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The Independent Communications Authority of South Africa (the Authority)

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SECOND INFORMATION MEMORANDUM ON THE LICENSING PROCESS FOR INTERNATIONAL MOBILE TELECOMMUNICATIONS IN RESPECT OF THE PROVISION OF MOBILE BROADBAND WIRELESS ACCESS SERVICES FOR URBAN AND RURAL AREAS USING THE COMPLIMENTARY BANDS, IMT700, IMT800, IMT2600 AND IMT3500

The ICT Sector Code Council (herein referred to as "Council") welcomes the opportunity by ICASA to provide comments on its second Information Memorandum on the licensing of spectrum bands IMT700, IMT800, IMT2600 and IMT3500, published under General Notice No.668 of 2021 in Government Gazette No. 45496 on 16 November 2021. Council notes that the intended purpose of the 2nd Information Memorandum is to contain *the key elements to be contained in the ITA to be published on the 10 December 2021.*

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The Council and its Functions

The Council is established in terms of section 9 (1) of the B-BBEE Act of 2003 as amended from time to time, with a mandate to oversee and monitor the implementation of the ICT Sector Code. The Councillors are nominated from the ICT Sector Industry Associations and appointed by the Minister of Communications and Digital Technologies to serve a 4-year office period. The inaugural Council came into effect on 1 October 2015.

The Council, guided by the legislation and policy instruments stated in the preamble, shall be established to perform, but not exclusively, the following functions:

- Oversee the implementation and monitoring of the Sector Code;
- Provide guidance on matters relating to black economic empowerment in the ICT sector;
- Compile reports on the status of on black economic empowerment in the ICT sector;
- Share information with approved accreditation agencies conducting black economic empowerment ratings in the ICT sector;
- Engage and advise, the sector Ministers, ICASA and other relevant regulatory entities regarding implementation of the ICT Sector Code;

It is in terms of our function to *engage with government, the public sector, the B-BBEE Advisory Council and other regulatory agencies to promote the implementation of the ICT Sector Code*, that Council is participating in this commentary process on the 2nd Information Memorandum.

The Council's comments are limited to the provisions aimed at the promotion of empowerment in the ICT Sector and in particular, amongst licensed entities governed by the Electronic Communications Act (ECA). To this end, the Council applauds ICASA for its intention through this licensing process to address the fulfilment of some of the objectives under section 2 of the Electronic Communications Act. It is noted with appreciation, that the first objective of this licensing process relates to empowerment in terms of:

1. *Promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and for persons with disabilities through applying Section 9(2)(b) of the ECA read together with regulation 7(3)(d) of the Radio Frequency Spectrum Regulations, 2015 (as amended) sets out the B-BBEE requirements, which will be applied as part of the prequalification criteria.*
2. *Develop and promote SMMEs and cooperatives through the open access obligations proposed in respect of spectrum sharing seeks to enable SMMEs to gain access infrastructure to compete at retail level.*

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Understanding B-BBEE as it relates to the ICT Sector

a. Applicability of Codes

In terms of Statement 000 which outlines the General Principles of the 2016 ICT Sector B-BBEE Code (herein referred to as “the Codes”), the Codes are applicable upon

- All Organs of State and Public Entities operating in the ICT Sector in South Africa;
- All Measured Entities that undertake any economic activity within the ICT Sector with any Organ of State and Public Entities;
- Any other Measured Entity that undertakes any economic activity within the ICT Sector, whether directly or indirectly with any other Measured Entity which is seeking to establish its B-BBEE compliance.
- During the 2020 process of the amendment of the Codes (which are due to be gazetted for public commentary), the undernoted was added to give effect to Section 10.1 read with Section 10.3 of the amended B-BBEE Act (Act No. 64 of 2013).
- Measured Entities that apply for any licence from the Independent Communications Authority of South Africa (ICASA) in addition to other transformation objectives as prescribed by ICASA

Measurement of B-BBEE

The B-BBEE Codes, since the commencement of the Generic Codes of Good Practice (the Generic Codes) on 9 February 2007, prescribed that the measurement to determine the level of compliance, are conducted at the end of a company’s financial year, following said financials having been independently audited. Therefore, the measurement is applied retrospectively.

