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BY EMAIL

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Dear Sir and Madam

DRAFT REGULATIONS IN RESPECT OF THE LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS (HDGS) AND THE APPLICATION OF THE ICT SECTOR CODE

1. Community Investment Ventures Holdings Proprietary Limited (**CIVH**) thanks the Independent Communications Authority of South Africa (the **Authority**) for the opportunity to submit written representations on the Draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (**HDGs** or **HDPs**) and the application of the ICT Sector Code as published by the Authority (**Draft Regulations**).[1]

2. CIVH is a specialised Information and communications technology (**ICT**) holding company with key investments in fibre network operators, Dark Fibre Africa (**DFA**) and Vumatel. Through its various subsidiaries, the Group's ICT capabilities range from dark fibre infrastructure, lit and managed services, fibre-to-the-home (**FTTH**) and connectivity for the Internet of Things (**IOT**) to the provision of internet services and field services.

3. CIVH notes that in developing the Draft Regulations, the Authority has taken into account the Findings Document and Position Paper on the Inquiry into Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code published on 15 February 2019 (**Position Paper**). The Position Paper sets outs the Authority's position in respect of two key issues being (i) the implementation of the ICT Sector Code in light of the ownership requirements in respect of HDGs in the Electronic Communications Act 36 of 2005 (**ECA**), and (ii) the promotion of broad-based Black economic empowerment (**B-BBEE**) and equity ownership by

[1] Published under General Notice 91 in *Government Gazette* 43021 of 14 February 2020.

HDGs as required in terms of the ECA. CIVH understands that the Draft Regulations should be understood in light of the Authority's position on these issues, as expressed in the Position Paper. Accordingly, in providing its submissions, CIVH has set out and considered the Authority's views as set out in the Position Paper which in turn informs CIVH's submissions and recommendations.

4. CIVH's submission is attached.

5. CIVH requests an opportunity to make further oral submissions in the event that the Authority decides to convene public hearings in respect of the Draft Regulations.

Yours sincerely

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CIVH SUBMISSIONS ON THE DRAFT REGULATIONS IN RESPECT OF THE LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS (HDGS) AND THE APPLICATION OF THE ICT SECTOR CODE, PUBLISHED ON 10 FEBRUARY 2020

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1. INTRODUCTION AND BACKGROUND

1.1 CIVH is a leading proponent of the open access business model in the South African telecommunications market. CIVH's main operating companies are Dark Fibre Africa Proprietary Limited (**DFA**) and Vumatel Proprietary Limited (**Vumatel**). Through its various subsidiaries, the Group's ICT capabilities range from dark fibre infrastructure, lit and managed services, fibre-to-the-home (**FTTH**) and connectivity for the Internet of Things (**IOT**) to the provision of internet services and field services. As the Authority is aware, DFA holds an individual electronic communications network service (ECNS) licence and an individual electronic communications service (**ECS**) licence. Vumatel operates in terms of various class ECNS licences in respect of various municipalities where it has rolled-out infrastructure.

1.2 The open-access business models of DFA and Vumatel have changed the South African telecommunications landscape creating a more competitive fibre infrastructure market, which has accelerated FTTB and FTTH rollouts and transformed the digital economy in South Africa. CIVH's open-access strategy has also lowered several barriers to entry and facilitated a dynamic telecommunications ecosystem by enabling competition in the mobile market.

1.3 CIVH's focus is firmly on being a wholesale open-access telecommunications provider.

1.4 CIVH expresses its support for the transformation imperatives in the telecommunications sector that the Draft Regulations seek to achieve. CIVH believes that, if implemented sensibly, the Draft Regulations could have a significant positive impact on the telecommunications sector, facilitating dynamic growth in the retail sector by removing barriers to entry and enabling the participation of wholesale open-access providers who, in turn, facilitate the roll out of connectivity across the country.

2. OVERVIEW OF CIVH'S SUBMISSIONS

2.1 The Draft Regulations include proposed definitions for the terms "Control", "Control Interest" and "Transfer of a Control Interest" but do not use these terms anywhere in the Draft Regulations.

2.2 The lower control threshold of 20% is commercially problematic and possibly inconsistent with the ECA

2.2.1 The Draft Regulations propose to include both (i) a definition of "control" incorporated from the Competition Act, 89 of 1998 (**Competition Act**) and, (ii) a separate definition of "control interest", which provides for a control threshold of 20% interest in a licensee.[2] While it is clear from the current position under section 13(1) of the ECA that the Authority's approval is required for a transfer of control, the Draft Regulations propose that the Authority's approval will also be required where there is a transfer of a control interest. However, the proposed threshold for a control interest – 20% – is significantly lower than that of control i.e. exercise of 50% plus 1 voting rights (actual control), *de facto* control, or the ability to veto strategic decisions of the licensee. Therefore, this may mean that the Authority's approval process would be triggered whether or not the acquirer has any control. CIVH is of the view that this 20% bright line control threshold is commercially problematic and inadvisable, and possibly subject to legal challenge as it is not consistent with the ECA.

