



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID AFRIKA

Vol. 669

31

March
Maart

2021

No. 44382

N.B. The Government Printing Works will not be held responsible for the quality of "Hard Copies" or "Electronic Files" submitted for publication purposes

ISSN 1682-5845



9 771682 584003



AIDS HELPLINE: 0800-0123-22 Prevention is the cure

IMPORTANT NOTICE:

THE GOVERNMENT PRINTING WORKS WILL NOT BE HELD RESPONSIBLE FOR ANY ERRORS THAT MIGHT OCCUR DUE TO THE SUBMISSION OF INCOMPLETE / INCORRECT / ILLEGIBLE COPY.

No FUTURE QUERIES WILL BE HANDLED IN CONNECTION WITH THE ABOVE.

Contents

<i>No.</i>		<i>Gazette No.</i>	<i>Page No.</i>
GENERAL NOTICES • ALGEMENE KENNISGEWINGS			
Independent Communications Authority of South Africa / Onafhanklike Kommunikasie-owerheid van Suid-Afrika			
170	Independent Communications Authority of South Africa Act (13/2000): Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code	44382	3



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

The Independent Communications Authority of South Africa, in terms of section 4(3)(k) of the Independent Communications Authority of South Africa Act, 2000 (Act No.13 of 2000) , as amended (“ICASA Act”) read with sections 4, 9(2)(b) and 13(3)(a) of the Electronic Communications Act , 2005 (Act No.36 of 2005) , as amended (EC Act) hereby prescribes Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code .

A handwritten signature in black ink, appearing to read 'K. Modimoeng'.

DR. KEABETSWE MODIMOENG
CHAIRPERSON
DATE: 31/03/2021

CONTENTS

1.	Definitions	3
2.	Purpose of the Regulations	5
3.	Application of the HDG Equity Requirement (Section 9(2)(b) of the EC Act)	5
4.	Application of B-BBEE Requirements on Licences	6
5.	Dilutions of HDG and B-BBEE Shareholdings in an Individual Licensee	7
6.	Contraventions and Penalties	7
7.	Transitional Periods	7
8.	Short Title	8
	Appendix 1	9
	Methodology to be used to compile Credible Assurance Report	9
1.	Introduction	9
2.	Assessing Compliance with the HDG Equity Requirement	9
3.	Required Documents	10
4.	Application of Ownership Principles	11
	Appendix 2	13
	Progressive Reporting on the B-BBEE Requirements	13

1. Definitions

Unless otherwise stated, or the context otherwise requires, the words and expressions listed below shall bear the meanings ascribed to them:

- 1.1 **Authority** – means the Independent Communications Authority of South Africa established in terms of the ICASA Act;
- 1.2 **B-BBEE** – means Broad Based Black Economic Empowerment and shall have the same meaning assigned to it in the B-BBEE Act;
- 1.3 **B-BBEE Act** – means the Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended from time to time;
- 1.4 **B-BBEE Codes** – means the Codes of Good Practice for Black Economic Empowerment published in terms of the B-BBEE Act;
- 1.5 **B-BBEE Contributor Status Level** – a contributor status level determined in terms of paragraph 5.2 of Series AICT000, Statement AICT000, of the ICT Sector Code, as confirmed by a B-BBEE Verification Certificate;
- 1.6 **B-BBEE Verification Certificate** – an independent written verification certificate of compliance with the ICT Sector Code issued by a SANAS recognised and accredited verification agency;
- 1.7 **Black Equity Requirement** – means the requirement that each Individual Licensee must have a minimum of 30% of its ownership equity held by Black People as set out in regulation 4(1);
- 1.8 **Black People** – shall have the same meaning assigned to it in the B-BBEE Act;
- 1.9 **Business Days** – Monday to Friday, excluding any public holidays;
- 1.10 **CCC** – means the Complaints and Compliance Committee, an independent committee of the Authority, established in terms of section 17A of the ICASA Act;
- 1.11 **CIPC** – means the Companies and Intellectual Property Commission;
- 1.12 **Class Licence** – shall have the same meaning assigned to it in the EC Act;
- 1.13 **Class Licensee** – shall have the same meaning assigned to it in the EC Act;
- 1.14 **Compliance Procedure Manual Regulations** – means the Compliance Procedure Manual Regulations, 2011 issued in terms of section 4(3)(j) of the ICASA Act (Government Notice 902 in Government Gazette No. 34863 of 12 April 2012);
- 1.15 **EC Act** – the Electronic Communications Act, 36 of 2005, as amended from time to time;

- 1.16 **EME** – means an exempted micro enterprise, which is an entity with an annual Total Revenue of R10 million or less;
- 1.17 **Equity** – means the instrument by which a person holds rights of ownership in an entity;
- 1.18 **Flow Through Principle** – shall have the same meaning assigned to it in the B-BBEE Codes;
- 1.19 **HDG Equity Requirement** – means the requirement that each Individual Licensee must have a minimum of 30% of its ownership equity held by historically disadvantaged groups as set out in regulation 3(4);
- 1.20 **ICASA Act** – means the Independent Communications Authority of South Africa Act, 13 of 2000, as amended from time to time;
- 1.21 **ICT Sector** – means the Information and Communication Technology Sector;
- 1.22 **Individual Licence** – shall have the same meaning assigned to it in the EC Act;
- 1.23 **Individual Licensee** – means a person to whom an Individual Licence has been granted in terms of the EC Act;
- 1.24 **ICT Sector Code** – Amended Information and Communication Technology Sector Code published in terms of section 9 (1) of the B-BBEE Act on 3 November 2016;
- 1.25 **Large Individual Licensees** – means any Individual Licensee with an annual Total Revenue of R50 million and more;
- 1.26 **Licensee** – means a person issued with a licence to provide services in terms of chapter 3 the EC Act;
- 1.27 **Organs of State** – shall have the same meaning assigned to it in the B-BBEE Act;
- 1.28 **Public Entities** – shall have the same meaning assigned to it in the B-BBEE Act, and “**Public Entity**” shall have the corresponding meaning;
- 1.29 **QSE** – means a qualifying small enterprise, which is an entity with an annual Total Revenue of between R10 million and R50 million;
- 1.30 **Regulations** – means these regulations in respect of the limitations of control and equity ownership by Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code, together with any of its appendices;
- 1.31 **SANAS** – means the South African National Accreditation System;
- 1.32 **SMMEs** – means collectively QSEs and EMEs;