Notwithstanding the fact that when the Generic Codes became effective, some companies opted to be verified against their 2006/7 financial period in order that they gain understanding of which elements required development plans to achieve a higher score. However, many companies elected to wait a few years prior to commencing with the verification process and as such, the annual assessment of the state of transformation progress resulted in analysis being skewed. That said, following the introduction of the amended B-BBEE Act (Act No. 64 of 2013) and the establishment of the B-BBEE Commission, which resulted in the implementation of Section 13G (requiring listed entities to report on their progress to the Commission within 90 days from financial year end), the resultant effect was that companies re-adjusted their rating periods to ensure compliance with reporting periods.

B-BBEE Certificates have a 12-month validity period, calculated from the date of issue. However, where there is a material change to the Ownership and/or Management Control (Board representation) at any time during the validity period, the company is required to have such elements re-measured, resulting in the re-issue of the B-BBEE certificate. This action does not affect any to the expiry date as per the original issue of the certificate.

The elements of Employment Equity, Skills Development, Preferential Procurement, Supplier Development, Enterprise Development and Socio-Economic Development are all measured as at the

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financial year ending date. The reason for this is that awarding of recognition of compliance is dependent upon the audited financial records of the company in terms of

- Payroll
 - o Measures accuracy of claim as it relates to the employment of black people
 - o Measures achievement of target for Skills Development – being 6% of leviable amount
- Nett Profit after Tax (NPAT)
 - o Measures achievement of target for Supplier Development as 2% of NPAT, Enterprise Development at 3% of NPAT and 1.5% of NPAT for Socio-economic Development

Whilst a company develops its annual transformation plan against the projected financial outcomes, it is not until after the closing of its financial period that such company is in a position to determine the accurate level of compliance in terms of financially influenced elements as stated above.

Effects of amendments of the Codes

The concept of Codes for specific economic sectors is for each economic sector to design a B-BBEE Codes aimed at drive transformation by placing targeted focus on those areas of the sector that require meaningful and sustainable change whilst at the same time, taking cognizance of the changes to the landscape in which such sectors operate. In terms of the ICT Sector Code, the contributing factor for the 2016 amendment was driven by the need to align with the changes made by the Generic Codes (these are applicable to all sectors that do not have a sector code).

The 2016 Amended ICT Sector Code (as a result of aligning the 2012 ICT Sector Code with the 2013 Amended Generic Codes) came into effect on the date upon which was gazetted – being 7 November 2016. Whilst the Council had requested a transitional period for the implementation of the amended Codes, this was not granted. This meant that any company within the sector that had financial year ending December, February and March, had little to no time to effect changes to their development plans and as such Council noted a drastic decline in the B-BBEE status results across the 4 sub-sectors.

As stated above, one of the functions of the Council is to monitor the state of progress of transformation of the entire ICT Sector which includes the sub-sectors of Information Technology, Broadcasting, Telecommunications and Electronics/Manufacturing.

In the table below, Council demonstrates how annual results change or are retained depending on the changes either in legislation or operational and financial factors:-

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Measured Entity	Sector	FY17/18	FY18/19	FY19/20	FY20/21	Contributing Factor
Dimension Data	IT	4	4	2	2	Concluded BBEE deal to 51% in FY19/20
DSTV Media Sales	Broadcasting	3	6	6	4	Lower on SD and ED between FY18/19 and FY19/20
T-systems SA	IT	2	2	1	1	Focus on maximizing Management Control and Skills Development
Tarsus Technology			3	3	3	
CISCO SA	IT	4	4	4	2	
MIP Holdings	IT		Non compliant	4	4	FY2018/19 measured using 2016/17 financials

The Council has recently amended the current 2016 ICT Sector Codes to give recognition to the advancement of the Fourth Industrial Revolution (4IR) and the impact of Covid19 which resulted in most business activities being moved onto digital platforms.

