purpose of the Findings Document is to highlight key issues raised by stakeholders following an inquiry held by the Authority on ownership and control and articulate the Authority's position.

II. Legislative Background

4. The Authority initially published its Discussion Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences in Notice 1825 published in Government Gazette 23873 dated 30 September 2002 ("the Discussion Paper"). This was done within the framework of and in line with the requirements of Sections 48, 49, 50, 52 and paragraphs 1 and 3 of Schedule 2 to the Independent Broadcasting Authority Act, 153 of 1993. Interested parties made written and oral representations on the Discussion Paper to the Authority.

5. Subsequent to the Authority having duly considered both the written and oral representations by interested parties, the Authority published The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper ("the Position Paper") on 13 January 2004.

6. Subsequent to the 2004 position paper, the Authority sent a letter, on 07 May 2004, to the Minister of Communications detailing a set of recommendations that had to be tabled before the National Assembly.

7. Key elements of the Authority's letter to the Minister, as originally written, included the view that technological developments had the potential to change the landscape of the broadcasting industry in the country thereby providing new opportunities for broadcasters. It was recommended that greater investment in the broadcasting industry must be encouraged, empowerment at all levels must be promoted and attempts must be made to ensure that commercial broadcasters operate in a climate of certainty and stability.

8. The Authority mailed the latter recommendations to the Ministry of Communications, whilst a legislative review was underway which led to a promulgation of the Electronic Communications Act, No 36 of 2005. Although the Authority's recommendations were not tabled in Parliament, sections relating to ownership and control were transposed verbatim from the Independent Broadcasting Act, under Sections 2, 13(4), 65 and 66 of the ECA. The ECA effectively retained the Authority's powers as outlined in the IBA Act, namely to limit control of commercial broadcasting services and cross-media control of commercial broadcasting services.

9. Prior to the publication of the above-mentioned Position Paper, the Ministry of Communications published in Government Gazette 24288 dated 16 January 2003, the regulations in respect of the limitations of ownership and control of telecommunication services in terms of section 52 of the Telecommunications Act, 103 of 1996.

10. In response to the legislative changes introduced in the ECA, the Authority embarked on a process of reviewing the regulations published in respect of the limitation of ownership and control of telecommunications services prescribed in terms of the section 52 of the Telecommunications Act, 1996 (Act No.103 of 1996) and developing regulations on ownership and control in respect of all the new

categories of licences, namely the Broadcasting Service (BS) licensees, Electronic Communications Service (ECS) licensees and Electronic Communications Network Service (ECNS) licensees. This process was undertaken under the ECA read with the Independent Communications Authority of South Africa Act, 13 of 2000 (ICASA Act) and related legislations.

11. In order to conduct a comprehensive review of the current recommendations and regulations on Ownership and Control and to fulfil the provisions of sections 2, 13, 64, 65 and 66 of the ECA, the Authority published a Discussion Document on 17th November 2009 inviting inputs from interested stakeholders and the general public. The document specifically mentioned that the Authority is guided by sections 2, 4, 13 (3), (4) and (5) and 65(7) of the ECA and section 4(3) (k) of the ICASA Act.

12. The closing date for the receipt of representations was 19 February 2010. The Authority received Twenty eight (28) submissions, nineteen (19) of which expressed their interest to make oral presentations. Submissions were received from the following stakeholders:

- African Media Entertainment (AME) MultiChoice
- Avusa Media Limited
- Kagiso Media
- MDDA
- NAB
- Cell C
- MTN
- Neotel
- Telkom SA
- E-tv
- Media Monitoring Africa
- SOS
- SABC
- Caxton
- MWeb
- ISPA

- Smile
- WNC IT Services
- Altech
- Super 5 Media
- South African Communications Forum (SACF)
- Vodacom
- BT
- Collateral Trading
- Maxitec Internet Services
- AT & T South Africa
- LARI

Public hearings on the Discussion Document were held on the 05th to the 07th May 2010. The hearings provided interested parties with opportunities to make submissions in respect of issues raised in the Discussion Document and the Notice for Public Hearings.

III. Analysis of written and oral submissions

13. The Discussion Document was divided into two distinct parts. The first part, Part A, dealt with Individual Broadcasting Services. The second part, Part B, dealt with Individual ECS and ECNS.

14. In Part A and Part B several questions derived from the research undertaken are raised as a way to guide discussions with stakeholders and the general public. For the purposes of consistency, the submissions are analysed in terms of the questions as they appear in the Discussion Document. Below is the analysis of the submissions.

14.1. Should the ownership and control restrictions in South Africa be guided by market share of licensees as a measure to ensure that those who have the largest market share contribute the most to meeting the goals of the legislation e.g. BBBEE Act?

(a) A further consideration is how effective is regulation of market share, can it be used as an instrument to diversify views and opinions or is best used to manage competition?

(b) Is regulation of market share perhaps not best applied in primary markets where broadcasters are competing for target audiences, and indirectly also competing for advertising- with attached revenue? If so, what form of regulation is applicable in secondary markets and rural areas, and is it ideal to adopt different interventions for different markets?

MDDA, e-tv, M-Net and MultiChoice reject the suggestion that the ownership and control restrictions in South Africa should be guided by market shares of licensees. They add that compliance with BBBEE should be mandatory for all individual licensees.

MDDA further argues that market share cannot be used as an effective instrument to diversify views and opinions and that strong regulation and licensing, supported by monitoring and compliance, provide an effective instrument to ensure diversity of views and opinions. MDDA states that diversity of views and opinions can be enhanced by diverse ownership and control, multiple languages, various formats and broad ranging news and programming, different sources of news and information. MDDA also argues that regulation of rural and secondary markets can only be supported by a developmental-orientated-approach which is premised on constitutional transformation imperatives.

SABC is of the view that the current market share is likely to create an illusion that the public broadcaster dominates the radio market, whereas in reality there is no correlation between radio audience drawn to SABC and revenue collected by it. SABC argues that despite the 17 radio stations it has, together with their respective audiences, the revenue

returns are not positive. In support of its claim it argues that SABC Radio and non- radio advertising volumes share the market on an equal basis of 50/50. The revenue that is generated is spent on compliance with legislative mandate requirements like extensive public interest contributions through high levels of local content, provision of programming in all official languages and the provision of full spectrum services catering for diverse audience needs.

Similarly to MDDA, the SABC believes that the licensing process and license conditions can be used to facilitate content diversification, hence there is no need for ICASA to introduce regulation of market shares as an additional tool. The public broadcaster is also of the view that the Competition Act provides sufficient tools for the management of competition, and proposes that if the Authority believes that the Competition Act does not cover the concerned issues satisfactorily, it can approach the Competition Commission with a view to amend this Act. It argues that a new set of rules and regulations will burden the regulator with excessive administrative duties, adjudication and recruitment costs.

The Authority, in considering all submissions, and accepting that the use of market share may be effective in some developed countries, is of the view that any decision seeking to diversify content through market share in South Africa at this stage might not necessarily ensure a diversity of views and opinions in the broadcasting sector, and a closer examination of the broadcasting market after the digital migration process may yield better answers. However, the Authority notes that Section 13 of the ECA does lend itself to an interpretation that control and ownership restrictions should apply to individual licences, that is, those with larger market share.

14.2. On one level it can be argued that easing current restrictions on foreign ownership has the potential of injecting more investment into the sector and thereby encouraging diversity of views, especially where local investors are cash-strapped. On another level others contend that foreign investment, if not managed, could diminish local opportunities and enterprise and thereby limit diversity of views and opinions at the local level.

(a) Can exemptions be given to foreign investors who contribute to the socio-economy, and how significant should such contributions be?

(b) Can relaxation of foreign ownership be off-set by increased restriction on control, through amongst others, limited employment of foreign professionals, reservation of critical professional and senior positions for nationals, and thus promoting diversity of opinions and views?

The South African Communications Forum (SACF) submits that the reasons for the imposition of restrictions on foreign ownership are valid and legitimate and especially important in this era when South Africa is still knitting together a national culture and transcending the legacy of apartheid. SACF is of the view that the provisioning of funds for socio-economic projects does not change these reasons, nor justify an exemption.

SACF maintains that restrictions on control do not adequately offset relaxation of foreign ownership limitations. With increased restriction on control, foreign companies that own controlling shares in a broadcasting licensee may, by example, be forced to hire South African CEO's or CFO's, but ultimately who pays the piper calls the tune. Job reservation does not directly equate to a restriction on foreign influence. Even under increased restrictions of control, the South African CFO and CEO will be assessed and hired by the controlling foreign shareholder; their remuneration, including bonuses, will be approved by the controlling foreign shareholder; and their powers and authority will be regulated by the controlling foreign shareholder. Job reservation or other restrictions on control will not guarantee a diversity of perspectives as ultimately the owners of the business will be able to influence those South African nationals who will act as their proxies. Otherwise, the foreign company would probably not make the investment decision to pay for a controlling interest. Most companies would not make a substantial investment in a company without being able to achieve control of the company, directly or indirectly.

The SABC shares a similar view with SACF in arguing that foreign investment does not guarantee diversity of opinions. The SACF further states that limitations on foreign control should only be raised to the extent that the resulting benefits become tangible in the industry.

The MDDA in contrast, supports the 2004 Position Paper which promoted a slight relaxation in respect of limitations of foreign ownership in view of a need to increase foreign investment but being limited in order to ensure that the broadcasting sector complies with the objectives of the Act and is controlled by South Africans.

Caxton is of the view that the Authority has not mentioned that at the time that Australia "abolished" foreign media ownership restrictions in 2006, ACMA (the Australian Communications and Media Authority) was given wider (and weightier) responsibilities to ensure diversity in ownership of media and to prevent "unacceptable media diversity situations", or concentrations. Thus Caxton is of the view that any relaxation in the current ownership and control provisions of the ECA will perpetuate the lack of diversity in the local media industry.

In sharp contrast M-Net and MultiChoice argue that countries which had imposed limitations on foreign ownership and control provisions have reviewed them or are in the process of doing so with an aim to ease their negative impact. They also submit that the effects of globalization and convergence in the international arena are compelling reasons for reviewing and increasing the current 20% on the foreign control of commercial broadcasting services in the country. They add that relaxations of foreign limitations need not be at the expense of other policy objectives.

M-Net and MultiChoice furthermore argue that the most effective way to deal with issues of foreign limitation is through voting rights, as opposed to the financial interest or paid up capital a person may have in a licensee. They insist that this proposal must be incorporated if any changes are to be made to section 64 of the ECA. They propose that the definition of a Foreigner must be included in the ECA and that of Foreign Interest must be deleted.