- 1.33 **Total Revenue** – shall have the same meaning assigned to it in the B-BBEE Codes; and;
- 1.34 **Transfer** – means assign, cede, sell, convey, settle, alienate or otherwise transfer, in whole or in part, whether or not for value, any interest in a licence or Licensee from one person to another.

2. Purpose of the Regulations

- (1) The purpose of these Regulations is to promote equity ownership by historically disadvantaged groups and to promote B-BBEE. In achieving this, these Regulations will:
- (a) facilitate diversity and transformation in the ICT Sector by promoting B-BBEE, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities;
 - (b) prescribe the application of the HDG Equity Requirement; and
 - (c) provide the manner in which compliance with the HDG Equity Requirement, Black Equity Requirement and B-BBEE Contributor Status Level requirements will be verified, monitored and enforced.

3. Application of the HDG Equity Requirement (Section 9(2)(b) of the EC Act)

- (1) The HDG Equity Requirement is not applicable to Class Licences.
- (2) Notwithstanding regulation 3(1), Class Licensees will be required to comply with the minimum B-BBEE Contributor Status Level requirement set out in regulation 4(2).
- (3) Equity held by Organs of State or Public Entities designated as B-BBEE Facilitators, by the Minister of Trade, Industry and Competition in accordance with the B-BBEE Codes, will be recognised as black owned equity in accordance with B-BBEE Codes.
- (4) An Individual Licensee must have a minimum of 30% of its ownership equity held by historically disadvantaged groups as required in terms of the EC Act, determined using the Flow Through Principle.
- (5) An Individual Licensee is required to provide the Authority with proof confirming compliance with regulation 3(4) on an annual basis in accordance with the Compliance Procedure Manual Regulations.
- (6) Proof of compliance with the HDG Equity Requirement will, subject to regulation 3(7), be by way of:
- (a) a B-BBEE Verification Certificate confirming ownership equity held by Black People determined using the Flow Through Principle; and/or
 - (b) a credible assurance report issued by a SANAS recognised and accredited verification agency confirming ownership equity held by historically disadvantaged groups (excluding Black People if a B-BBEE certificate is

provided in terms of regulation 3(6)(a) determined in accordance with Appendix 1.

- (7) Proof of compliance with the HDG Equity Requirement by Individual Licensees who are recognised as EMEs or QSEs under the ICT Sector Code may be by way of a sworn affidavit or CIPC issued certificate, issued in accordance with the ICT Sector Code, confirming the Individual Licensee's annual Total Revenue and level of ownership equity percentage held by Black People determined using the Flow Through Principle.
- (8) Notwithstanding regulation 3(5), an Individual Licensee is required to provide the Authority with proof of compliance with the HDG Equity Requirement when making any kind of application pertaining to a licence (including new applications, transfers, renewals and amendments).
- (9) The Authority may, within ten (10) Business Days of receiving an Individual Licensee's proof of compliance with the HDG Equity Requirement for purposes of regulations 3(5) or 3(8), request any supplementary information from an Individual Licensee which it deems necessary in order to verify compliance with the HDG Equity Requirement.

4. **Application of B-BBEE Requirements on Licensees**

- (1) An Individual Licensee must have a minimum of 30% of its ownership equity held by Black People, determined using the Flow Through Principle.
- (2) An Individual Licensee must comply with both the Black Equity Requirement and the HDG Equity Requirement..
- (3) Notwithstanding regulation 4(2), compliance with the Black Equity Requirement by an Individual Licensee will also constitute compliance with HDG Equity Requirement.
- (4) Individual Licensees and Class Licensees must have a minimum B-BBEE Contributor Status Level of four.
- (5) Existing Class Licensees will not be required to comply with the minimum B-BBEE Contributor Status Level requirement set out in regulation 4(4) until the renewal, transfer or amendment of their Class Licences.
- (6) Individual Licensees and Class Licensees are required to provide the Authority with proof demonstrating compliance with regulations 4(1) and/or 4(4) on an annual basis in accordance with the Compliance Procedure Manual Regulations.
- (7) Proof of compliance with regulations 4(1) and 4(4) will, subject to regulation 4(7), be by way of a B-BBEE Verification Certificate.
- (8) Individual Licensees and Class Licensees that are recognised as EMEs or QSEs under the ICT Sector Code may submit a sworn affidavit or CIPC issued certificate, issued in accordance with the ICT Sector Code confirming:
 - (a) the Licensee's annual Total Revenue
 - (b) the Licensee's B-BBEE Contribution Status Level; and
 - (c) in the case of Individual Licensees, level of ownership equity percentage held by Black People determined using the Flow Through Principle.