The intended purpose for the amendments is expanded further to provide ICASA with the understanding of the influencing factors that inform amendments – these being, but not limited to

- Ensure alignment with the 2013 Amended Generic Codes in as far as such alignment is relevant to the transformation of the ICT Sector

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- Enable the ICT Sector Code to stand independently from the Generic Codes by the provision of its own Glossary and Annexures with amendments
- Ensure alignment with other key legislation such as the National Small Business Act and the Employment Equity Act in order to drive the focus towards achieving the objects of the National Development Plan.
- Ensure that the amendments enhance the implementation of key focus areas of the Ministry of Digital Communications and Digital Technologies (DCDT) on the empowerment of women, youth, people living with disabilities and SMME's.
- To align with the key drivers contained in the DCDT's strategy on SMME support and Digital Skills strategy

It is hoped that the draft amendment ICT Sector Codes will be finalized by mid-2022 with a 6 months transitional period before the implementation of the Codes. The Council wishes to note that the intention is to ensure that the ICT Sector Code is a "living" document which will be subject to changes as and when necessary. This is critical in ensuring that as our country evolves through the 4IR, black people are not marginalized further but instead, benefit meaningfully and sustainably through the changing environment.

Comments relating to the 2nd Information Memorandum

As stated above, the Council's comments are specific to the empowerment provisions contained in the 2nd Information Memorandum.

Ad provision 13 Empowerment provisions for the industry

Ad 13.2 A licensee would have to, within 12 months of being issued with a radio frequency spectrum licence, reach a Level 1 contributor (BBBEE status) in terms of the Codes of Good Practice, applicable to the ICT Sector, published in terms of Section 9 (1) of the BBBEE Act and maintain such status for the period of the licence.

Council's view

Whilst Council applauds ICASA for driving transformation in licensees, the Council is concerned as to the practicality and reasonableness of the requirement under provision 13.2. The reasons for the concern pertains to the following considerations are :-

- In order for economic empowerment to be effective, it must be meaningful and sustainable.
- The strategy for economic empowerment outlined the levels as a competitive instrument through the creation of transformative initiatives that are not viewed as a "once-off" event
 - According to the B-BBEE Commission's annual State of Transformation report across all economic sectors, for the period of 2019/20, only 7% of 3350 companies analyzed attained a Level 1.

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- The report demonstrates that in the ICT Sector, only 20 companies out of 148 attained a Level 1 status whereas 73 companies attained between Level 4 to Level 2.[i]
- https://www.bbbeeecommission.co.za/wp-content/uploads/2020/07/National-Status-and-Trends-on-Broad-Based-Black-Economic-Empowerment_.pdf

It is for this reason that B-BBEE has not been easy so as to ensure companies have a dedicated focus on the empowerment of black people through various implementation mechanisms ranging from Ownership, Employment, Skills Development and Supplier spend and development.

The Council's concern relates to the provision in terms of the timeline to attain the Level 1 in that this has the tendency to result in initiatives undertaken by the licensees that could amount to fronting or circumvention. The B-BBEE Act defines fronting practices as those acts that *"directly or indirectly undermines or frustrates the achievement of the objectives of the Act", including but not limited to practices in connection with a B-BBEE initiative*".

It must be noted that the B-BBEE Commission have over the past 3 years investigated 17 cases of fronting or circumvention where invalid or incorrect awarding of B-BBEE status that sought to inflate the actual level of compliance. These investigations were conducted not only against companies but also against Verification Agencies (who are accredited to conduct the audit on B-BBEE). Whilst the number of cases might appear low, it is imperative to note that these are only the cases either lodged to the Commission or where the Commission itself have become aware of opportunistic practices.

Proposed Recommendation

In order to ensure that the ICT Sector implements meaningful and sustainable economic transformation and empowerment, the Council humbly implores upon ICASA to consider a phased approach to the attainment of the Level 1 – taking into consideration any effects of amendments that might impact the B-BBEE status.

Conclusion

The Council welcomes the opportunity to engage further with ICASA on this matter and trust that our contribution to the public consultation process is well received.

Yours Sincerely,



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