The Authority maintains the promotion of diversity of South African cultures, languages and viewpoints, needs to be balanced with the objects of the Act and Government Policy which includes the encouragement of investment within the sector. The Authority does not wish to abolish limitations on foreign ownership nor increase the threshold arbitrarily. The limited employment of foreign professionals may advance the objectives of the BBBEE Act, but there is no certainty that the employment of South African nationals or

even HDI's will automatically result in increased diversity of views and opinions. Similarly relaxation of foreign ownership may not necessarily increase diversity of views.

The Authority recognises that the consultation preceding the 2004 recommendations argued for increase in foreign ownership in the sector, however, the number of players in the sector has increased in parallel with foreign investment (See On Digital Media, Walking on Water and Super 5 Media). The Authority's position is that diversity of views can also be promoted through increased competition and by default increased collective foreign investment in the sector, there is no need for the authority to dilute the foreign ownership threshold in individual licensees beyond those proposed in the 2004 recommendations or WTO agreement stipulations.

The Authority concurs that an exemption on foreign ownership restrictions will not necessarily address concerns on diversity of content.

14.3. What constitutes control of an individual licence?

Telkom is of the view that the instances that are generally considered to confer control in a company like owning more than 50% of the issued share capital, possessing an actual voting right that controls the majority of directors and top management of the company, the ability to exercise material influence, etc. should be viewed as constituting control of an individual licence. But this should not necessarily be taken to be exhaustive but merely as indicative of the most common forms of control.

Avusa proposes that the issue of "control" be dealt with in the licensing conditions when a commercial sound broadcasting licence is issued. Avusa believes that it will enable the Authority to address the issue of control on a case-by-case basis founded on guidelines issued by it, alternatively in terms of the established guidelines adopted by the Competition Tribunal, established in terms of the Competition Act 89 of 1998.

The MDDA also supports the proposed amendments to the 2004 recommendations in order to define and simplify control, deemed control, financial interest and securities.

The SABC observes that since the ECA does not provide a useful definition for Control, the Authority should examine other legislation such as the Companies Act, for guidance. The Public Broadcaster explains that while the Company's Act does not necessarily define Control, it gives a detailed account of what is meant by a company and a subsidiary of another company and this is predicated on Control.

Super 5 Media posits that an interpretation of control derived from Section 2 of the Companies Act of 2008, which reads thus, "control is present when a person or juristic person; has majority votes in general meetings; and / or can appoint or veto the appointment of directors who control the majority of votes; and / or has the ability to materially influence the policy of the firm" would suffice for the purpose of the ECA. They further state that the presence or absence of control should be ascertained from agreements between the shareholders of the licensee. Where no additional agreements have been concluded by the shareholders, a memorandum and articles of association of the licensee could provide further insight.

Caxton asserts that the definition in section 12 of the Competition Act offers a sensible and comprehensive approach to determining control of a licensee. Thus a broad definition of control such as that described would ensure that any machinations attempted by shareholders and others could nonetheless constitute control for purposes of the ECA. Caxton mentions that control can be effected through economic interests. Although the Competition Act suggests 50+1% could constitute control, Caxton recommends the adoption of a lesser threshold, close to that applied by the Securities Commission, which is 35%. Caxton is of the view that that the threshold must be raised gradually from the current 25% - 35% in order to ensure that control in the context of concentrations and cross media ownership is limited.

<u>The Authority believes that control is a critical issue in view of the objects of Act that South Africans need to control South African licenses. Control may be on various levels and is summarized as follows by *Cilliers and Benade*:</u>

<u>"A distinction is often made between four categories of control which differ in degree of security and effectiveness. They are: (a) complete control, which entitles the holder thereof to exercise all the voting rights at company meetings; (b) majority control which entitles him to exercise more than 50% of the voting rights; (c) minority control, which</u>

means that the controller exercises sufficient voting rights, though less than the majority, to place him in de facto control of the company; (d) management control or control of the proxy voting machinery, which is usually coupled to minority control, enabling the controller to control the company by soliciting proxy votes, particularly where the shares of the company are widely held." [Cilliers & Benade *Corporate Law* (2000) 460]

The Authority's position is that control should be viewed from a multidimensional perspective as advocated by Cilliers and Benade (2000), not simply on the basis of financial interest. Whilst, the Authority has studied the competition commission's definition and the definition contained in the Company's Act, it is of the view that control should comprise 25% shareholding or the right or the ability to direct or otherwise control the majority of the votes attached to the shareholders' issued shares, or the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the board of directors, or the right to control the management of the enterprise.

14.4. Should exemptions that apply to compliance with BBBEE be incorporated in new regulations of ownership and control, if so in which instances? And should compliance with BBBEE be mandatory for all individual broadcast licensees?

The SACF is of the view that on good cause shown, the Authority should have the ability, without departing from the objects and principles of the IBA Act, to provide an exemption from compliance with BBBEE requirements with regard to ownership and control. Such exemption should be granted:

- In furtherance of BBBEE, for example, upon application of a current BBBEE shareholder who wishes to unencumber his/her shares but by doing so will reduce his/her percentage shareholding
- When a commercial broadcaster needs to be rescued and it can be reasonably shown that alternative financing cannot be sourced.

SACF strongly agrees that all individual broadcast licensees should comply with BBBEE requirements.

e-tv submits that great strides have already been made in advancing BBBEE in the broadcasting sector. They are of the view that since its inception, the Authority has taken an uncompromising approach to the advancement of BBBEE in its licensing of broadcasters.

MDDA, like the SACF, feels that exemptions should be considered on good cause shown but within the framework of the objectives of the ECA.

The SABC believes that the Authority should advance empowerment goals, and exemption provisions should be aligned with the BBBEE Act.

The Authority will continue to encourage compliance with ECA legislation in licensing processes until such time amendments are effected to align the ECA with BBBEE legislation.

14.5. What factors should the regulator consider when promoting diversity of views and opinions through regulation?

The SACF is of the view that the Authority should have sight of all contracts and agreements among the owners of the licensee that relate to issues of ownership and control. Although on paper a South African company can be seen as the controlling shareholder; their controlling power and influence can be eroded by management and other contracts that effectively deliver *de facto* control to a minority shareholder. All such contracts, agreements and arrangements should be reviewed by the Authority on an on-going basis to ensure that the objects and principles of the regulations are not eroded.

The SABC believes that the primary intention of the ECA is to ensure diverse views and opinions and not manage foreign investment. Whilst encouraging investment and innovation in the communications sector as per section 2(d) of the ECA, the Authority must strive to maintain the balance between public broadcasting and commercial interests as it embarks on this inquiry and its related tasks. For instance, it would not be in the public interest for South African assets to be controlled by a foreign company. The South African control of local assets provides for such assets to reflect local cultures and aspirations. Thus, the Authority is urged to consider an assessment of the impact of

regulations on the South African Broadcasting Industry following the licensing of the Greenfields and Introduction of Competition.

Caxton stresses that the Authority should continue to retain the objectives and provisions of the ECA, which in short, are to protect and promote the interests of the public and protect and promote diversity of views. However, Caxton similarly warns that the inconsistencies in the wording in section 2 subsections (d), (f), (h), (k), (s), (w) and (y) may perpetuate the lack of diversity in the South African media industry.

The NAB is of the view that it is not necessary to make regulations in terms of section 13(4) as the Authority already promotes a diversity of views and opinions in the licensing process and thereby ensures that broadcasting services collectively promote a diversity of views and opinions in South Africa.

M-Net and MultiChoice strongly support the principle of plurality of views and opinions. They recommend that the Authority focuses on other aspects of diversity other than news, these include, promotion of local content, regional, national and international matters, the needs of children, youth and women and actuality programmes. However M-Net and MultiChoice indicate that the reality today is that content, including views and opinions, may be sourced and distributed by an unprecedented number of sources. As a consequence, many jurisdictions are liberalising limitations on horizontal and cross-media control.

In relation to the factors to be considered when promoting diversity of views and opinions, the Authority will monitor compliance with licence conditions and content regulations and establish whether competition in the sector is enhancing or discouraging diversity of views.

14.6. Chapter 9 focuses on restrictions on horizontal integration, in spite of convergence. Should the regulations not address vertical integration in the broadcasting and electronic communications sectors?

The NAB is of the view that it is not necessary to address vertical integration in view of the fact that the ECA does not provide the Authority with jurisdiction to do so.

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MDDA posits that regulations will have to be specific on broadcasting services given the mandate broadcasting services have in terms of the objects of the ECA. For example, public service programming, development of local content, promotion of South African cultures, religions, and languages among others.

The SABC feels that the principle behind cross media limitations is sound as it serves to ensure diversity of news and views in the media. It argues that it is nevertheless still important to promote diversity of content to ensure a plurality of ownership. Critics of deregulation have pointed out that relaxation in ownership rules can lead to the spread of bland, low cost, high return stations as seen in the USA radio market which is dominated by large corporations.

The Authority *maintains* that "*political* and *cultural diversity of* media types and content is central to media pluralism." As a result, the Authority has decided to regularly evaluate the effectiveness of existing measures to promote pluralism and/or anti-concentration mechanisms and examine the possible need to revise them in the light of economic and technological developments in the media field.

The Authority is mandated in terms of chapter 10 of the ECA to look into the prevalence of anti- competition in the sector, and relevant regulation will emanate from such findings and consultation.

14.7 What measures should be used to ensure that ownership or control restrictions on new services, for example, mobile television services, IPTV/VOD services and Direct Audio Broadcasting reflect diverse opinions and/or views of all, including the poor?

The NAB is of the view that it would be inappropriate to use ownership and control as a regulatory instrument to set restrictions on new services. Firstly, under the technology-neutral licensing framework of the EC Act there are only individual and class broadcasting services offered within the ambit of three types of broadcasting set out in Chapter 9, namely Public, Commercial and Community Broadcasting. Consequently there is no need to subject new services to different rules of ownership and control. The

NAB is of the view that the appropriate regulatory tool to encourage diversity and views on new services is through licensing and local content regulation.

SACF submits that ultimately, ensuring that new services reflect diverse opinions and views of all, including the poor, requires at a minimum access by all to these services. If these services remain accessible by only a small elite then the views of the majority will not be reflected on them. Most of these new services require access to broadband. Currently only 2% of South Africans have access to broadband. Clearly new services will be geared to those who have access and who can afford them. The Authority needs to make even more concerted effort to ensure greater access to these services by the poor by means of promoting competition, tariffing interventions, and enhanced effectiveness of regulatory processes.