- (9) Individual Licensees that have, as proof of compliance with the HDG Equity Requirement, submitted a B-BBEE Verification Certificate in accordance with regulation 3(6)(a), or a sworn affidavit or a CIPC issued certificate in accordance with regulation 3(7), which confirms both the Individual Licensee's level of ownership equity percentage held by Black People determined using the Flow Through Principle and B-BBEE Contributor Status Level, will not be required to submit an additional B-BBEE Verification Certificate, sworn affidavit or a CIPC issued certificate in accordance with regulations 4(7) or 4(8) in order to show compliance with regulations 4(1) and 4(4).
 - (10) Notwithstanding regulation 4(6), Individual Licensees are required to provide the Authority with proof of compliance with regulations 4(1) and 4(4), and Class Licensees are required to provide the Authority with proof of compliance with regulation 4(4) when making any kind of application pertaining to a licence (including new applications, transfers, renewals and amendments).
- 5. Dilutions of HDG and B-BBEE Shareholdings in an Individual Licensee**
- (1) An Individual Licensee shall, notwithstanding compliance with regulation 3(5), notify the Authority in writing in any case where a Transfer or multiple Transfers over a period of 24 months results, directly or indirectly, in a:
 - (d) decrease in the number of shares held by historically disadvantaged groups / Black People in Licensees, where such decrease amounts to 5% or more of the issued share capital of the Licensee, and/or
 - (e) dilution of the rights, including voting or veto rights, attaching to those shares.
 - (2) Notwithstanding the provisions of regulations 3(5) and 4(7), the Authority may, within ten (10) Business days of such notification, call for proof, as set out in sub-regulations 3(6) and 4(8), of ongoing compliance post the said Transfer(s) with regulations 3(1) and 4(1).
- 6. Contraventions and Penalties**
- (1) A person that submits false, misleading or inaccurate information to the Authority is guilty of an offence and subject, on conviction to a fine of less than R50 000 but not exceed R5 million.
 - (2) An Individual Licensee that contravenes regulations 3(4) and/or 4(1) is liable to a fine of which ever is greater between an amount not exceeding R5 million or 10% of the Licensee's annual turnover of its licensed services. The CCC shall, on a case by case basis recommend the time period within which the Licensee ought to remedy the non-compliance with regulation 3(4) and/or 4(1).
- 7. Transitional Periods**
- (1) All applications received prior to the promulgation of these Regulations will be assessed in terms of the prior regulatory framework and will be required to comply with these Regulations within the transitional period set out in sub-regulation 3.
 - (2) Subject to regulation 7(5), all applications received during the transitional period will be assessed in terms of these Regulations.

- (3) Subject to regulation 7(5), compliance by existing Licensees with these Regulations is required as follows:
 - (a) for Class Licensees and SMMEs, 48 months of the promulgation of these Regulations; and
 - (b) for Large Individual Licensees, 36 months of the promulgation of these Regulations.
- (4) During the transitional periods, Licensees must achieve and comply with the set B-BBEE targets as set out in Appendix 2 and submit to the Authority annual progress reports indicating compliance with the set targets together with the annual reporting in terms of the Compliance Procedure Manual Regulations.
- (5) The operation of regulations 4(1), 4(2) and 4(3) is suspended until a future commencement date to be published by the Authority.

8. **Short Title**

These Regulations are called the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT Sector Code, 2021 and shall commence in accordance with the transitional provisions.

Appendix 1**Methodology to be used to compile Credible Assurance Report****1. Introduction**

- 1.1 Regulation 3(4) provides that an Individual Licensee must comply with the HDG Equity Requirement.
- 1.2 This methodology is aimed at providing the ICT Sector with information on how the Authority will assess compliance with the HDG Equity Requirement and the documents that Licensees are required to submit to a SANAS recognized and accredited verification agency and/or the Authority in order to prove compliance with the HDG Equity Requirement.

2. Assessing Compliance with the HDG Equity Requirement

- 2.1 In order to determine whether an Individual Licensee has complied with the HDG Equity Requirement, the Authority will consider the Individual Licensee's shareholding structure to ascertain whether:
 - 2.1.1 A minimum of 30% of the total ownership equity in an Individual Licensee is held by:
 - 2.1.1.1 Black People;
 - 2.1.1.2 Women, who are citizens of South Africa;
 - 2.1.1.3 People with disabilities, who are citizens of South Africa; and/or
 - 2.1.1.4 Youth, who are citizens of South Africa.
 - 2.1.2 The persons referred to in clause 2.1.1 who own equity in an Individual Licensee are afforded full unlimited and unrestricted shareholder/ownership rights associated with holding ownership equity in an entity. These shareholder rights include the right to attend and vote at shareholder meetings and director meetings (through appointed directors, if applicable) and the rights to share in the Individual Licensee's economic interest and realise capital growth.
- 2.2 The Authority acknowledges that the Individual Licensee may not have persons referred to in clause 2.1.1 holding ownership equity directly in the Licensee. Such persons may hold their ownership rights indirectly through some form of an entity such as a company, closed corporation, trust or any form of juristic person recognised under South African law.
- 2.3 Notwithstanding clause 2.2, the Authority will only consider the indirect ownership equity held by persons referred to in clause 2.1.1 together with ownership rights afforded to them when determining compliance with the HDG Equity Requirement.

- 2.4 The required ownership equity and ownership rights will be determined across every tier of ownership of a multi tiered chain of ownership until that chain ends with a person from the group of persons set out in clause 2.1.1.
- 2.5 The required ownership equity and ownership rights will be determined by multiplying the ownership equity held by each person from the group of persons set out in clause 2.1.1 in juristic persons through which those rights pass by the percentage of the rights of ownership of each juristic person to the Individual Licensee.
- 2.6 Clause 4 demonstrates the application of the principles set out in clauses 2.3 to 2.5 which will be used by the Authority to determine compliance with the HDG Equity Requirement through indirect ownership.