2.2.2 CIVH recommends that the Authority re-consider the introduction of a 20% bright line and consider motivating for the incorporation of the Competition Act's definition of "control" into the ECA itself so as to provide uniformity and certainty across sectors.

2.3 The requirements for 30% HDG ownership and 30% ownership by Black people overlap and should be made consistent with the B-BBEE Act

2.3.1 The Draft Regulations propose to introduce a requirement for 30% HDG ownership and 30% ownership by Black people and a minimum level 4 B-BBEE status. These are two separate, overlapping requirements and it is not clear what licensees are required to comply with and when. It is not clear whether class licensees (like Vumatel) must have 30% ownership by Black people, or whether this is limited only to individual licensees (like DFA).

2.3.2 If the Authority's intention is to align the requirement in the ECA to have 30% HDG ownership with the BBBEE Act and, accordingly, to require licensees to have a particular level of ownership by Black people (as defined in the BBBEE Act) rather than 30% ownership by HDGs, which is a broader category of persons that is not limited only to Black people, it would be preferable for the Authority to motivate to the Minister of Communications to amend the ECA to remove the references to HDGs and instead to refer specifically to Black people, as defined in the BBBEE Act. In the interim, the Authority could consider requiring licensees to maintain 30% HDG ownership (which is consistent with the terminology used in the ECA) but stipulate that, of that 30% HDG ownership, a certain

[2] See clause 1 (Definitions and Interpretation) of the Draft Regulations.

percentage should be held by Black people e.g. 20%. Licensees should also be encouraged to ensure representation by Black women, in particular.

2.3.3 It is also unclear why the ownership principles in the Amended Information and Communication Technology Sector in terms of section 9(1) of the B-BBEE Act[3] (the **ICT Sector Code**) should not apply by virtue of the Broad-Based Black Economic Empowerment Act 53 of 2003 (**B-BBEE Act**) to the calculation of HDG ownership. CIVH recommends that the Authority explicitly allow the B-BBEE ownership principles in the ICT Sector Code to be applied when licensees calculate their percentage HDG/Black ownership for the sake of consistency in approaches to B-BBEE and because the B-BBEE Act is the primary legislation for the promotion of B-BBEE and the Transformation Imperatives.

2.4 CIVH discusses these two submissions in detail below.

3. THE CONTROL THRESHOLD IN THE DRAFT REGULATIONS

3.1 Defined terms not used

3.1.1 The Draft Regulations include proposed definitions for the terms "Control", "Control Interest" and "Transfer of a Control Interest" but do not use these terms anywhere in the Draft Regulations. Against the background of the Authority's findings in the Position Paper, CIVH understands that these terms are intended in some way to apply to the processes that individual licensees must follow in terms of the ECA, where there is a transfer or "transfer of control" of an individual licence. However, the Draft Regulations do not say this anywhere and do not provide any indication of how the defined terms relate to the requirements in the ECA.

3.1.2 If the Authority's intention is that the defined terms must be used to determine whether a transaction undertaken by an individual licensee amounts to the "transfer" or "transfer of control" of the licence-holder's licence as envisaged in section 13(1) of the ECA, the difficulty is that definitions used in delegated legislation (like the Draft Regulations) cannot be used in the interpretation of the primary legislation in terms of which the delegated legislation is made. In general, it is "not permissible to use a definition created by a Minister in regulations to interpret the intention of the legislature in an Act of Parliament".[4] Accordingly, the words used in the ECA must be interpreted on their own terms. In addition, the terms used in the ECA itself are not the same as the terms defined in the Draft Regulations.

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[3] Published under Government Notice 1387 in *Government Gazette* 40407 of 7 November 2016.

[4] See *National Lotteries Board v Bruss NO* 2009 (4) SA 362 (SCA) at para 37.

3.1.3 It is not clear whether the terms are also intended to apply to the transfer or transfer of control of a radio frequency spectrum licence, as provided for in section 31(2A) of the ECA and how the Draft Regulations relate to the provisions of the Radio Frequency Spectrum Regulations, 2015 that deal with transfers and transfers of control of spectrum licences (being regulations 12 and 15 respectively). CIVH suggests that, if the Authority develops principles to assist licensees to determine whether a particular transaction amounts to the transfer or transfer of control of an individual service licence, the principles should apply equally to spectrum licences. The Radio Frequency Spectrum Regulations should be amended to provide for this.