M-Net and MultiChoice suggest that the Authority deviates from one of the key principles of the ECA, namely that the legislation and regulatory framework be technologically neutral. To the extent that there are to be any limitations on ownership and control, those limitations may be imposed to varying degrees on different types of services (electronic communications services, electronic communications network services and broadcasting services). Furthermore, within, for example, broadcasting services, those limitations may vary according to the nature of the broadcasting services (for example, whether it is a free-to-air broadcasting service or a subscription broadcasting service). But the limitations should not be varied between services according to the technological means whereby those services are provided.

The Authority acknowledges that people in rural areas have very limited access to ICT-enabled communications. Nevertheless, opportunities for enhancing access, voice and participation of rural people have emerged as technological convergence of traditional and new media comes closer to reality and services become more accessible. In addition, the new media and networked communication environments have transformed the communicative space driven by the use of modern technology such as the Internet, wireless technologies and mobile telephony. Through these new technologies, users and communities, including the poor, are provided with an avenue for creating content. In the future, The Authority will examine the ownership structures of new services and

assess their impact on diversity of content before it makes further legislative proposals or regulations.

14.8 What measures should be introduced to ensure that the BBBEE is not diluted when the shares are transferred? Can a lock - in period be used? If so, for how long?

In their submission, Altech gave a historical background that one of the draft versions of the DTI Codes adopted the position that if black shareholders sold their shares in a company, that company would lose its BEE ownership points. Companies responded to this approach by contractually instituting lock-in clauses that prevented black shareholders from selling their shares to non-black people. The philosophy underpinning this approach was long-term black ownership of the economy and the avoidance of fronting transactions. The disadvantage of this approach was that black shareholders were offered limited liquidity, even after the lock-in period had expired because they were often restricted to selling shares to other black people only. Proponents of the opposing approach argued that the "*once empowered, always empowered principle*" should apply and that companies should be entitled to continue to count BEE ownership points of black shareholders who have sold their shares. This, it was argued, would allow black people to buy and sell their shares at their discretion, which would enable them to maximise and realise gains in terms of normal investment principles.

The DTI Codes, as argued by Altech, adopt a middle-ground approach to this debate, by allowing a company whose black shareholders have sold or lost their shares to count some of the sold or lost shareholding as black shareholding provided that certain criteria pertaining to, amongst other things, the level of transformation in the company, have been satisfied.

SOS supports lock-in periods but notes certain problems. Firstly, as soon as the "lock-in" period is over, smaller shareholders will probably sell their shares - the inevitable will just be delayed. Further, SOS noted that "lock-in" clauses generally create a two tier level of shares – those that can be traded and those that cannot. This makes certain shares more valuable than others.

Caxton submits that requiring a licensee to continue meeting the mandatory level even after a sale by an HDI shareholder to a non-HDI shareholder, would mean that one of two things must happen; either (i) the shareholders agreements (in an unlisted company) must prevent HDI shareholders from selling their shares, or it must require them to only sell to other HDI groups, or (ii) companies themselves will be required to monitor holdings of shares by HDI groups (in a listed environment) and ensure that shareholders are selected only if they are from the right race. Caxton argues that lock-ins may be a useful compromise, but they echo the example given at (i) above and are generally regarded as commercial arrangements, and not arrangements that should be prescribed. A compromise might be possible if changes in shareholding are permitted, subject to maintaining the prescribed levels of HDI ownership.

SACF proposes a minimum of a five- year lock in period. They argue that a lock-in period balances the expectations of the co-owners of the licensee that they have met the BEE requirements of the license with the desire by some BEE investors to realise the value of their shareholding or to unencumber their shareholding. Another mechanism besides a lock-in period is to ensure that when an HDG seeks to sell their interest in the licensee they do so on condition that they sell to another HDG.

The Authority has reviewed the submissions on lock-ins and believes that at present other safe-guards provided in the process and procedures regulations are sufficient. However, the ownership structure will be monitored over time to assess the impact of the latter provisions.

14.9 Does an increase in ownership by historically disadvantaged groups lead to a proportional increase in diverse opinions and views? If yes explain, if no explain.

SACF submits that there is no correlation between ownership held by historically disadvantaged groups (HDG's) and an increase in diverse opinions, but overall ownership does matter. SACF further states that ownership by HDG's can and, in many cases, does have an effect in increasing the diversity of views. As a majority or significant owner, a historically disadvantaged group has the platform to advocate and determine that different perspectives of language, culture and viewpoint are represented.

However, they might not choose to do so and instead they might focus on the same bottom line interests and values as their non-HDG co-owners.

In addition, SACF believes that if the HDG's were not owners, their voices would not be head. Having HDG's as owners provides for a greater opportunity for a diversity of views and opinions to be represented. SACF stresses that it is important that this opportunity be preserved as South Africa is still overcoming the legacy of apartheid which amplified some voices more than others. They are of the view that the historically disadvantaged owners of a commercial broadcasting licensee should take greater responsibility in ensuring that the content of their services represents a diversity of opinions and views.

MDDA maintains that diverse ownership and control, where equity is unencumbered and there is no management contracts that limit participation of owners, does increase diverse views and opinions. They state that when accompanied by policy for editorial independence, diversity of views and opinions will increase. Moreover, such diversity of views would require further strong monitoring and compliance, which means a strong regulator will be needed. MDDA is of the view that the Licensing process at ICASA can be strengthened to ensure diversity in the market.

In contrast, M-Net and MultiChoice submit that it cannot be assumed that an increase in ownership of historically disadvantaged groups would necessarily result in proportional increase in the diversity of views and opinions. Technological development and market forces have dramatically increased the opportunity for diversity of views and opinions. Furthermore, there are other possibly more appropriate means whereby the Authority may encourage a further increase in diverse views and opinions.

The Authority accepts that HDI alone will not ensure, diversity of views, but it believes that an absence of HDI considerations my yield less plurality of views.

14.10 The ECA is silent on ownership and control of Class Broadcast Services. Should this be viewed as partial relaxation of control and ownership restrictions of small players, and should the focus on individual Broadcasters remain?

M-Net, MultiChoice and Telkom concur and submit that it would seem to be a reasonable approach on the part of the Authority to permit light touch regulation of class licensees. SACF also agrees that this can be viewed as a partial relaxation of control and ownership imposed on small players. Therefore these would mainly be the small players that cover a limited scope and may mostly be the SMMEs that are not under the control of foreigners. Therefore it would be inappropriate for the Authority to seek to impose any type of limitations on the ownership and control of Class Broadcasting Services.

In contrast, the MDDA states that the objectives of the ECA remain applicable to all licensees. According to the SABC, sections 65 and 66 of the ECA provide for limitations on control of commercial broadcasting licensees. The NAB supports the SABC that the ECA does not expressly provide for light touch regulation of all BS licensees.

The Authority is of the view that commercial broadcasters are all classified as individual licences, and that low power and community broadcasters are categorised as class licences. Further the ownership structure applicable to community broadcasters is prescribed in the ECA and aligned with community representation. The Authority will consequently accept that its interpretation is correct, and will accordingly not impose additional ownership restrictions on Class broadcasting licences.

14.11. What ownership and control restrictions, if any, should be placed on listed individual broadcast licences to ensure that in the process of listing diversity of opinions and views is widened? What measures should the Authority place on companies listed on the JSE in relation to foreign control and ownership in order to promote diversity of views and opinions?

SACF recommends that proposals with regard to listed individual broadcast licenses contained in the 2004 Position Paper be adopted. They further propose that the Authority place the same measures on companies listed on the JSE as those which are not listed.

The MDDA similarly supports the approach taken by the Authority in the 2004 Position Paper, namely, that no person may control more than 35% of the number of commercial sound broadcasting services that are licensed to broadcast.

The SABC asserts that there is no research, let alone analyses to prove that ownership and control restrictions on listed companies could positively influence the widening of diversity of opinions and views. Super 5 Media feels that the current 20% limit on foreign control of commercial broadcasting services, particularly for subscription broadcasting services limits the potential of attracting investment in the sector. Super 5 Media recommends that percentage be increased from the current 20 % to 49%. This, it motivates, would be in line with other jurisdictions of Tanzania, Mexico, Poland and Austria.

Caxton supports the control of ownership restrictions by the relevant management who are then able to supervise day to day operations of the licensee. The degree of diversity on any platform including digital platforms will be determined to a large degree if not solely, by the choices of the platform owner, and not the content providers. The diversity of channels carried on the platform is therefore determined by the owner of the platform, and it remains the functions of ICASA to regulate that person under the ECA.

M-Net and MultiChoice are of the opinion that listing is a financial decision and thus the notion that in the process of listing the diversity of views and opinions could be widened is totally misplaced and misleading. In any event, any attempt to introduce restrictions into the process of listing is likely to contravene JSE Listing requirements. Persons who invest in a company ought to be completely free to sell their shares to the most willing buyer in order to extract the maximum financial benefits from their investment.

<u>The Authority has resolved that listed and non-listed companies cannot be treated differently, the objects of the Act will be upheld and applied to all licensees who wish to offer services in the sector</u>.

14.12. How should we advance BBBEE in the broadcasting sector?

Telkom submits that the Authority should advance the BBBEE policy objectives and codes, and include the Charter where possible without necessary having to reinvent the wheel.

SACF submits that it is clear that ownership can be a platform for advancing BBBEE in the broadcasting sector; however it is not the only means, nor necessarily the most effective means to do so. SACF further submits that narrowly defining black economic empowerment by only counting the economic gain for the Black shareholders of a licensee limits the impact, effectiveness and intended result of the black economic empowerment requirements.

The SABC believes that the categories of companies to be empowered ought to be defined. The Public Broadcaster believes that such definitions, that set the criteria for different levels of empowerment, would assist both the Authority and operators during licensing processes. The SABC also agrees with the Department of Trade and Industry (the DTI) Codes of Practice as it sets out a clear and verifiable methodology for measuring BBBEE.

M-Net and MultiChoice make the following proposals;

- The Authority needs to consider whether to propose amendments which would bring the ECA in line with the BBBEE Act of 2003.
- The Authority has to note the HDI/G requirements contained in individual licenses conditions, especially for sound broadcasting licensees. Changing those conditions to suit black people only, may result in some licensees being in breach of their licensing conditions
- The Authority needs to set clear goals as to how it aims to measure BBBEE requirements. As it is, DTI's Codes of Good Practise already entails basic conditions. The Authority can require each individual licensee to provide a verified balanced score card in line with the DTI Codes of Good Practise.