3. Required Documents

- 3.1 Individual Licensees are required to report compliance with the HDG Equity Requirement in accordance with the Compliance Procedure Manual Regulations by submitting a Form 1 and any supporting documents outlined in therein.
- 3.2 Individual Licensees must submit the following documents:
 - 3.2.1 Proof of the shareholding held by the persons reflected in paragraph 5 of Form 1. This proof will include:
 - 3.2.2 Certified copies of the Individual Licensee's latest share register.
 - 3.2.3 Certified copies of the each of the Individual Licensee's shareholders' share certificates.
 - 3.2.4 Certified copies of the Individual Licensees' constitutional documents which includes memorandum of incorporation, memorandum of understanding, shareholders agreement or joint venture agreement.
 - 3.2.5 The Companies and Intellectual Property Commission ("CIPC") confirmation of the directors on the Licensee's board of directors.
 - 3.2.6 Any documents to prove that shareholders (ultimately the group of persons set out in clause 2.1.1) were paid dividends in the proportion of their shareholding during the past financial year.
- 3.3 If any such shareholders of the Individual Licensees are juristic persons, a diagram of the structure of shareholding in such shareholder, using the method set out in clause 2.5, to identify rights of ownership ultimately accruing to natural persons who is a citizen of South Africa and falls within the group of persons set out in clause 2.1.1.
 - 3.3.1 The diagram should also indicate the percentage of South African citizens' shareholding in those entities in which they are shareholders.
 - 3.3.2 The Individual Licensees should submit:
 - 3.3.2.1 the share registers of those shareholders and share certificates required to indicate the rights of ownership ultimately accruing to natural persons who are citizens of South Africa and fall within the group of persons set out in clause 2.1.1.

- 3.3.2.2 shareholders' agreements at every tier of shareholding in respect of the Individual Licensee until the South African citizen which the Individual Licensee seeks to rely on for compliance with the HDG Equity Requirement.
- 3.4 If any such shareholders of the Individual Licensees are natural persons, the identity numbers of such shareholders, with certified copies of their identity documents/books.
- 3.5 If any shareholders of the Individual Licensee or shareholders of the shareholders of the Individual Licensee are trusts, the Licensee must submit the following documents:
- 3.5.1 the trust deed;
- 3.5.2 a letter from the trustees confirming:
- 3.5.2.1 who the beneficiaries of the trust are; and
- 3.5.2.2 that such beneficiaries are South African citizens or, to the extent that such trust does not only have citizens as beneficiaries, indicating the extent (percentage) to which citizens are beneficiaries.
- 3.6 If people with disability are shareholders of an Individual Licensee, submission of that person's proof of disability status (e.g. valid disability certificate from a medical practitioner or evidence of registration to receive a Disability grant from the Department of Social Services).
- 3.7 If there is any ownership held directly by organs of state or public entities, proof of this in the form of share certificates or confirmation from the organ of state or public entities.
- 3.8 If there is any ownership held by organs of state or public entities that are designated as B-BBEE facilitators, submission of a copy of the Government Gazette issued in terms of which the shareholder is identified as a B-BBEE facilitator in accordance with the B-BBEE Act.

4. Application of Ownership Principles

The following examples illustrate the method of calculating indirect ownership in a Licensee through one or more intermediate juristic persons:

- 4.1 If an individual who falls within any of the categories set out in clauses 2.1.1.1 to 2.1.1.4 owns 40% of the share capital of Company A (the intermediate company) and Company A owns 70% of the share capital in a Licensee.
- 4.1.1 The individual's indirect ownership in the Licensee is calculated by multiplying the individual's interest in Company A by the percentage interest Company A holds in the Licensee (40% x 70% = 28%).
- 4.1.2 For the purpose of determining compliance with the HDG Equity Requirement, the individual will be deemed to hold 28% of the issued share capital in that Licensee.
- 4.2 If an individual who falls within any of the categories set out in clauses 2.1.1.1 to 2.1.1.4 owns 40% of the share capital of Company A (the intermediate company) and Company A owns 70% of the share capital in a Company B which holds 20% of the Licensee.

- 4.2.1 The individual's indirect ownership in the Licensee is calculated by multiplying the individual's interest in Company A by the percentage interest Company A holds in the Licensee ($40\% \times 70\% = 28\%$; $28\% \times 20\% = 4\%$).
- 4.2.2 For the purpose of determining compliance with the HDG Equity Requirement, the individual will be deemed to hold 4% of the issued share capital in that Licensee.

Appendix 2

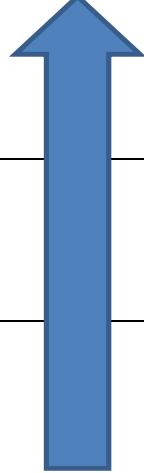
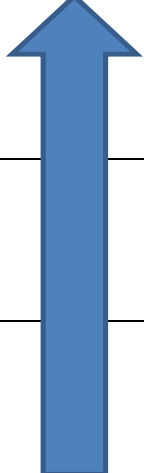
Progressive Reporting on the B-BBEE Requirements

1. Class Licensees

Compliance Requirement	Description	Measure	Compliance Target by end of 48 Months	Progress Achieved by:				Weighting
				12 months	24 Months	36 months	48 Months	
B-BBEE Contributor Status Level Requirement	Minimum BBEE Contributor Status Level	B-BBEE Contributor Status of Level determined using the ICT Sector Code	Minimum BBEE Contributor Status of Level 4	Level 7	Level 6	Level 5	Level 4	Y/N

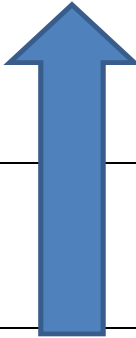
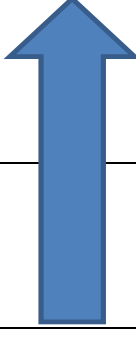
Licensees will be required to continue to report on compliance with their terms and conditions on an annual basis during the transitional period in accordance with the Compliance Procedure Manual Regulations. Licensees will also be required to submit progress report on compliance with the mandatory minimum B-BBEE Contributor Status Level requirement during the transitional period when reporting in accordance with Compliance Procedure Manual Regulations.