3.2 What types of change of ownership transactions should trigger the requirement to approach the Authority for prior approval?

3.2.1 The question of a "control threshold" (i.e. when someone can be said to control a licensee) arises in the context of a transfer and a transfer of control of individual licences under section 13 of the ECA and the transfer and transfer of control of radio frequency spectrum licences under section 31(2A) of the ECA. Those sections require the prior written permission of the Authority for the transfer and the transfer of control of individual licences and radio frequency spectrum licences respectively.

3.2.2 A discussion of what an appropriate control threshold is requires two separate considerations. The first is the meaning of "control" as used in section 13(1) of the ECA and the second is what constitutes a transfer of control. Before discussing these two considerations, it is useful to point out the following:

3.2.2.1 The requirements to obtain approval for the transfer of control of an individual licence and a radio frequency spectrum licence were introduced by the Electronic Communications Amendment Act 1 of 2014 (the **Amendment Act**) which came into effect on 21 May 2014. The wording introduced by the Amendment Act provides that an –

"individual licence may not be let, sub-let, assigned, ceded or in any way transferred to any other person and control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority" (underlined emphasis added).

3.2.2.2 It is clear that the transfer of an individual licence and the transfer of control of an individual licence are different concepts. This was acknowledged by the High Court in *Telkom SA SOC Limited v Mncube NO and Others* (***Telkom v ICASA***).[5] Although the High Court considered that the acquisition of 100% of the issued shares in a licensed entity amounted to a transfer of control, the precise meaning of the new provisions that

[5] [2016] ZAGPPHC 93 (26 February 2016) at para 30.

were introduced by the Amendment Act and exactly what types of transactions they cover has not yet been considered by the courts.

3.2.2.3 Prior to its amendment, section 13(1) of the ECA only required the Authority's prior approval for the transfer of an individual licence from one licence-holder to another.

3.2.2.4 The intention underlying the changes that were effected to section 13(1) of the ECA appears clearly to be that the Authority's prior approval for acquisitions of control of the holder of an individual licence must be obtained. This is because the transfer of control of a licence encompasses the transfer of control in the licence-holder, which will in most instances be a juristic person.[6] As such, when interpreting the requirement for approval of a transfer of control, the concepts of what constitutes control of a juristic person and what constitutes a transfer of control in a juristic person are relevant.

3.2.3 The concept of "control" is central to an understanding and application of section 13(1) of the ECA because it is only where "control" is involved that the approval requirement will be triggered.[7] However, neither section 13(1) nor section 1 (the general definitions section) of the ECA provides a definition of control and neither section 13(1) nor 31(2A) has been the subject of judicial pronouncement.

3.3 Definition of "control"

3.3.1 The Draft Regulations propose to include a new definition of the term "control". (The Draft Regulations provide as follows: "Control – as defined in the Competition Act".) As noted above, however, this term ("control") is not actually used anywhere in the Draft Regulations. CIVH assumes that the Authority's intention is that the word "control" as used in section 13(1) of the ECA (and possibly section 31(2A)) should be interpreted in line with the way in which the term is used in the Competition Act. If this is what the Authority intends, the Draft Regulations need to be amended to say this. However, as discussed above, there is also the difficulty in that definitions used in delegated legislation cannot be used to interpret the primary legislation. In short, a defined term in the Draft Regulations cannot be used to determine what the ECA (and specifically section 13(1) and section 31(2A) means.

3.3.2 CIVH supports some direction being given by the Authority as to what the Authority considers "control" means in the context of sections 13 and 31 of the ECA. In particular, the

[6] The Authority and the Complaints and Compliance Committee (**CCC**) have confirmed that this is their view. See *In re: Ohren Telecom CC* CCC Case No: 311/2018 para 7.

[7] As discussed below, the Individual Licensing Processes and Procedures Regulations, 2010 require individual licensees to notify the Authority within seven days of a change to the shareholding of the licensee. Given that the new requirement to obtain approval for a transfer of control of an individual licence was introduced into the ECA in 2014, Parliament was presumably aware of this notification requirement and did not intend for section 13(1) to require the Authority's approval for each and every change of shareholding of a licensee. If it had intended this to be the effect of section 13(1), Parliament would presumably have extended the requirement already imposed by the Authority (to notify it of shareholding changes). Parliament did not do so.

incorporation of the elements of control set out in section 12(2) of the Competition Act – constituting actual control, *de facto* control and the ability to veto strategic decisions – are helpful tools in assessing what types of transactions would trigger the approval requirement under section 13(1) of the ECA. The proposal to define "control" with reference to the Competition Act generally accords with how the Authority and the **CCC** have addressed the question of what constitutes control in a number of contexts over the years.[8]

3.3.3 Because the Authority cannot make binding regulations that say what primary legislation means, CIVH suggests that the Authority instead publish a guideline document setting out its interpretation of what "control" means in the context of sections 13(1) and 31(2A) of the ECA. This would provide guidance to licensees on when corporate transactions will need to be approved by the Authority. CIVH also suggests that control should be interpreted in line with the principles outlined in section 12(2) of the Competition Act and that the Authority's approval should only be required where control (whether negative or positive) is actually acquired.