- The Authority must assess BBBEE holistically in order to ensure that, a company that may have a high score in equity can also strive to include scores on other indicators to strike a reasonable balance.

The support for alignment of BBBEE legislation with the ECA is noted, however the Authority is of the view that alignment should not distract from equity, ownership and control considerations.

14.13. It has been indicated that the Authority could not assess the regional representation, gender balance and extent of inclusion of disabled people in the shareholding structure of the Broadcasting operators. Should future regulations require licensees to present this data? If not, explain.

The SABC is of the view that issues of representation are dealt with through the licensing process during which the structure of the applicants is interrogated. The public broadcaster further argues that ICASA has regulations dealing with disability issues in place. In addition the SABC posits that it is also required to report on representation of gender and disability annually, and thus believes that the aforementioned regulatory tools are sufficient to ensure and assess representation, it is therefore not necessary to duplicate already existing measures.

SACF submits that collection and recording of this data would be beneficial to track the impact of the regulations in advancing the objects and principles of the Act, and the NAB is of the view that such information should be requested during the licensing process.

M-Net and MultiChoice do not believe that the Authority should set targets for such categories of ownership. They propose that the Authority should require all licensees to present their verified BBBEE score card annually. The scorecard already sets indicators for gender representation.

The Authority believes that specific requirements for regional representation may be appropriate where the Authority is inviting applications for regional licenses. The categories listed collectively constitute the diverse range of communities in the Republic

and the authority will require all licensees to submit data annually to ensure that the ICT sector is representative of the diverse communities resident in the Republic as per the objects of the ECA.

14.14. What values or percentages should be allocated to gender, youth and regional representation to ensure that broadcasters diversify views and opinions?

The MDDA posits that, historically, the Authority has always incorporated the promises of performance by applicants. In the context of the BBBEE and the ICT Charter, the Authority will be guided by the minimum score card provided.

The NAB indicates that there is no scientific evidence that demonstrates a relationship between percentages of shareholding and diversity of views on the broadcasting service. They propose that the Authority must further be cognizant of already existing instruments which deal with representation, such as the BBBEE Codes.

Like NAB, e-tv does not believe the imposition of requirements to report shareholding data and the allocation of "values or percentages" to special interest groups will have any significant impact on diversifying views and opinions on broadcasting services.

In addition e-tv does not agree that further "diversifying" is necessarily required. e-tv argues that the South African broadcasting sector is extremely vibrant and diverse and the various programming requirements contained in broadcasters' licences are more than sufficient to ensure diversity.

The Authority is not persuaded by the latter arguments and will accordingly align itself with the objects of the Act to ensure that gender, youth and regional representation is considered in the licences that have been issued by the Authority.

14.15. See questions (i), (iii) and (xiv) on BBEEE on pages 36-38, are they relevant to the broadcasting sector?

The NAB is of the view that the Authority must note that the concepts of BBBEE and historically disadvantaged individuals are imperatives, and ought to be complied with, even though they are not synonymous. They further state that if the Authority wishes to move to an understanding of empowerment that excludes white women and white people with disabilities it will have to recommend the amendment of the ECA to align it with the BBBEE Act. However, the NAB would recommend that the Authority should align its definition of BBBEE with the DTI Codes.

In addition the N. nits that 'equity' is not defined in the ECA and proposes that the definition of equit le 100 issued by the BBBEE Act be adopted. The NAB is of the view that this BBBEE equity ownership limitation is already set out as a condition in the licences of individual broadcasting licensees. Failure to comply would therefore be a breach of licence conditions; therefore no additional mechanism is required.

The Authority accepts that the term equity has not been defined and will accordingly incorporate such definition in the regulations. The Authority will adhere to the term Historically Disadvantaged Groups (HDG) until such time as the Act dictates otherwise.

14.16. Any other relevant issue you would like to suggest or comment upon?

SACF submits that from the research presented in the position paper (2004) it can be concluded that the prior and present ownership and control requirements have had significant impact in opening the way for HDG to participate meaningfully in this sector. Therefore HDG ownership and control requirements are pillars of empowerment and must be strengthened and maintained.

MMA believes that diverse content can be promoted through the enhancing of public service obligations and conditions for foreign ownership. They propose that the Authority should conduct a market review on license conditions.

MDDA posits that in order to limit commoditisation of broadcasting, the Authority may wish to consider Canadian regulatory practice which allows for, sales of shares above a certain level to incur a levy, which in turn is dedicated towards training or other capacity building initiatives. In the case of SA, MDDA could administer such a levy for the particular purposes for which the Authority would want it intended.

With specific reference to broadcasting, Caxton rejects ICASA's tackling of the HDI/HDGs under sections 64 – 66 of the ECA. Caxton notes that the Authority cannot attempt to vary the provisions of sections 64 – 66 through regulations because this would be *ultra vires*.

In addition Caxton warns that, retaining empowerment levels at a particular threshold may frustrate shareholders seeking to realize value from their investment and may retard their willingness to invest in the sector again if their next investment is going to be subject to restrictions. Thus, they propose that it would be best to require a threshold to be met over the short to medium term following a purchase by a foreign investor. Once diversity is more visible in the sector, there is a high possibility that the current prescribed HDG and BBBEE levels will occur commercially. Caxton also recommends that applicable restrictions and limitations on all types of commercial broadcasters continue, albeit with the provision that there are no exemptions.

Kagiso Media supports ICASA in ensuring that HDG's are recognised, on condition foreign investments are discouraged in the process.

AVUSA asserts that ICASA must allow cross media ownership because this will assist in leveraging marketing, promoting platforms, utilizing the scarce and specialized sales knowledge, enhancing cross media advertising sales opportunities, and the sharing of resources. It argues that cross media leads to diversity of opinions and ideas where different media platforms can efficiently utilize their valuable financial and human resources effectively. AVUSA further alleges that, the current definition of cross media ownership fails to appreciate the developments in the broadcasting sector. AVUSA asserts that the reality is media companies in the print and publishing space resist collaborations/coalitions unless such intentions have the potential to expand their horizons, including providing possibilities of international growth.

14.17. What is your view of the approach adopted by the Authority?

Telkom is supportive of an intensive engagement on important issues and encourages an approach where broad views are first sought before drafting regulations. On the other hand AME believes that the Recommendations are the only basis on which ICASA can make changes to the current regime governing the ownership and control of broadcasting services.

15. Part B raised seventeen (17) questions as a way to guide discussions with stakeholders and the general public. Below is the analysis of the submissions.

15.1. When formulating ownership and control regulations under the ECA

(a) How should the Authority deal with instances of transfer of control interest that takes place in small proportions of 5% over an extended period of more than five years? Should the Authority's approval still be required in such instances or would such transfer be deemed null and void on the basis that it amounts to the transfer of a control interest?

Vodacom is of the view that any regulation granting ICASA powers to approve transfers of ownership and/or control should be derived from the provisions of either the ECA or ICASA Act. Vodacom's understanding of section 13 of the ECA is that it contains what seems to be a general discretion on the part of the Authority to prescribe regulations of general application on ownership limitations whereas section 9(2)(b) obliges the Authority to include the percentage equity ownership to be held by persons from historically disadvantaged groups which percentage must not be less than 30%. Therefore Vodacom submits that the Authority cannot impose such a requirement through subordinate legislation. They believe that the Authority's powers are restricted to imposing limits on ownership and/or control of an individual licence or the transfer of such licence in its entirety.

Vodacom is of the view that in proposing to restrict the transfer of licences, ICASA should provide clarity about which aspect of the licence is substantive. They posit that the plethora of companies that have been licensed by ICASA to provide ECS and ECNS

is evidence that there is no restriction per se on the number or nature of companies who are authorised to provide communications services. They further submit that there is no strong case for limiting transfers of licences which are not inherently limited.

Vodacom believes that ICASA should require a simple notification for transfers with an assurance that the change does not affect the ultimate control of the licensee or the licensee's compliance with any equity requirements relating to HDI/BEE. Such notification would also be consistent with the operating licence requirement to notify the regulator of the owners of the licensee.

Cell C proposes that the Authority only regulates the transfer of shares if:

(a) It affects the percentage ownership by HDG's for the first two years of being compliant to a 25% equity shareholding;

(b) If at any point prior to the company reaching the 25% threshold, it reduces the percentage HDG shareholding; or

(c) If it results in any shareholder increasing its shareholding by more than 25%;or

(d) If it results in a transfer of shareholding of more than 25% to an entirely new shareholder.

Cell C further proposed that the Authority should take the various pieces of legislation regulating the operators into account when making a decision regarding the transfer of interest. They argue that it will be in the best interest of the consultative process for the Authority to discuss its approach with the Competition Commission and the Takeover Regulations Panel (Companies Act 71 of 2008).

Telkom is of the view that any instance of transfer of control interest, particularly one that affects the BBBEE status or structure of a licensed operator in the sector, should be undertaken through a notification process. Accordingly, the Authority's approval should be required.

The authority is of the view that general sentiment of licensees suggests that transfers cannot proceed without checks and balances. The extent of the checks and balances differs from one submission to the next and consequently the Authority will continue to

monitor transfers to ensure that HDG targets which are set via legislation are not undermined.

(b) How do we strike a balance between sections 2(d), (f) and (y) on the one hand and 2(h) and (p) on the other hand of the ECA? Can we reconcile these two policy objectives so that the need to empower HDI's and the need to ensure that regulatory measures developed by the Authority do not serve as a barrier to entry?

Vodacom believes that the requirements for HDI ownership will make the existing barriers to entry even higher and perhaps insurmountable, to the extent that all prospective licensees would face the same hurdle.

Cell C submits that all licensees must be required to comply with the same requirements of empowerment and ownership and control. They further submit that once a minimum set of standard empowerment requirements are in place either by virtue of the BBBEE Sector Codes or regulations, the regulations must be put in place for the licensees to comply with section 13. Cell C is of the view that the intention of the legislation is to facilitate a general application, of minimum empowerment requirements on all licensees rather than to create regulations that would only be applicable upon the transfer of change of ownership of a licence, in an environment where there is no standard empowerment requirements imposed on similar licensees.