2. SMMEs – Individual Licensees

Compliance Requirement	Description	Measure	Compliance Target by end of 48 Months	Progress Achieved by:				Weighting
				12 months	24 Months	36 months	48 Months	
HDG Equity Requirement	Minimum 30% of equity is held by historically disadvantaged groups	Economic Interest Full shareholder voting rights	30%				30%	Y/N
Black Equity Requirement	Minimum 30% of equity is held by Black People	Voting rights attaching to an equity instrument owned by or held for a participant measured using the Flow Through Principle Economic interest representing a return on ownership of the entity similar in nature to a dividend right, measured using the Flow Through Principle	30%				30%	Y/N
B-BBEE Contributor Status Level Requirement	Minimum BBEE Contributor Status Level	B-BBEE Contributor Status of Level determined using the ICT Sector Code	Minimum BBEE Contributor Status of Level 4	Level 7	Level 6	Level 5	Level 4	Y/N

Licencees will be required to continue to report on compliance with their terms and conditions on an annual basis during the transitional period in accordance with the Compliance Procedure Manual Regulations. Licencees will also be required to submit progress report on compliance with the mandatory minimum B-BBEE Contributor Status Level requirement during transitional period when reporting in accordance with Compliance Procedure Manual Regulations.

Large Individual Licencees

Compliance Requirement	Description	Measure	Compliance Target by end of 48 Months	Progress Achieved by:			Weighting
				12 months	24 Months	36 months	
HDG Equity Requirement	Minimum 30% of equity is held by historically disadvantaged groups	Economic Interest Full shareholder voting rights	30%		30%	Y/N	
Black Equity Requirement	Minimum 30% of equity is held by Black People	Voting rights attaching to an equity instrument owned by or held for a participant measured using the Flow through principle Economic interest representing a return on ownership of the entity similar in nature to a dividend right,	30%		30%	Y/N	

B-BBEE Contributor Status Level Requirement	Minimum BBEE Contributor Status Level	B-BBEE Contributor Status determined using the ICT Sector Code	measured using the Flow Through Principle	Minimum BBEE Contributor Status of Level 4	Level 6	Level 5	Level 4	Y/N
---	---------------------------------------	--	---	--	---------	---------	---------	-----

Licenses will be required to continue to report on compliance with their terms and conditions on an annual basis during the transitional period in accordance with the Compliance Procedure Manual Regulations. Licensees will also be required to submit progress report on compliance with the mandatory minimum B-BBEE Contributor Status Level requirement during transitional period when reporting in accordance with Compliance Procedure Manual Regulations.



Independent Communications Authority of South Africa

350 Witch-Hazel Avenue, Eco Point Office Park
Eco Park, Centurion.

Private Bag X10, Highveld Park 0169
Telephone number: (012) 568 3000/1

EXPLANATORY MEMORANDUM FOR THE REGULATIONS IN RESPECT OF THE LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY HISTORICALLY DISADVANTAGED GROUPS (HDG) AND THE APPLICATION OF THE ICT SECTOR CODE ("REGULATIONS ")

Definitions

Unless otherwise stated, or the context otherwise requires, all capitalised terms in this Explanatory Memorandum shall bear the meanings ascribed to them in the Regulations.

Background

1. The Authority bears an obligation to promote B-BBEE, in granting a licence, which includes the empowerment of women, the youth and persons with disabilities, in accordance with the requirements of the ICT Sector Code.
2. In addition to the obligation to promote B-BBEE in granting licences, the EC Act requires the Authority to require an Individual Licensee to demonstrate that 30% of its equity ownership is held by persons from historically disadvantaged groups ("**HDG**").
3. As an organ of state, section 10(1) of the B-BBEE Act requires the Authority to apply the relevant code of good practice issued in terms of the B-BBEE Act in determining qualification criteria for, amongst others, the issuing of licences.
4. In December 2011, the Authority informed the ICT Sector of its intention to conduct an audit of Individual Electronic Communications Network Services and Electronic Communications Services.
5. In the 2013 / 2014 financial year, the Authority undertook an audit and review of the regulatory framework governing the broadcasting and telecommunications

industries. This review process resulted in the Authority publishing a number of findings documents and reports.

6. Following this audit process, the Authority published the Discussion Document: Equity Ownership by Historically Disadvantaged Groups and the application of the ICT sector code in the ICT Sector in terms of section 4B of the ICASA Act ("**Discussion Document**").¹ The purpose of this Discussion Document was to inform the ICT Sector of the Authority's intention to conduct an inquiry in terms of which the Authority's position in respect of the following would be determined:
 - 6.1 the implementation of the ICT Sector Code in light of the EC Act's ownership requirement in respect of HDGs; and
 - 6.2 the promotion of B-BBEE and equity ownership by HDGs as required in terms of the EC Act.
7. On 15 February 2019, following the public inquiry process and consideration of stakeholders' submissions, the Authority published the Findings Document and Position Paper on the inquiry into equity ownership by HDGs and the application of the ICT Sector Code in the ICT Sector² ("**Position Paper**"), which outlined the Authority's position in respect of the abovementioned issues.
8. Section 4 of the EC Act and section 4(3)(k) of the ICASA Act read with section 13(3)(a) of the EC Act empower the Authority to make regulations on the empowerment requirement to promote B-BBEE.
9. On 14 February 2020, the Authority published the Draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code to address its various obligations toward the promotion of B-BBEE in the ICT Sector³ ("**Draft Regulations**"). The Authority invited interested parties to submit their representations on the Draft Regulations.
10. The Authority took its position as set out in the Position Paper into consideration when preparing the Draft Regulations.
11. Pursuant to a comprehensive public consultation process, the Authority has published these Regulations.