3.3.4 CIVH also suggests that the Authority consider motivating to the Minister of Communications that section 13(1) of the ECA be amended to clarify that an acquisition of control in an individual licensee amounts to a transfer of control of a licence and to introduce a specific list of control indicia in the ECA itself e.g. in a schedule. (The list of control indicia in Schedule 2 to the Independent Broadcasting Authority Act 153 of 1993 (**IBA Act**) is instructive.) This would avoid the legal problem that currently faces the Authority in that it cannot lawfully make regulations to interpret a requirement in the ECA.

3.4 Definition of "control interest"

3.4.1 The Draft Regulations propose to include a new definition of the term "control interest". As noted above, however, this term is not actually used anywhere in the Draft Regulations. It is also not the term that is used in the ECA: sections 13(1) and 31(2A) talk about "the control of an individual licence [that] may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority" (underlined emphasis added). Sections 13(1)and 31(2A) do not refer to a "control interest". Given the Authority's findings in the Position Paper CIVH assumes that the definition of "control interest" is supposed to provide some guidance to licensees as to what types of corporate

[8] These include: (1) the CCC"s decision in *Caxton and CTP Publishers and Printers Ltd v Multichoice Africa (Pty) Ltd*, case number 37/2010, 11 October 2010 on what constitutes control for the purposes of section 64 of the ECA (relating to restrictions on foreign "control" of commercial broadcasting services). The CCC found that while a significant shareholding is one manifestation of control of a company, control of a company may also be acquired or exercised through various mechanisms or arrangements other than shareholding; (2) 2011 Findings Document on Ownership and Control (published under GN 624 in *Government Gazette* 34601 of 15 September 2011) in which the Authority suggested that control would include complete control (where the controller exercises all the voting rights), majority control (where the rights holder exercises more than 50% of the voting rights), minority control (where the controller exercises sufficient voting rights although less than a majority to place him in *de facto* control), and management control or control of the proxy voting machinery. The Authority then also indicated that the control threshold should be set at 25% (as it was previously in terms of the 2003 Ownership and Control Regulations).

transactions amount to a transfer of control for the purposes of section 13(1) of the ECA. However, this is not clear.

3.4.2 The proposed definition of "control interest" appears to have emanated from the Authority's view, set out in the Position Paper, that control should be defined by way of regulation similarly to how "control interest" was defined in the Regulations in respect of the Limitation of Ownership and Control of Telecommunications Services in terms of section 52, 2003[9] (the **2003 Ownership and Control Regulations**) which were published in terms of the Telecommunications Act 103 of 1996 (which was repealed by the ECA in 2006). The Authority also indicated – in the Position Paper – that it intended to introduce a "bright line" control threshold at 20%[10] but that certain categories of transactions would be excluded from the definition of control in the proposed regulations.[11]

3.4.3 As noted above, providing guidance on what the Authority considers "control" as used in section 13(1) and 31(2A) of the ECA to mean, would be very helpful to licensees. In this regard the Authority has previously found that control has a similar meaning to control under the Competition Act. CIVH suggests that the Authority should maintain this position. It seems clear that this is what the word "control" as used in section 13(1) and 31(2A) was intended to mean. This would mean that licensees would need to get the Authority's prior permission where, amongst other things:

3.4.3.1 someone directly or indirectly acquires a controlling interest in a licensee i.e. the right to exercise 50% + of the voting rights or the right to appoint or veto the appointment of the majority of the members of the board of directors of a licensee;

3.4.3.2 someone acquires negative control i.e. the ability to <u>veto</u> strategic decisions in relation to the licensee such as budget, business plan and the appointment or dismissal of key employees.

3.4.4 Introducing a bright line control threshold of 20%, as seems to be suggested in paragraph (a) of the definition of "control interest", is not consistent with the ECA. As subordinate legislation, the Draft Regulations must be consistent with the ECA as the primary legislation regulating transfers of and transfers of control of a licence.

3.4.5 Whereas the proposal to incorporate the definition of control from the Competition Act would, in our view, assist with the interpretation of control under the ECA, the proposal to introduce a bright line of 20% <u>substantially alters</u> what control is and would be understood to mean under the ECA. In this sense, although the definition of "control interest" appears on paper to be an elaboration of the definition of "control" as proposed in the Draft

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[9] Published under GN R105 in *Government Gazette* 24288 of 16 January 2003.