Cell C believes that it is crucial to clarify the chronology of the process, as stated above, as the regulations to be implemented at the end of this process must bear in mind, the objective of incorporating the provisions of the BBBEE Act into the electronic communications regulatory sector. They impressed on the importance of addressing the objectives in a sequential manner to ensure the social and economic imbalances of the past are corrected in a commercially responsible manner.

Telkom submits that setting the ownership threshold at a level higher than 25% - 30% could be seen as setting a barrier to entry. Telkom observes that the Authority might find it challenging to strike a balance between the ECA sections (sections 2(d), (f) & (y)

on one hand and sections 2(h) & (p) on the other hand) mentioned here particularly in the case of operators that are licensed already even though it may not be the case with new applicants. Having said that, Telkom holds the view that giving effect to section 2(h) and to a certain extent section 2 (p) of ECA could be achieved by the Authority through placing parts of the provisions of these sections in the license conditions , especially of new applicants whenever possible. However, they are of the view that such conditions should not discourage prospective licensees or investors. A desirable balancing act could be achieved when the policy objectives underlying these mentioned sections are not onerous or detrimental to service provisioning and infrastructural development.

Telkom nevertheless, submits that the legislative framework that the Authority administers seems to confine it to new applications and/or transfers mostly, and limits the latitude to make strides in empowering HDI's. Therefore any meaningful reconciliation of these two policy objectives *(HDI empowerment and competitive sector)* mentioned here may be achieved through an engagement with the sector and ultimately amendments to the legislative framework.

Telkom further submits that the promotion of SMMEs can be promoted through imposing preferential procurement in their favour. Again, an explicit statutory requirement or obligation in this regard would have to be introduced even if it is in the form of making it compulsory for licensees to comply with the BBBEE Act and codes in their procurement processes or activities.

On the other hand, MWeb is of the view that the Authority can strike a balance between sections 2(d), (f) and (y) on the one hand and 2(h) and (p) on the other. In the context of approval for change in control the Authority will need to assess these on a case by case basis. A change in control application is not the only means available to the Authority to achieve these objectives and is in fact not the most suitable. They propose that the Authority looks at the measures at its disposal when granting licenses and when monitoring the empowerment of licensees.

SACF submits that this question seems to pose that promotion of BEE is a zero sum game in relation to the promotion of investment and innovation in the sector. SACF is of the view that one object does not need to be obtained to the detriment of the other. In fact, all of these objects can be complimentary. SACF does not support a view that requiring black shareholding in a licensee will necessarily be to the detriment of innovation or investment in the business. Diversity of thinking, diversity of culture, diversity of business paradigms can be a benefit to the long term growth of a business, especially as it attempts to grow and develop new markets. This is the reason many businesses, not only those subject to the preferential procurement policies of Government, have chosen to bring in empowerment partners – to attempt to maximise the growth and development of their businesses.

The Authority has considered all submissions and is encouraged that it is recognised that these policy positions can co-exist in the regulations. It will continue to subject change in ownership and control of licensees to regulatory scrutiny within the ambit of these sections.

15.2. The BBBEE Act makes reference to "black people", whilst the ECA relates to "historically disadvantaged persons or groups" (See Section 2 (h) which articulates the primary objects of the Act and section 9(2) (b) of the ECA.) Are these two concepts reconcilable?

Vodacom submits that the anomaly between Black and HDP/HDI should be rectified by aligning ECA and the BBBEE Act, and accepting that the primary instrument for regulating BEE in South Africa is the BBBEE Act and the BEE Codes of Good Practice. The BBBEE Act defines Black as being the generic term for African, Coloured or Indian citizens who either obtained citizen through birth, nationalised prior 27 April 1994 or where one or both parents were SA citizens. Historically Disadvantaged Persons ("HDP/HDI") is a term used to describe all persons who were historically disadvantaged including black people, women, youth and people living with disabilities. It is therefore clear that HDP/HDI does not only pertain to black people but also to women, youth and disabled persons who are not black.

Cell C submits that the envisaged regulations must be extended to include both ownership and control (which could include HDG's and black people), and the BBBEE scorecard to ensure an inclusive approach is adopted to redress the inequalities of the past. However, in calculating ownership and control there will be a percentage that must be reported which include only black people and a separate percentage reported for HDG's – which may include white women and white persons with disabilities.

Telkom submits that the concepts *"black people"* and *"historically disadvantaged persons or groups"* appear to be irreconcilable. The biggest issue is with the definitions accorded to these concepts rather than the goal of these two concepts within the context of empowerment process. Therefore they are of the view that in light of the government's pursuit of the Broad Based Black Economic Empowerment (BBBEE) policy objectives, it would be advisable for the Authority to align with the current government agenda for the sake of uniformity in this regard and pursue amendments to the ECA to remove HDI and substitute it with "black people".

SACF submits that certainly the intended beneficiaries are the same. M-Net believes that while it phrases the issues of empowerment on different occasions, the ECA does not define the concept, historically disadvantaged persons. They propose that the Authority must focus on empowering historically disadvantaged persons in various ways. The Authority is aware that the DTI Codes provide detailed mechanisms and calculation methodologies for the measurement of broad-based BEE scores of business entities under the generic scorecard. The Authority has noted that the majority of submissions have proposed that the ECA be amended to align with the BBBEE. The Authority concurs with the submission that the concepts *"black people"* and *"historically disadvantaged persons or groups"* are not synonymous.

15.3. Section 9 (2) (b) allows the Authority to include the minimum percentage of equity ownership to be held by persons from historically disadvantaged groups who are applying for an individual licence. Should the envisaged ownership regulations adopt the same threshold?

The major operators are of the view that the ECA be amended to align with the BBBEE Act. Vodacom strongly supports the objectives of the BBBEE Act and that those objectives should be consistently applied across all sectors of the South African Economy. They submit that the BBBEE Act constitutes a national legislative instrument designed to regulate BEE in the larger economy and it ought to trump the ECA. They further state that one of the key factors which determines the competitiveness of a country is its ability to create an environment of certainty in order to among others secure investor confidence. The presence of conflicting policy positions, particularly on a matter as significant as BEE, can have a devastating impact on investment in South African enterprises. The apparent conflict between the 30% HDI ownership in the ECA and balanced scorecard notion in the BBBEE Act is a classical case that engenders confusion in the mind of an investor. They propose that the ECA be amended to align to the BBBEE Act in order to achieve absolute clarity.

Cell C echoes Vodacom's views and adds the following sentiments; that the Authority should consider the following four principles, before a decision regarding the percentage ownership is made:

(a) The regulations should be clear, simple to implement and be fairly applied to all stakeholders;
(b) The regulations should ensure continued investment in the country and in new technologies
(c) The regulations should be aligned with national policy and other initiatives to avoid a fragmented empowerment approach; and
(d) The regulations should contain measurable and enforcement rules.

Cell C is of the view that the 30% requirement should be read in the context of the ECA where it is only a requirement for an application for new licences. They propose that the ECA be amended to reduce the threshold to 25% and to set it as a target – as this is in line with the BBBEE Codes of Good Practice and the average percentage contained in all the other industry charters. They further propose that the Authority regularly review the percentage and the information acquired through reporting and monitoring requirements to assess empowerment progress.

Telkom is supportive of the minimum of 30% equity for HDIs and holds the view that anything higher could affect competition in the sector as it could result in the creation of barriers to entry and may not facilitate empowerment.

Telkom submits that section 9(2) (b) is peremptory in which case the Authority does not have an option but to include the stipulated minimum percentage of equity of ownership that is not less than 30% in respect of HDIs when it formulates an ITA. Accordingly, ownership regulations would have to give effect to that. However, the Authority would have to take note of the provisions of section 13 of ECA as well in this regard. Section 13(3) gives discretion to the Authority to set limits / restrictions in the Ownership and Control Regulations. Accordingly, ICASA may chose not to set a limit but use the Regulation to control the reduction of HDI equity ownership when it comes to instances of transfer or change of ownership of a licensee. Telkom states that in keeping with the draft ICT Charter it would be advisable that the notations indicated therein in relation to equity ownership be considered and perhaps be incorporated in the draft regulations.

The object of the Act requires the Authority to oversee the electronic communications industry, not selected licensees. The Authority consequently disagrees with the view that the minimum 30% requirement should only apply to new licensees, as this would be discriminatory and believes that the 30% threshold should be adopted across the board. Accordingly ICASA will set the threshold at the minimum of 30% and existing licensees who do not comply will be given a period of 18-24 months to comply. However, should the ECA be amended to align with DTI codes, the Authority will uphold such amendments.

15.4. Whilst the term equity is not defined in the ECA, Section 10(a) of the Broad-Based Black Economic Empowerment Act 53 of 2003 ("the BBBEE Act") provides that "*Every organ of state and public entity must take into account and, as far as is reasonable possible, apply any relevant code of good practice issued in terms of this Act in determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law*".

The codes are issued in terms of section 9 of the BBBEE Act. In terms thereof, clause 3.8 in Code 100 defines equity as follows:

"*Equity, in relation to any form of enterprise, means the capital invested in that enterprise in respect of which the members have a claim against the enterprise or against the other members of that enterprise by reason of holding an equity interest.* Analogous terms and concepts include, but are not limited to:

- **issued share capital in a company limited by shareholding or share capital in a co-operative society;**
- **the total of members' interests in a close corporation; and**
- **the total interest of all the partners in a partnership"**

Is this definition helpful in the context of the ownership and control framework? If not, can you provide an alternative?

Vodacom is of the view that the request to consider the appropriateness of the BEE Codes definition of equity ownership for purpose of the proposed regulation is misplaced. They believe that ICASA is legislatively bound by the BBBEE Act to apply the provisions of Code Series 100 in the measurement of ownership in an individual licence, and any limitations and restrictions which ICASA may impose under the Proposed Regulations will not be permitted to deviate from the principles contained in Code Series 100.

Cell C submits that unless the Authority makes use of the definition as it is written into the BBBEE Act, the term should not be utilised at all and that reference should be made to terminology defined in other relevant legislation such as the definitions of "share" and securities" used in the Companies Act, 71 of 2008.

Telkom submits that the definition seems helpful save that the Authority could include concepts like the granting of economic interest, actual voting rights, net equity interests, special powers in the running of the company, and under what circumstances equity is conferred, when it formulates regulations.

M-Net and MultiChoice agree that the definition is helpful as it applies to the economy as a whole.