¹ Government Notice 274 in Government Gazette No. 40759 of 31 March 2017

² Government Notice 85 in Government Gazette No. 42234 of 15 February 2019

³ Government Notice 91 in Government Gazette No. 43021 of 14 February 2020

Object of the Regulations

12. The object of these Regulations is to introduce the regulatory framework in terms of which the Authority will implement its statutory mandates to:
 - 12.1 require that 30% of the ownership equity in Individual Licensees be held by HDGs;
 - 12.2 promote B-BBEE including the empowerment of women, the youth and persons with disabilities, in accordance with the requirements of the ICT Sector Code, in granting Individual Licences and in furthering the objectives of the EC Act; and
 - 12.3 apply the relevant code of good practice issued in terms of the B-BBEE Act in determining qualification criteria for, amongst others, the issuing of licences as prescribed by section 10(1) of the B-BBEE Act.
13. The Regulations introduce licence conditions which Licensees with both individual and class licences are required to comply with, to transform the ICT Sector and ensure compliance with the HDG Equity Requirement during the period of the licence.
14. The Regulations are aimed at fast-tracking transformation in the ICT Sector to the extent permitted by the Authority's scope and to ensure compliance with the HDG Equity Requirement during the licence period.

Regulation by Regulation Analysis

15. Regulation 2 – Purpose of the Regulations

- 15.1 This regulation outlines the Authority's purpose and reasons for publishing the Regulations. This regulation is also aimed at providing an overview of the aspects intended to be covered and/or addressed by the Regulations.
- 15.2 The Regulations provide the regulatory framework in terms of which the Authority will promote, verify, monitor and enforce the HDG Equity Requirement in accordance with section 9(2)(b) of the EC Act and B-BBEE in accordance with its obligations set out in the EC Act and the B-BBEE Act.
- 15.3 The Regulations seek to facilitate diversity and transformation in the ICT Sector, with particular attention to the needs of women, opportunities for the youth and challenges for persons with disabilities.

16. Regulation 3 - Application of the HDG Equity Requirement (Section 9(2)(b) of the EC Act)

16.1 Regulations 3(1) and 3(2) – Class Licence Exemption

16.1.1 The purpose of these regulations is to confirm that the HDG Equity Requirement set out in section 9(2)(b) of the EC Act is not applicable to Class Licences.

16.1.2 While section 9(2)(b) of the EC Act is clear, it is prudent for the Authority to confirm in these regulations that the HDG Equity Requirement is not applicable to Class Licences in order to avoid any uncertainty.

16.1.3 The Authority is not empowered to impose any equity requirements on Class Licensees, however the Authority bears an obligation to promote B-BBEE in granting licences and this obligation is not only limited to Individual Licensees but extends to any licence granted by the Authority.

16.1.4 Consequently, in order to discharge its obligation to promote B-BBEE in accordance with the ICT Sector Code, the Authority requires Class Licensees to comply with the minimum B-BBEE Contributor Status Level requirement set out in regulation 4(2).

16.2 Regulation 3(3) – Recognition of B-BBEE Facilitators

16.2.1 The purpose of this regulation is to recognise and exempt ownership of a licensee that is held by an entity that has been designated as a B-BBEE facilitator by the Minister of Trade, Industry and Competition, in accordance with clause 3.6 of statement 100 of the B-BBEE Codes, from complying with the HDG Equity Requirement.

16.2.2 Equity held by B-BBEE facilitators will be recognised as black equity for the purposes of by SANAS recognised and accredited verification agencies when determining compliance with the Black Equity Requirement. For the purpose of consistency, the Authority will also recognise such equity for purposes of determining compliance with the HDG Equity Requirement.

16.3 **Regulation 3(4) – HDG Equity Requirement**

- 16.3.1 The purpose of this regulation is to impose the HDG Equity Requirement on all Individual Licensees for the duration of the licence.
- 16.3.2 Section 9(2)(b) of the EC Act requires the Authority “to include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%”. The Authority has consistently required licensees to have 30% of their equity held by HDGs upon application for any kind of Individual Licence.
- 16.3.3 The Authority has noted that not all Individual Licensees have been complying with the HDG Equity Requirement throughout the duration of their licence period. In order to ensure that Licensees comply with and maintain compliance with the HDG Equity Requirement throughout the licence period, this regulation introduces the HDG Equity Requirement as a condition which Licensees are required to comply with during the licence period.

16.4 **Regulations 3(5) to (7) – Annual Proof of Compliance with the HDG Equity Requirement and required documentation to demonstrate compliance**

- 16.4.1 The purpose of these regulation is to inform Individual Licensees of the documentation that they ought to submit with any application in order to demonstrate compliance with the HDG Equity Requirement.
- 16.4.2 The Standard Terms and Conditions for Individual Licences Regulations,⁴ read with the Compliance Procedure Manual Regulations impose an obligation on Licensees to submit information on an annual basis to prove compliance with their licence conditions and other requirements of the EC Act and other related legislation.
- 16.4.3 Licensees are required to therefore report on their compliance with the HDG Equity Requirement when reporting on their compliance in accordance with the Standard Terms and Conditions for Individual

⁴ Government Notice 523 in Government Gazette No. 33294 of 14 June 2010, Government Notice 525 in Government Gazette No. 33296 of 1 June 2010

Licences Regulations read with the Compliance Procedure Manual Regulations.