[10] Position Paper, para 18.9.13.

[11] Position Paper, para 18.10.18.

Regulations, in practice, if implemented in the current form, the operation of the lower control threshold would result in two tiers of control. Effectively, the incorporation of the definition of "control" as the higher tier would be rendered meaningless. The result would be that, while "control" under the ECA has been and is currently interpreted as defined in the Competition Act (in the jurisprudence of the CCC and in the Authority's previous findings), the implementation of the Draft Regulations in their current form would mean that "control" under the ECA would be interpreted differently, that is, at the bright line of 20%, even though the Draft Regulations specifically incorporate the Competition Act's definition of control. CIVH is not clear that this is what the Authority may have intended particularly given the fact that the term "control interest" is not used at all in the provisions of the Draft Regulations. However, to avoid inconsistency with the ECA, CIVH recommends that the Authority re-consider the introduction of a 20% bright line and consider instead adopting the Competition Act's definition of "control" so as to provide uniformity and certainty across sectors. This would be similar to the position under the IBA Act (see Schedule 2) and the Telecommunications Act (in terms of which the Ownership and Control Regulations were published).

3.4.6 The High Court in *KZN Talk Radio (Pty) Limited v Independent Communications Authority of South Africa*[12] held that that the deeming provision in section 66(5) as to what constitutes control applies also in the context of section 65 of the ECA (which imposes media concentration restrictions and limits the number of AM and FM licences or television licences that one person can hold or control), and section 64 (which provides that foreigners may not control a broadcasting service licensee). This meant that, for the purposes of sections 64, 65 and 66 of the ECA in relation to broadcasting licensees, control exists at the 20% shareholding level. However, this decision was made in the specific context of the Chapter 9 provisions in the ECA relating to broadcasters. It does not apply outside of that context and to provisions of the ECA (the amended version of section 13(1)) that only came into effect after that case was brought. Sections 64, 65 and 66 of the ECA replicated the old sections 48, 49 and 50 of the IBA Act, respectively. Section 50(2)(d) of the IBA Act, which previously dealt with limitations on cross-media control of commercial broadcasting services, provided, similarly to the current section 66(5), that a 20% shareholding in a television or sound broadcasting service was deemed to constitute control. However, as discussed in further detail below, Schedule 2(3) of the IBA Act made it clear that control was presumed to exist where a person held **25%** of the shares in a broadcasting service licensee. As such, outside the context of the cross-media restrictions in section 50 of the IBA Act, a person was *not* deemed to control a licensee where it directly or indirectly held a 20% shareholding interest in a licensee that was a company.

[12] (41672/12) [2014] ZAGPJHC 396 (5 August 2014).

3.4.7 It would not make sense to apply the 20% control threshold in the context of section 13(1) and section 31(2A) of the ECA. Sections 64, 65, and 66 of the ECA are concerned, respectively, with the limitations on control of commercial broadcasting services by way of foreign ownership, concentration of control and cross-media control. The High Court in the *KZN Talk* case held that extending the deemed control provision in section 66(5) of the ECA to sections 64 and 65 would promote the diversity of ownership intended to be achieved by these sections. Sections 13(1) and 31(2A), however, are concerned with the transfer of control of a licence from one person to another. They are aimed at ensuring that the Authority is at all times aware of the identity of the person responsible for carrying out the obligations under the licence and that such person meets the substantive requirements of the ECA for the grant of a licence, or the terms of the licence itself. In this context, it is only when a firm acquires control in the common law sense of acquiring the ability to determine the destiny of the licences, that the rationale underpinning the Authority's oversight role in terms of sections 13(1) and 31(2A) should apply. The acquisition of a 20% shareholding in and of itself without the acquirer having any rights of control will not give rise to those types of concerns and the application of the deeming provision in relation to sections 13(1) and 31(2A) would therefore make little sense.

3.4.8 Simply put, holding 20% of the shares in a company does not give the shareholder any type of control whatsoever. It is not correct, as posited in the Position Paper, that the 20% threshold "has historical significance because it is a reasonable threshold to infer that an entity in the industry is likely to exercise control of a licensee".[13] 20% has <u>never</u> been the relevant threshold at which control is established in the telecommunications and broadcasting sectors. Under both the 2003 Ownership and Control Regulations and the IBA Act, control was presumed to exist at the 25% level not 20%.[14]

3.4.9 A shareholder who holds 20% of the shares in a company does not ordinarily have the ability to veto any strategic decisions in relation to the company or to make or influence any other strategic decisions. Where a 20% shareholder does have veto rights because the threshold for the passing of special resolutions has been increased (from 75% to 80% for

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[13] Position Paper, para 18.9.13.