The Authority is not convinced that adherence to the codes are sufficient. Research has confirmed that even if all South African companies were to meet the targets of the scorecard this would have limited impact on empowerment for the following reasons:

- Only 7.4 % of the population are in management positions (regardless of racial lines)
- Only 11,9% of the labour force work in big companies and the codes do not apply to the other 88% who work in small businesses
- Two thirds of the population is unemployed or underemployed and earn less than R2500 per month, and the codes do not apply to them either (Duma Gqubule 2009).

Even if the above figures have changed in 2011, it is probable that the changes are marginal. Furthermore, the demand for equity shares exceeds supply as seen in the recent share transactions in Vodacom, MTN and Multichoice The Authority has resolved that it will focus on equity as mandated in the Act until such time the ECA is amended to align it with BBBEE Act.

15.5. How could the Authority better promote the ownership and control of electronic communications services by historically disadvantaged groups in listed companies?

Vodacom submits that section 13(3) of the ECA gives ICASA the power to limit or restrict the ownership and control of a licence in relation to HDI; but it does not necessarily follow from this that to regulate the ownership of listed companies would promote the ownership and control of electronic communications services by historically disadvantaged individuals. A licence will not necessarily be held directly by a listed company. Indeed, where conglomerates are concerned, it is highly unlikely that the listed company and the licensee will be the same legal entity.

They believe that ICASA is not empowered to impose such limitations or restrictions in order to "promote the ownership and control of electronic communications services by historically disadvantaged groups in listed companies" unless such an imposition is made with a view to either:

- Promote the ownership and control of *electronic communications services* by historically disadvantaged groups;

- Promote competition in the ICT sector.

Cell C submits that there should be no differentiation between listed and private companies. They believe that with the implementation of a scorecard system and the "once compliant always compliant" approach, broad based empowerment will be achieved in a fair and meaningful manner.

Telkom submits that the ICT BEE Council must make proposals to the Department of Labour (DOL) as to how un-utilised funds in the relevant SETA's can be used as collateral for broad-based BEE within the sector. A special BEE fund must be established to finance the acquisition of equity from established companies in the ICT industry. Telkom also stated that the Authority should also have sight of all licensees' contracts and agreements that are relevant to issues of ownership and control. Although on paper a South African company can be seen as the controlling shareholder; their controlling power and influence can be eroded by management and other contracts that effectively deliver *de facto* control to a minority shareholder. All such contracts, agreements, arrangements should be reviewed by the authority on an ongoing basis to ensure that the objects and principles of the regulations are not eroded. Further, when the Authority grants licences or approves transfers of licences or give authorizations (e.g. when allocating frequency bands) especially in instances where black people are not involved or are involved in a negligible way, it may impose as a condition that a proportion of the concerned company's issued share capital be exclusively offered at an affordable price to black people through the stock exchange and be locked in for a stipulated period.

Also, with management and control, the Authority could require that a certain percentage of the management of the company consist of black people in keeping with the codes or the ICT Charter and accord veto voting rights to black people on issues of transfer or decrease of black people shareholding particularly in those listed companies that already have a fair number of black people owning shares. However, such actions may need to

be preceded by discussions with the JSE as well as analysis of the company laws of the republic.

The Authority is not persuaded that equity in listed companies is a non-issue. Therefore the Authority will treat listed and unlisted companies in the same manner in accordance with its broad aim to limit discrimination amongst licensees.

15.6. Are the issues regulated in the limitation of ownership and control of telecommunications services in terms of section 52, 16 January 2003 (Notice R105, Government Gazette 24288 of 2003) still relevant under the Electronic communications Act, 2005 (Act 36 of 2005) ("The Act")? What improvements, if any can be made to the 2003 ownership and control regulation?

Vodacom submits that the Ownership and Control Regulations were promulgated by ICASA under section 52 of the Telecoms Act prior to convergence when the market structure was different from the current structure. Vodacom argues that given the changes in the regulatory landscape prompted by advent of the ECA, it will be inappropriate to impose the existing ownership and control requirements based regulations which were developed under an obsolete Telecoms Act regime. Therefore, the ownership and control regulations need to be amended to reflect the new market structure emerging from the ECA regulatory regime.

Vodacom proposes that the following issues in the current Ownership and Control Regulations, inter alia, need to be considered:

- Regulation 2- with special emphasis on the fact that this Regulation makes reference to a "concentrated market". It is our opinion that a concentrated market if so retained must be linked to a market review process in terms contemplated in Chapter 10 of the ECA.

- The reference and use of "telecommunications service category".

Vodacom adds that if the Regulations are not repealed there needs to be an alignment between these Regulations and the existing Processes and Procedures Regulations as drafted in terms of the ECA when it comes to processes contained therein.

Cell C submits that the ownership and control regulations need to be reviewed to ensure that they are technology agnostic, and aligned with the new companies' legislation and the proposals made in their submission. They believe that these regulations should not make a distinction between different categories of companies and propose that the licence terms and conditions of all similarly situated licensees, be aligned as a first step.

Telkom believes that on the whole, some of the issues are still relevant. However, the emphasis on concentrated markets may need to be reviewed following the *en masse* licence conversion that has probably resulted in less concentrated markets.

Telkom proposes that perhaps the concept of Significant Market Power (SMP) should be the main emphasis even then perhaps only in markets or sub-markets that are found to be characterised by ineffective competition. Accordingly, limiting cross ownership or control interest may have to be closely examined in such markets where companies could be found to be possessing SMP.

SACF believes that these issues are still relevant. The Electronic Communications Act is not very clear with regard to the authority's powers to regulate ownership and control of existing licensees. Section 9(2) (b) of the ECA allows the Authority to regulate ownership limitations on applicants for new licenses. Sections 13(3),(4) and (5) of the ECA grants the Authority powers to regulate ownership and control with regard to transfers of ownership. Greater clarity needs to be provided with regard to the Authority's ability to regulate ownership and control of existing licensees.

AVUSA suggests that the issues of Control must be dealt with under the licensing conditions when a commercial sound broadcasting license is issued. Alternatively, the Authority can also employ the established guidelines as adopted by the Competitions Tribunal, in terms of the Competition Act 89 of 1998. The reference there-of, will assist

the Authority on the definitions of what constitutes Control. This can also be supplemented by the provisions of the Companies Act, section 61 of 1973

AVUSA motivates that, Competitions Act section 12 (2) merely explains specific instances where an individual can be said to have a Control in a firm if such person:

- beneficially owns more than half of the issued share capital of the firm,
- is entitled to vote a majority of the votes or has the voting power to sway things in his/her favour,
- is able to appoint or veto the appointment of a majority of the directors of the firm,
- is a holding company, and the firm is just a subsidiary as contemplated in section 1.3 (a) of the Companies Act

The Authority has noted that the general sentiment is that the term "concentrated market" is out-dated in view of the Altech judgement which converted all VANS to "individual licensees". The Authority is of the view that Licensees must be required to submit their BBBEE verification Certificates (verified by an accredited verification agency) on an annual basis. Further, additional changes to the 2003 regulations will be effected in recognition of legislative and market changes.

15.7. How could the Authority strike a balance between the need to promote the empowerment of historically disadvantaged persons on the one hand and the need to promote competition and encourage investment on the other hand? Are the two necessarily mutually exclusive?

Vodacom maintains that investment in telecommunications infrastructure which is accessible to all citizens of South Africa is a prerequisite for broad-based economic development. The dual role telecommunications play as both a traded service and a vehicle for trade means that price reduction, development of infrastructure and services, among others, have a positive impact on other sectors of the economy. A decrease in investment in telecommunications has a domino effect on all other sectors that depend on telecommunications to maintain an effective and economically sound local and global presence. For this reason, sustained investment in the communications sector is vital for empowerment. Vodacom submits that ICASA should consider creative approaches to

achieving empowerment, to avoid any tension arising between these overwhelmingly important objectives. They believe that the country must find a way to advance empowerment and continue to develop world-class communications infrastructure and services.

Vodacom supports a balanced-scorecard approach to assessing compliance, rather than a narrow focus on equity ownership, as pronounced in the BBBEE Act and the Ministry of Trade and Industry's BEE Codes of Good Practice.

Cell C submits that the two concepts are not mutually exclusive, provided that the empowerment process is broad-based, effective and implemented over a period of time.

Telkom concurs with Cell C that these two terms may not necessarily be mutually exclusive. They argue that the Authority has to decide, depending on matters on-hand and existing circumstances, which one has to receive priority: consumer welfare or HDI empowerment. Where at any given time the two do not present conflict in anyway on the matter under consideration, the Authority would easily strike the balance, but where they present conflict the Authority may have to lean in favour of what it chooses to prioritise in that given case between consumer welfare and HDI empowerment. Telkom proposes that the circumstances of each case depend on weights attached to the variables.

SACF does not support a view that requiring black shareholding in a licensee will necessarily be to the detriment of innovation or investment in the business. Diversity of thinking, diversity of culture and diversity of business paradigms can be a benefit to the long term growth of a business, especially as it attempts to grow and develop new markets. They do not believe that the two terms are mutually exclusive.

The Authority is encouraged by the views of SACF and Telkom. Empowerment should advance the prime object of the Act which is to advance public interest and in so doing the Authority should also promote participation of people with little or no capital base into the economy. Investment (by foreigners) in such an economy could easily complement

the aspirations of many indigenous people who have been historically and unjustly marginalised in the economy.

15.8. Do the provisions of the Act empower the Authority to prescribe regulations on foreign limitations in individual ECS and ECNS licences?

Vodacom notes that ICASA's powers are within the terms of the ECA, which relate to the promotion of ownership and control of electronic communications services by HDI and the promotion of competition. Foreign ownership is a distinct question, which is not within the ECA's scope. Accordingly, the ECA does not provide a specific right to limit or restrict investment by foreigners, other than to the extent to which it is in conflict with the objectives described in section 13(3) of the ECA.

Cell C does not believe the Authority is empowered to impose foreign limitation on ownership, and submits that any approach in that regard will result in reduced investment, reduced technological development and a failure to meet South African growth targets by 2014. On the other hand, SACF submits that it is clear that the Authority would be empowered to do so with regard to new licenses.

Telkom is of the view that section 13(3) of the ECA is arguably worded such that it could be interpreted not to be excluding the power of the Authority to prescribe regulations on foreign limitations in ECS and ESNS licensees where necessary. For example, it is not implausible that an instance may arise where the Authority could decide that given the structure of a particular licensee, its HDI requirement should be set at 49% which would naturally result in reduction of any foreign ownership in that company.