- 16.4.4 The Compliance Procedure Manual Regulations require Licensees to submit a form 1 in order to report on their annual compliance with the terms and conditions of their licence. Form 1 has been amended to enable Licensees to report compliance with the HDG Equity Requirement and any other requirement as provided for in these Regulations.
- 16.4.5 Due to the profile make-up of HDG being broader than the definition of Black People, a B-BBEE Verification Certificate may be used to show compliance with the HDG Equity Requirement as is provided for in regulation 4(3).
- 16.4.6 In accordance with the ICT Sector Code, the Authority will recognise and accept the submission of sworn affidavits or a CIPC issued certificate commissioned by or issued to entities eligible to rely on a sworn affidavit or CIPC certificate in accordance with the ICT Sector Code, as proof of compliance with the HDG Equity Requirement.
- 16.4.7 A B-BBEE Verification Certificate, sworn affidavit or a CIPC issued certificate commissioned by or issued to entities eligible to rely on a sworn affidavit or CIPC certificate in accordance with the ICT Sector Code, will be accepted as proof of compliance with the HDG Equity Requirement. This is because a B-BBEE Verification Certificate, sworn affidavit or a CIPC issued certificate demonstrates an Individual Licence's ownership equity held by Black People. Given the profile make up of the HDG, the submission of a B-BBEE Verification Certificate, sworn affidavit or a CIPC issued certificate will also demonstrate compliance with the HDG Equity Requirement.
- 16.4.8 In respect of the categories of people other than Black People, that make up HDGs, the Authority require Licensees to submit a credible assurance report issued by a SANAS recognised and accredited verification agency.
- 16.4.9 The credible assurance report will provide confirmation of an Individual Licensee's compliance with the HDG Equity Requirement in respect of such categories of people.

16.4.10 Considering that the ICT Sector Code and the B-BBEE Verification Manual⁵ are not applicable to the measurement of the HDG Equity Requirement, the Authority sets out a methodology providing information on how the Authority will assess compliance with the HDG Equity Requirement and the documents that Licensees are required to submit to the verification agent for assessment purposes and issuing the assurance report. The methodology recognises indirect ownership using the Flow-Through Principle. The methodology is set out in Appendix 1 of the Regulations.

16.5 Regulation 3(8) - Proof of Compliance with the HDG Equity Requirement on Application

16.5.1 The purpose of this regulation is to inform Licensees of the documentation that they ought to submit with any application in order to demonstrate compliance with the HDG Equity Requirement.

16.5.2 On 10 October 2014, the Authority published a Notice⁶ which indicated that the Authority will no longer approve licence transfer applications which do not comply with the HDG Equity Requirement.

16.5.3 In line with this Notice, the Authority will require Licensees to comply with the HDG Equity Requirement when making any kind of application pertaining to a licence.

16.6 Regulation 3(9) – Request for supplementary Information

16.6.1 The purpose of this regulation is to empower the Authority to request any additional information from Licensees in order to satisfy itself that Licensees have truly complied with the HDG Equity Requirement during the licence period.

16.6.2 The information that the Authority may request is in addition to the information set out in regulations 3(6) and (7). The Authority may only request the additional information within 10 Business Days of receiving a Licensees' proof of compliance with the HDG Equity Requirement on

⁵ Government Notice 776 in Government Gazette No. 31255 of 18 July 2008

⁶ (Government Gazette No. 38087)

an annual basis or for purposes of any kind of application pertaining to a licence.

17. **Regulation 4 - Application of B-BBEE Requirements on Licences**

17.1 **Regulations 4(1) to 4(3) - Black Ownership Requirement**

17.1.1 The purpose of these regulations is to impose and set out the Black Equity Requirement which Licensees are required to comply with during the licence period.

17.1.2 The Authority has exercised its duty to promote B-BBEE by ensuring that 30% of the ownership equity of Individual Licensees is held by Black People.

17.1.3 The Black Equity Requirement does not remove an Individual Licensee's duty to comply with the HDG Equity Requirement, however given the overlap between the two requirements, the Authority will recognise compliance with the Black Equity Requirement as compliance with the HDG Equity Requirement.

17.1.4 The Authority determines compliance with the HDG Equity Requirement for entities whose shareholders hold equity in it through other juristic persons such as companies and trusts, by using the Flow Through Principle.

17.1.5 Similarly, the Authority will determine compliance with the Black Equity Requirement using the Flow Through Principle.

17.2 **Regulation 4(4) - Minimum B-BBEE Contributor Status Requirement**

17.2.1 The purpose of this regulation is to impose and set out the minimum B-BBEE Contributor Status Level requirement which Licensees are required to comply with during the licence period.

17.2.2 This requirement is imposed in line with the Authority's obligation to promote B-BBEE in accordance with the ICT Sector Code. Individual and Class Licensees will be required to comply with this requirement, compliance of which will be determined by the submission of the

prescribed documents set out in regulation 4(8) and 4(9) confirming that Licensees have a B-BBEE Contributor Status Level four.

17.2.3 For Licensees that do not qualify for enhanced recognition, their B-BBEE Contributor Status Level will be determined by assessing their compliance with the targets set out in the ICT Sector Code.

17.2.4 For those Licensees that qualify for enhanced recognition, such as EMEs and QSEs, their B-BBEE Contributor Status Level will be determined in accordance with the principles applicable to enhanced recognition as set out in the ICT Sector Code.

17.3 Regulation 4(5)– Minimum B-BBEE Contributor Status Requirement suspended for existing Class Licences

17.3.1 The purpose of this regulation is to confirm that the minimum B-BBEE Contributor Status Level requirement is only applicable to existing Class Licensees on the renewal, transfer or amendment of their Licence.

17.4 Regulations 4(6) to 4(9) – Proof of compliance with Black Equity Requirement and/or minimum B-BBEE Contributor Status Requirement

17.4.1 The purpose of these regulations is to provide for the documentation that Licensees are required to submit to demonstrate compliance with the Black Equity Requirement and the minimum B-BBEE contributor status level requirements.

17.4.2 A B-BBEE Verification Certificate indicating a Licensee's B-BBEE contributor status level as well as the equity ownership by Black People, determined using the Flow Through Principle, will be sufficient to demonstrate compliance with regulations 4(1) and/or 4(4).