[14] In terms of the IBA Act, see Schedule 2(3), control was presumed to exist where a licensee held more than 25% of the shares in a company (and thus was able to veto the adoption of a special resolution in terms of the old Companies Act 61 of 1973 that applied at the time) unless the licensee could show that the shareholder actually did not have any type of influence. The provision read as follows: "Without derogating from the provisions of any law or from the common law, <u>and in the absence of proof to the contrary</u>, a person shall be regarded as being in control of, or being in a position to exercise control over, a company if he or she has <u>equity shareholding in the company exceeding twenty-five per cent</u> or has other financial interests therein equal to at least twenty-five per cent of its nett assets" (underlined emphasis added). As such, even where a person held 25% of the shares in a licensee and could veto special resolutions, the person may still not have had control of the licensee.

example) and the list of reserved matters is expanded to include matters of strategic significance such as budget, business plan, and appointment of key executives, the shareholder would have negative control. If control is to be understood in the same way that it is understood under the Competition Act, the acquisition of negative control in this way would trigger an approval requirement.

3.4.10 The proposed definition of "control interest" appears to suggest that the acquisition of a 20% interest in a licensee will trigger the prior approval process, whether or not the acquirer has any control or not e.g. 50% + voting right control, *de facto* control, or the ability to veto strategic decisions. Given that many more transactions would in consequence cross the bright line of 20%, the Authority may well be inundated with applications for transactions which require its prior approval. Given that there are no firm timelines for approval to be granted, this would likely result in significant delays for licensees and their shareholders in implementing very ordinary corporate transactions. This would not be consistent with the objectives in section 2(y) of the ECA to "refrain from undue interference in the commercial activities of licensees while taking into account the electronic communications needs of the public".

3.5 Definition of transfer

3.5.1 As set out above, section 13 of the ECA regulates both the transfer of an individual licence and the transfer of control of an individual licence. This ensures that both outright transfers of licences and changes of ownership, which have the same effect, are subject to regulatory approval.

3.5.2 Whereas the term "transfer" is not defined in the ECA, the Draft Regulations proposed to define "transfer" to mean "assign, cede, sell, convey, settle, alienate, or otherwise transfer, in whole or in part, whether or not for value, any interest in a licence or licensee from one person to a different person". This interpretation accords with the underlying purpose of section 13 of the ECA. A licence is a personal right issued to a specific person or persons: the identity of the licence-holder is important, and the basis on which the decision is taken to grant the licence in the first place. This explains why the granting of a licence is generally conditional on the identity of the licence-holder remaining the same or, if the licence-holder changes seeking approval from the relevant licensing authority. In this regard, the Constitutional Court in *Shoprite Checkers*[15] held that:

"…*licences are subject to administrative withdrawal and change. They are never absolute, often conditional and frequently time-bound. They are never there for the taking, but*

[15] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC).

instead are subject to specified pre-conditions. In time, a licence holder may cease to be suitable to hold the licence. And they are also not freely transferrable."[16]

3.5.3 In light of this, it is clear that the Authority's approval is required before there can be a "transfer of control" because the Authority ought to be informed when control of the licence vests in a person other than the person that had previously controlled it. It is clear, then, that control must go somewhere where it did not exist previously, otherwise the underlying rationale for informing the Authority would be absent.

3.5.4 The Draft Regulations also provide for the definition of a "transfer of control interest" as being the same as that of a transfer of control but in the context where a control interest is transferred from one person to another. It is not apparent to CIVH why, in light of the proposed adoption of the Competition Act's expansive definition of "control", there would be a need to propose the inclusion of a definition of "control interest". Our view is that "control" sufficiently captures the instances of the acquisition of an interest that may trigger the requirement for approval.

3.5.5 CIVH is concerned that the effect of the proposed introduction of a 20% bright line threshold would be that all changes in the ownership structure of a licensee that amount to the acquisition of 20% interest, directly or indirectly, would require approval because the trigger of a "transfer" of "control interest" would be present. Thus, any type of material change in a licensee's ownership structure would be treated as a "transfer of control interest", and licensees would be required to obtain approval. This may not be what the Authority intended. However, for the reasons set out above, CIVH recommends that the Authority re-consider the introduction of a 20% bright line control threshold.

3.6 <u>Specific comments on draft regulation 5</u>

3.6.1 It is not clear what the Authority intends this draft regulation to achieve. In particular, it is not clear what a "direct transfer of ownership" is as this term is not used anywhere in the ECA.