Telkom states that similarly, sections 8(3), 9(2)(c) and 9(6)(b) point to the inherent powers of the Authority that give the Authority the right to decide to put conditions that understandably would have to be exercised in the public interest. Telkom adds that it would not be far-fetched to argue that the provisions of section 2(k) of ECA could be interpreted to be affording the Authority some degree of latitude to prescribe regulations on foreign limitations in ECS and ESNS, if necessary, to achieve the objective of that section.

Telkom however submits that in a narrow sense, it is a valid argument to make that if that it was intended that the Authority should have powers to prescribe regulations on foreign limitations in individual ECS and ECNS licenses that would have been clearly provided for as is in the instance of broadcasters.

The Authority has considered both the direct responses from Vodacom and Telkom, and is of the view that in the interest of the public, the authority should investigate the national stance on this matter, in particular of DOC and DTI, the prime policy makers on this subject. National Treasury has also established a policy formulation process to fill the policy vacuum. It is worth noting that foreign ownership restrictions applicable to the sector in the WTO agreements have not been deleted. The Authority will establish if it is obliged/not obliged to consider the latter agreement in the making of its regulations.

15.9. Should the Authority regulate foreign ownership for electronic communications? If so to what extent?

Vodacom is of the opinion that this is a matter of national economic policy. The policy on inward foreign investment should be developed and adopted by the South African Government, as informed by the World Trade Organisation Agreements and the SADC Protocol on Finance and Investment. Any limitations on foreign ownership are of national and global significance, and not sectoral in nature. Consequently, it would be premature to address the issue of whether or not ICASA has the right to regulate foreign ownership until the broader policy debate has taken place.

Cell C submits that the Authority should not regulate foreign ownership at this point in time, and any such actions would be *ultra vires* the ECA. Therefore, proposes that any foreign ownership regulation should form part of a national policy that will be spearheaded by the DTI.

Telkom submits that the Authority, as provided in section 2(o) of the ECA, would have to consider relevant policy objectives that are generally pursued by government and which are sometimes embodied in various statutes, and balance those with what it considers to be its core mandate when it regulates foreign ownership in the sector. Telkom further

states that the Authority when exercising its regulation on foreign ownership would need to balance things like BBBEE applicable requirements, economic growth factors that could be yielded by the sector, risk to national security, evaluate foreign direct investment that comes to the sector with a view to stopping one that would not benefit the sector and the country at the end of the day.

Caxton believes that transformation of the broadcasting sector is more than an allocation of equity to HDI/HDG representatives, but it also requires other efforts to be made in order to include, develop and empower the HDGs. Caxton further advises ICASA to enforce compliance with the Codes and avoid duplicative regulatory efforts. Caxton indicates that, while HDGs equity is included in the current ECA, it must be read in parallel with other provisions of section 2 of the ECA.

The Authority believes that the Act indeed makes a distinction between broadcasting services, on the one hand, and ECNS and ECS services, on the other, depending on the subject matter of application. For example, section 13(4) authorises ICASA to impose limitations on ownership and control of broadcasting services, subject to Chapter 9. Chapter 9 deals with, *inter alia*, foreign ownership and control of broadcasting services and cross-media ownership and control of broadcasting services. There is no similar requirement in section 13(3) that deals with limitations on ownership and control of ECS and ECNS.

15.10. In regulating ownership and control for electronic communications what percentage should be allocated towards black people, black women, black youth and black disabled people? Should a score card be used?

Vodacom is of the opinion that ICASA should effectively use the guidelines as provided for in the BBBEE Act and BEE Codes of Good Practice.

Cell C believes a standard scorecard such as the generic scorecard in the DTI Codes of Good Practice or a Sector Code should be used. Any different measure would result in confusion, double jeopardy and inefficiencies.

Telkom submits that it is important that there is a common approach to issues relating to BBBEE across the codes, regulations and charters that ECS and ECNS licensees will be subject to. Alignment of these tools for the promotion of BEE in the industry will provide clear guidance and direction for those licensees which seek to comply with BEE requirements. The draft ICT Charter must be finalized as a matter of urgency. The requirement for HDI should be consistent with the objectives and strategy of the BBBEE Act, including the focus on woman, youth and disabled people.

Telkom adds that it would seem that in order to be able to gauge progress made as well as compliance, the use of scorecards may have to be used. Also that would encourage all intended groups to be involved in the process.

MMA admonishes the Authority for not seeking strong grounds to represent people with disabilities and women.

Section 2 (h) requires the Authority to promote the empowerment of historically disadvantaged persons. The Authority recognises the obligation imposed by the ECA to pay particular attention to the needs of women, opportunities for the youth and challenges for people with disabilities. However, in the absence of research into the categories identified in the question i.e. black women, black disabled people or black youth, the Authority believes it is premature to include exact percentages. However, after further monitoring compliance with legislation and studying the scores of members of the sector the Authority may develop regulations to support Section 2 (h) objectives.

15.11. Are restrictions and limitations on cross licence ownership relevant for electronic communications? If yes, to what extent and what measures should be put into place to ensure that convergence is encouraged in the process?

Vodacom submits that restrictions and limitations on cross ownership could only be relevant to electronic communications to the extent that an ECS or ECNS licensee may wish to merge with or acquire a broadcasting licensee, as the licensing environment currently does not prohibit cross ownership of both ECS and ECNS licences. However, Vodacom believes that cross-ownership issues are already effectively dealt with by the

Competition Commission/Tribunal when assessing mergers and acquisitions and the Commission/Tribunal is required by law to assess the impact of such mergers (cross ownership) on competition prior to making a determination. Vodacom recommends that cross-ownership issues should continue to be assessed, managed and regulated in terms of the merger and acquisition process established by the Competition Commission and that no further restrictions or limitations in this regard should be imposed by ICASA.

Cell C submits that cross ownership in the electronic communications arena would be unnecessary and superfluous. Electronic communications licensees have no restrictions on the types of services or technology. Therefore, it should not make a difference from a regulatory perspective, whether a licensee is providing all the services it offers in terms of a single or multiple licences, such a decision should be based on commercial imperatives.

Telkom submits that when they look at the nature of the licensing regime under the ECA, it would appear that the restrictions may not be necessary as there is probably no advantage that they could serve. This is because there are only three basic licence categories under ECA:

- Electronic communications network services (ECNS) licences;
- Electronic communications services (ECS) licences; and
- Broadcasting services licences.

As most persons licensed under the Telecommunications Act, 103 of 1996 ("the Telecoms Act") now have ECNS and ECS licences (largely as a result of the Altech court case), it is of little benefit to acquire the licences of other entities, as any person with an individual ECNS and ECS licence can provide fixed, mobile, voice, data, or any other service. This is a very different scenario to the licensing regime that existed under the Telecommunications Act era, where licences were limited to fixed, mobile, data, etc.

SACF submits that Cross license restrictions are not required and other elements of the ECA dealing with competition issues should be sufficient to address concerns with regard to cross licensing.

MMA foresees the digitization process of the media or convergence of the media platforms as a watershed moment for the diversifying content through promotion of all local languages, sports, documentaries, news, music and children's programmes.

The Authority accepts that the competition commission is best placed to adjudicate over concentration matters or mergers and acquisitions. The Authority is supportive of convergence where it benefits the public, but it will endeavour to monitor transfers and patterns of transfers in the market to ensure that integration patterns align with section 2 (k) and not frustrate development of SMME's as per section 2 (p) of the ECA.

15.12. To what extent should the Authority restrict the transfer of ownership and control interest in a licence?

Vodacom is of the view that in terms of the ECA, ICASA may restrict the transfer of ownership and control of an individual licence only in so far as this would have bearing on promoting competition in the ICT sector and the promotion of ownership and control of electronic communications services by HDIs. They believe that the nationality of an investor is irrelevant to the promotion of either the interests of historically disadvantaged groups or competition in the sector.

Cell C proposes that ownership and control should be restricted until such time that a licensee has reached the empowerment target of 25% and sustained it for 2 years thereafter. They emphasise that no further ownership and control restrictions should be put in place, in light of the fact that a South African market with an excess of 300 licensees, cannot be regarded as a concentrated market any longer.

Telkom submits that the Authority could restrict the transfer of ownership and control interest in a licence only in instances where reduction or stifling of competition in the market(s) concerned would occur as a result of that transfer and/or when the BBBEE objectives are undermined as a result of that transfer. If any transfer promotes both competition and the BBBEE objectives and on the whole is in the public interest and further enhances consumer welfare, restrictions in those cases may not be necessary.

SACF argues that transfers must preserve the 30% HDG ownership requirement by HDG's. SACF is of the view that in order to maintain the threshold held by Black shareholders, transfers can be limited to other Black shareholders, with exemptions granted in specific circumstances.

MMA advises that ICASA must advocate for the appointment of South African citizens at Board, executive and senior management levels.

The Authority agrees with the view that transfers must be restricted to the extent that they do not reduce empowerment stipulations or undermine section 2(k) and 2(h) or ignore public interests pertaining to strategic institutions as identified by the National Treasury (See "A review framework for cross-border direct investment in SA 2011").

15.13. What factors should be considered in prescribing a limitation on ownership and control of an individual licence by foreign investors?

Vodacom submits that a review of FDI rules must commence with a review of national policy towards foreign investment and the associated specific economic policy objectives. Only then can the merits of any limitations in investments by foreign investors be considered.

Cell C does not believe that there should be any restrictions on foreign ownership for ECS and ECNS licensees. In its view the only context wherein foreign ownership should be considered is in broadcasting.

Telkom submits that it would appear from the reading of the ECA that at most foreign investor(s) can hold up to 70% equity in an individual licence in the electronic communications. The Authority will have to ensure that foreign investors do not exceed this threshold. Telkom is of the opinion that acceptance of FDI must be accompanied by skills transfer and investment infrastructure.

Maxitec Internet Services proposes that there should not be any limitations on foreign ownership of individual licences and the Authority should ensure that everyone has fair

and regulated access to local facilities. On the other hand, SACF submits that at minimum, the Authority should consider a requirement that the CEO, CFO and CTO of a licensee be South African citizens.

The Authority will be guided, as required by section 4(3)(i) of the ICASA Act of 2000,by the most recently signed WTO agreements and generally by sections 2(k) of the ECA and policy guidelines provided by DOC, DTI and National Treasury.

15.14. What is the effect of ownership limitation and restrictions on foreign investment? Can lessons be learnt from the broadcasting sector and should we be guided by limitations imposed in other countries?

Vodacom submits that there should be no limitations on ownership and control of individual licenses by foreign investors as the ECA is only concerned with restricting foreign ownership in respect of broadcasting and this concern is based on a constitutional mandate that is particular to broadcasting as well as concerns around the regulation of content to preserve local culture.

Cell C submits that the only effect would be reduced investment, no technological advancement and ultimately failure to reach the 2014 growth targets.

Telkom believes that the one effect of ownership limitation and restrictions on foreign investment is that it slows down the pace of foreign direct investment. In a sense, broadly speaking it could result in the country not being considered a favourite destination for foreign direct investment. Ultimately they could be seen as one of the obstacles to doing business with the country.

Telkom proposes that learning from other countries could be helpful whilst taking into consideration that South Africa may have unique requirements and policy objectives related to ownership issues which may not be found in other countries.

The Authority recognises that there is a general trend to relax foreign ownership internationally, however the impact of such trends specifically in the ICT sector need to be assessed or measured. The Authority will at a later stage conduct such impact

studies and make recommendations to the Minister as per section 3(9) of the Act, furthermore the Authority will be guided by evolving policy shifts on foreign ownership.

15.15. What mechanism can be brought in place to ensure that existing licensees comply with the suggested limitation of equity ownership? What measures should be introduced to ensure that BBBEE is not diluted? In other sectors a lock-in period is used, how long should the lock-in period be, if any?

Vodacom notes that Lock-in periods are structured in accordance with the time-frames of the BBBEE policy framework. However, Vodacom notes that the framework also makes provision for the recognition of black ownership for a period of 18 months after the black owners have relinquished their shares in a measured company. In the draft ICT sector code, this period has been extended to 3 years having taken into account the difficulties companies have had in the past 8 years in finding suitable replacement black shareholders.

Cell C proposes the following:

- an alignment of ownership and control requirements in all licence terms and conditions;
- an annual reporting requirement based on a scorecard;
- a 10 year timeframe to reach a 25% empowerment ownership and control threshold, should the Authority wish to regulate ownership and control in addition to a scorecard system (DTI Code of Good Practice/Sector Code);
- maintenance of such 25% threshold for a period of 2 years, where after a once complaint always complaint" principle will apply; and
- ICASA to perform a regular monitoring function.

Telkom submits that aas a first point of departure the Authority may need to engage with the existing licensees to explore possible trade-offs before resorting to possible mechanisms, such as issuing codes and/or regulations. It may further be said that having the draft ICT Charter could be one way of instituting an appropriate mechanism in this regard.

Telkom proposes the use of Scorecards and targets to be introduced for the industry to ensure that BBBEE is not diluted.

Telkom submits that a lock -in period balances the expectations of the co-owners of the licensee that they have met the BEE requirements of the license with the desire by some BEE investors to realize the value of their shareholding or to unencumber their shareholding. However, Telkom believes that a lock-in period is not without its disadvantages particularly in the case of listed shares as by the end of the period the share value could have been devalued. Accordingly it recommends that lock-in periods should not be unreasonably long; to allow for recovery of incurred costs or part thereof, a maximum of 2 years as a total lock-in period without any form of trading or transfer be allowed, thereafter, a partial lock-in period wherein limited trading or transfer among the designated group be permitted to endure for the remainder of entire lock-in period. Telkom is of the view that lock-in periods that go beyond 5 years not be considered.

Telkom further submits that when it comes to the issue of dilution the Authority may have to use the monitoring and evaluation mechanisms to ensure that empowered companies do not later dilute their BEE status. This again would call for the Authority's scrutiny of any changes in the empowered licensees' status.

SACF concurs with Telkom that a lock -in period balances the expectations of the co-owners of the licensee that they have met the BEE requirements of the license with the desire by some BEE investors to realize the value of their shareholding or to unencumber their shareholding. They recommend a lock-in period of five years, or alternatively a mechanism that allows an HDG to sell their interest in the licensee to another HDG be considered.

The Authority acknowledges that stipulation of lock-in periods constitutes a contractual matter between shareholders. The Authority will however restrict transfer of shares in general including those held by empowerment groups especially those licensees who were granted spectrum based on their empowerment structure and with the aim of protecting the empowerment stature of the licensee and in the interests of other investors who embarked on the empowerment transaction with goodwill, and generally in order to advance the interests of the public.

15.16. What are the limitations to ensuring that electronic communication services and networks are controlled by South Africans?

Vodacom notes that ICASA has not defined the term "controlled by South Africans" in the discussion document, however they propose that ICASA should define specific requirements rather than broad limitations on foreign ownership and meet those objectives. The provision of technology-progressive electronic communications infrastructure on a national basis, that is of a high quality requires significant monetary investment and specialised technical and other skills. Access to such resources is not readily available on a global scale, a challenge that is similarly experienced in South Africa. This means it also significantly limits control options of ECNS and ECS services in South Africa.

WNC IT Services submits that the limitation on foreign ownership should be kept at a minimum (if any) as foreign investment into the new IECS and IECNS sector could be invaluable. License holders should however be obliged to adhere to the BBBEE score card.

Telkom submits that the limitations to successfully ensuring that electronic communication services and networks are controlled by South Africans would be failure to look at restrictions pertaining to equity, voting rights and management positions. They argue that funding challenges should be attended to by government to avoid additional failures.

SACF submits that access for the majority of South Africans to services such as broadband must be a priority. To the extent that such control will dissuade investment, then allowance of foreign investment that directly impacts on access to services (ECNS licenses) should not be unduly restricted.

The Authority is not persuaded that foreign investors will be discouraged by national policies; research by Ian Liddle (2009) in fact shows that foreign investors who invest in developing countries are familiar with the vagaries of investing in such markets.

15.17. Is it practical and desirable for the regulations or HDI targets to be identical across each sub – sector (ECS vs. BS)?

Vodacom submits that there are aspects to the operation of the broadcasting industry and the nature of its services which are quite distinct from the electronic communications industry. Furthermore MTN submits that there is a clear distinction between the Broadcasting and Electronic Communications sectors which is made apparent by the fact that where the legislature intended to impose limitations or restrictions on foreign ownership it did so expressly with regard to broadcasting licences. This interpretation is further supported by section 64 of the EC Act which specifically deals with limitations on foreign control of commercial broadcasting services. Moreover, the rationale required in limiting and restricting foreign ownership in broadcasting licences[1] does not apply in respect of Electronic Communication Services (ECS) and electronic Communication Network Services (ECNS) licences.

Cell C submits that it is neither practical nor desirable for regulations to be identical across broadcasting and electronic communication sub-sectors. Regulatory decisions and targets should be separately considered based on their own merits to ensure that the respective objectives of the sub-sectors are achievable.

Telkom submits that Broadcasting has specific constitutional imperatives that need to be closely considered and be given due effect to. One needs to be stricter towards Broadcasting because of its powerful opinion making influence in various spheres like social, political, moral, etc. In light of that, the applicable regulations may not necessarily have to be identical in every respect.

Neotel and Smile do not believe that each sub-sector has the same considerations. Differential treatment is required between broadcasting and electronic communications

[1] To ensure that broadcasting services are effectively controlled by South Africans

licensees, possibly between electronic communications network services and electronic communications service licences and even between individual and class licences.

SACF submits that as convergence advances, and as a greater percentage of South Africans have access to broadband, reason to have different targets across each subsector will diminish. However they have not yet advanced to the point where asymmetrical regulation is avoidable. These regulations can and should be reviewed to ensure they keep abreast with technological and market changes.

The Authority has considered the submissions made and is of the view that non-discrimination of licensees must be advanced in view of convergence where broadcasting is effectively taking place in ECS services. Recommendations will accordingly be shared with the legislature to ensure that policy changes and legislation allow for the regulator to keep abreast with technological developments.

IV. CONCLUSION

As mentioned in the beginning of this document, the Authority engaged in a public consultation process with the intention to consider written and oral submissions from stakeholders before reaching final conclusions. It is within that understanding that the Authority's considerations informed the broadcasting recommendations submitted to the Ministry of Communications, which were extended to cover ECS and ECNS matters that are the subject of legislative amendments.

The basis upon which the Authority has assessed and considered its current recommendations around issues of cross-media ownership and foreign ownership rules should be located within the current global financial crisis, which has affected the broadcasting and electronic communications sector negatively. It should also be seen as the Authority's intention to enforce the ECA; preserve and encourage a diversity of voices/views within the broadcasting system; promote the cultural values, economic and social goals; enhance, maintain, permit and promote efficient and effective economic competition; and help the industry navigate the negative impact of the economic downturn.

The Authority has considered the provisions of section 92(7) of the ECA and the recommendation(s) by stakeholders to align the 2004 recommendations with the provisions of the ECA and clarify their status by engaging the stakeholders in a transparent public review process. The Authority is also concerned about the issues of economic concentration, ownership restrictions and cross media. Under the current and previous law, the Authority ensures compliance with the ownership and control rules before it issues a licence. In addition, the Authority is required to review compliance on an on-going basis.

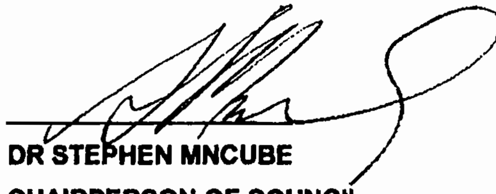
The Authority sought Legal Opinion on the relevance of the 2004 recommendations and realignment of the previous recommendations with the ECA. The opinion suggested that the 2004 Recommendations cannot be regarded as completely irrelevant as they dealt with legislative provisions some of which are to be found, in the ECA.

The Authority further considered changes to the 2003 Ownership and Control Regulations. Subsequently, the Authority took a position that it will propose some legislative amendments in relation to electronic communications services ("ECS"), electronic communications network services ("ECNS") and broadcasting services (BS).

Following the various challenges encountered in developing comprehensive draft regulations in terms of section 13 of the ECA, the Authority will make further recommendations in respect of changes which should be incorporated in the scheduled amendment of the ECA. These challenges centre on policy contradictions between the DTI and DOC as expressed in the DTI codes, the WTO agreement and the ECA. The latter contradictions impact on foreign ownership limitations in individual BS, ECS and ECNS licences, categories of beneficiaries of empowerment, and scope of empowerment.

The Authority has consequently decided that the promulgation of the ECS and ECNS Regulations should consequently be suspended until legislative amendments are effected.

The Authority wishes to thank all participants for their contributions during this review process. The Authority also wants to encourage participants to continue adding value to the development of the sector.



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