3.6.2 Where the shareholders in an individual licensee that is a company sell 100% of the issued shares to a new acquirer, this will clearly be a transfer of control of the individual licence. The licensee would have to apply for the Authority's approval in order to implement the transaction. Following the changes effected to the ECA by the Amendment Act the process that the licensee would have to follow is exactly the same as the process that the licensee would follow if its licence was transferred outright to a new licence-holder. If the Authority is concerned that the meaning of the requirement in section 13(1) of the ECA regarding transfers of control of individual licences is not sufficiently clear, this should be addressed by way of the guidelines that CIVH proposes the Authority should publish.

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[16] *Shoprite Checkers* at para 122.

4. **THE REQUIREMENT FOR 30% HDG OWNERSHIP AND 30% OWNERSHIP BY BLACK PEOPLE**

4.1 The Authority has various powers and obligations in relation to ownership by persons from HDGs and B-BBEE more generally in terms of the ECA, being the sector-specific legislation which governs the communications sector, the Independent Communications Authority of South Africa Act 13 of 2000 (**ICASA Act**), and the B-BBEE Act.

4.2 The Draft Regulations propose to impose two sets of requirements:

4.2.1 they impose requirements regarding HDG equity ownership in draft regulation 3; and

4.2.2 they impose separate requirements regarding ownership by Black people in draft regulation 4.

4.3 The two requirements overlap: Black people are one of the categories of persons who are HDPs. As such, if a licensee has 30% ownership by Black people as required under the Draft Regulations (regulation 4(4)), it will comply with the requirement to have 30% ownership by HDPs. The reason for two separate requirements is unclear and confusing.

4.4 <u>Inconsistency between ECA and BBBEE Act</u>

4.4.1 Section 9(2)(b) of the ECA which has been interpreted as imposing an ownership obligation on individual licensees when they apply for, amend, renew transfer, or transfer control of their licences, refers to “persons from historically disadvantaged groups”. CIVH understands that, from a policy perspective, the Authority’s position is that it would be appropriate for there to be alignment between the BBBEE Act and the ECA and, accordingly, for equity ownership requirements to be directed at Black people, rather than at the broader category of persons who may be regarded as HDPs.

4.4.2 The cleanest way for the Authority to achieve this objective would be for the ECA to be amended to clarity that a minimum percentage equity ownership must be held by Black people, as opposed to HDPs and for the ECA to make to make it clear that the calculation of equity ownership held by Black people should be calculated in line with the principles in the ICT Sector Code. CIVH suggests that the Authority consider motivating to the Minister that the ECA be amended in this way for the sake of consistency and to avoid two parallel regimes, given that the BBBEE framework is intended to be the overarching framework in terms of which empowerment should be understood and enforced.

4.4.3 The Authority could also consider simply introducing one requirement for individual licensees to maintain a particular level of equity ownership by persons from historically disadvantaged groups, in accordance with the provisions of the ECA in its current form. The Authority could remove the separate requirement in draft regulation 4 regarding ownership by Black people as distinct from the requirement in draft regulation 3 regarding

ownership by HDGs and simply require 30% ownership by HDGs. The Authority could then impose a sub-minimum requirement for the percentage equity ownership that should be held by Black people. For example, the Authority could stipulate that, of the 30% ownership by HDGs, 20% must be held by Black people. Licensees should also be encouraged, in line with the ICT Sector Code, to increase levels of ownership by Black women, broad-based groups and new entrants.

4.5 Specific comments on draft regulation 3

4.5.1 Following the decision of the High Court in *Telkom v ICASA,* an individual licensee who transfers, transfers control of, renews or amends an individual licence must have 30% ownership by HDGs. In the Position Paper, the Authority acknowledged that this category of persons is not limited to Black people alone but indicated that it intends to narrow the ambit of the category of persons who should hold equity in individual licensees in terms of section 9(2)(b) of the ECA to Black people alone.[17] Despite this, the Draft Regulations define HDPs to include Black people, women, youth and persons with disabilities.

4.5.2 The 30% HDP ownership requirement applies already to new licence applications, amendments, renewals, transfers and transfers of control on the basis of sections 9(2)(b), 10(2), 11(3), and 13(6) of the ECA following the decision of the High Court in *Telkom v.* As such, there is no need for a separate requirement to be included in the Draft Regulations that simply repeats what is already stated in the ECA.

4.5.3 It is not clear why regulation 3(1) has been included. Class licensees are not subject to any HDP ownership requirements in terms of the ECA and are not subject to section 9(2)(b). There is no reason for class licensees to be exempted from any requirement. Instead, the regulations should simply indicate that the obligations apply to individual licensees.

4.5.4 There does not appear to be any basis for the blanket exemption given to wholly-owned state entities in draft regulation 3(2). The ECA does not provide for such an exclusion for public entities.

4.5.5 Regulation 3 provides no clarity on the principles that can be used to calculate equity ownership by HDPs. In particular, it does not provide that any of the principles in Statement AICT 100 of the ICT Sector Code can be employed to calculate equity ownership by HDPs. The reason for this is unclear. The Authority is obliged in terms of section 2(h) of the ECA to promote "broad-based black economic empowerment", which has the same meaning given to it in the Broad-Based Black Economic Empowerment Act 53 of 2003, and section 4(3)(k) of the Independent Communications Authority of South Africa Act 13 of 2000 to make regulations on empowerment to promote broad-based black economic empowerment. As such, it would be appropriate and entirely in line with the ECA and

[17] Position Paper, paras 17.15 and 17.23.

ICASA Act for the Authority to allow equity ownership by HDPs to be calculated in line with the principles in the ICT Sector Code. In particular, equity ownership by designated BEE Facilitators (like the Public Investment Corporation, National Empowerment Fund and others), and qualifying private equity funds should be recognized as HDP ownership.

4.6 Specific comments on draft regulation 4

4.6.1 Draft regulation 4(1) provides that "[o]n application" applicants must have 30% ownership by black people and a minimum level 4 status.

4.6.2 It is not clear whether this requirement to have and then to maintain (in terms of draft regulation 4(4)) ownership by Black people and to achieve level 4 BBBBEE contributor status applies only to new applications for licences or also applies where an individual licensee applies to the Authority to amend, renew, transfer or transfer control of an existing licence.

4.6.3 It is also not clear whether the requirement to have 30% ownership by Black people and to maintain level 4 BBBEE contributor status applies to individual and class licensees or only to individual licensees. This needs to be clarified.[18].

4.6.4 Draft regulation 4(3) indicates that licensees will be required to submit their BBBEE verification certificates to the Authority on an annual basis "demonstrating its BBBEE status calculated on a flow through principle". It is not clear what is intended here: the BBBEE framework and the ICT Sector Code contain detailed principles in relation to how BBBEE status is to be measured including levels of Black ownership. There is no reason or basis for the Authority to depart from these principles and, to the extent that the regulations, conflict with the BBBEE Act (including the ICT Sector Code), the BBBEE Act will prevail.

4.7 Specific comments on draft regulation 7

The Authority is already required to apply the ICT Sector Code in terms of section 10 of the BBBEE Act and it is not clear why this draft regulation was included. Instead, the Authority should provide more detail in relation to how exactly the Codes of Good Practice will be applied by the Authority when granting individual and class licences.

4.8 Specific comments on draft regulation 9

Recognition should be given to the fact that, in the prevailing market circumstances, the ability for licensees to implement a 30% BBBEE ownership transaction is limited by funding constraints. CIVH suggests that consideration be given to allowing licensees to apply for an

[18] CIVH notes that the position taken in the Position Paper was that HDG equity ownership requirements do not apply to class licensees, see Position Paper, paragraph 18.2.1.3. CIVH also notes that CIVH also notes that the Authority's policy position was that "a mandatory minimum B-BBEE Status Level Six will be compulsory for all licensees which status level must be maintained for the duration of the licence", see Position Paper, paragraph 18.14.15.

extension of the period to comply to the HDP and BBBEE ownership requirements on good cause shown.

4.9 Definition of "Black people"

The definition should cross-refer to the definition of "black people" in the BBBEE Act.

5. CONCLUSION AND RECOMMENDATIONS

5.1 The Draft Regulations propose that the definition of "control" as defined in the Competition Act, be adopted by the Authority. Given that the ECA does not define control, CIVH welcomes this proposal as it provides clarity regarding how control in sections 13 and 31 of the ECA should be interpreted. In particular, the incorporation of the elements of control set out in section 12(2) of the Competition Act – constituting actual control, *de facto* control and the ability to veto strategic decisions – are helpful indicators in assessing what types of transactions would trigger the approval requirement under section 13(1) of the ECA.

5.2 CIVH recommends that the Authority re-consider the introduction of a 20% bright line and consider recommending legislative amendments to incorporate the Competition Act's definition of "control" into the ECA itself or publish a guideline for industry on its interpretation of the meaning of "control" as used in section 13(1) and 31(2A).

5.3 CIVH recommends that the Authority clarify and refine the requirement for 30% HDG ownership and 30% ownership by Black people and a minimum level 4 status particularly given the fact that non-compliance will mean that licensees will not have their licences renewed and/or licences may be revoked and/or significant fines may be imposed (up to 10% of turnover).

5.4 CIVH recommends that the Authority allow the B-BBEE ownership principles in the ICT Sector Code to be applied for the sake of consistency in approaches to B-BBEE and because the B-BBEE Act is the primary legislation for the promotion of B-BBEE and the Transformation Imperatives.