17.4.3 Individual Licensees and Class Licensees that are recognised as EMEs or QSEs under the ICT Sector Code and are entitled to submit a sworn affidavit or CIPC issued certificate in accordance with the ICT Sector Code, may do so provided that the sworn affidavit or CIPC issued certificate confirms:

17.4.3.1 the Licensee's annual Total Revenue;

17.4.3.2 the Licensee's B-BBEE Contribution Status Level; and

- 17.4.3.3 in the case of Individual Licensees, the ownership equity percentage held by Black People determined using the Flow Through Principle.
- 17.4.4 To the extent that an Individual Licensee has submitted a B-BBEE Verification Certificate, a sworn affidavit or a CIPC issued certificate to demonstrate compliance with the HDG Equity Requirement, then there will be no obligation to submit an additional B-BBEE Verification Certificate, a sworn affidavit or a CIPC issued certificate to prove compliance with the Black Equity Requirement.
- 17.5 **Regulation 4(10) – Compliance with the Black Equity Requirement on application**
- 17.5.1 The purpose of this regulation is to ensure that Licensees are compliant with the Black Equity Requirement and the B-BBEE Contributor Status Level requirement when making any application pertaining to a licence.
18. **Regulation 5 - Dilutions of HDG and B-BBEE Shareholdings in an Individual Licensee**
- 18.1 The purpose of this regulation is to monitor the effect of equity transactions undertaken by Licensees during a licence period, to ensure that there is no material dilution of HDG/Black equity in an Individual Licence in terms of section 13(3) of the EC Act, to promote the ownership and control of electronic communications services by HDGs and to promote B-BBEE.
- 18.2 This regulation will assist the Authority to ensure that Licensees continue to endeavour to promote rather than dilute HDG/black ownership levels.
19. **Regulation 6 - Contraventions and Penalties**
- 19.1 **Regulation 6(1) - Submission of false, misleading or inaccurate information**
- 19.1.1 The purpose of this regulation is to confirm the submission of false or misleading information to the Authority as an offence, to penalise and set out the penalties applicable to such an offence.
- 19.1.2 The offence and penalties set out in this regulation are in line with sections 17H(1)(c) and 17H(3)(a) of the ICASA Act.

19.1.3 The fine will be determined by the CCC in terms of section 17C of the ICASA Act. The Authority will make a decision based on the recommendations of the CCC in terms of section 17E of the ICASA Act.

19.1.4 It is important to highlight that the sanctions set out in this regulation are in addition to the provisions of the EC Act and ICASA Act which regulate the consequences of such offences on the granting of licences.

19.2 Regulation 6(2) - Contravention of HDG and B-BBEE equity requirements

19.2.1 The purpose of this regulation is to prescribe the maximum penalties applicable to the contravention of both the HDG Equity Requirement and Black Equity Requirement.

20. Regulation 7 - Transitional Period

20.1 Regulation 7(1) – Pending Applications

20.1.1 The purpose of this regulation is to confirm the requirements that will be applicable to applications received before the publication date of the Regulations and to provide for a grace period within which these Licensees ought to comply with the Regulations.

20.1.2 Any kind of application pertaining to a licence received by the Authority prior to the publication of the Regulations will be assessed in accordance with the current regulatory framework. Licensees awarded licences in this process will have to comply with the Regulations within the stipulated transitional periods.

20.2 Regulation 7(2) – Applications received during transitional period

20.2.1 The purpose of this regulation is to confirm that any applications pertaining to licences received during the transitional period will be assessed in terms of the Regulations.

20.2.2 This will however not extend to provisions of the Regulations that are specifically suspended.

20.3 Regulation 7(3) – Transitional Period for Compliance with the Regulations

- 20.3.1 The purpose of this regulation is to confirm the time period within which Licensees will be required to comply with the Regulations.
- 20.3.2 In setting the time periods, the Authority has considered the time period within which it approves any applications pertaining to licences which is 180 Business Days, how long it takes to conclude a sale of shares transaction, and the regulatory approval that may be needed to give effect to the sale of shares transaction.
- 20.3.3 The Authority has conducted a regulatory impact assessment ("**RIA**"), which has confirmed that the cost of regulatory compliance is different for class licensees, SMMEs and large individual licensees. The Authority has noted that the regulatory cost burden on class licensees and SMME individual licences may adversely affect their operations.
- 20.3.4 The Authority deems it appropriate to give these types of licensees more time to comply with the Regulations as, amongst others:
- 20.3.4.1 some SMMEs have no clear business model that they can readily utilise to increase shareholding so as to comply with the Equity Requirements imposed by the Regulations;
- 20.3.4.2 there are monitoring and regulatory costs that these entities will need to factor in and adjust their already low budgets in order to be able to ensure and prove compliance with the B-BBEE Contributor Status Level and Equity Requirements, where applicable; and
- 20.3.4.3 there are potential financing problems associated with the funding of B-BBEE transactions that large licensees usually fund using debt finance based on their balance sheets. For SMMEs on the other hand, this debt financing is nearly impossible to obtain.
- 20.3.5 The Authority wants to ensure that these licensees are given a fair opportunity to restructure, where necessary and ensure compliance with the Regulations in a cost and time effective manner. The Authority is aware of the significance of these entities and wishes to circumvent any closures of these entities resulting from attempts to comply with the Regulations.

20.4 **Regulation 7(4) – Progressive Reporting during Transitional Periods**

- 20.4.1 The purpose of this regulation is to ensure gradual and monitored progress in terms of compliance with the Regulations by avoiding rushed compliance towards the end of the transitional period.
- 20.4.2 In monitoring compliance, the Authority requires Licensees to submit progress reports and any necessary documents in respect of the specified targets set out in Appendix 3 of the Regulations.
- 20.4.3 Class Licensees are required to only report on their progress in respect of compliance with the B-BBEE contributor status requirement. Annual report will be in accordance with the Compliance Procedure Manual Regulations.
- 20.4.4 Licensees will be required to submit the necessary documents in the form of either a B-BBEE Verification Certificate, a sworn affidavit or CIPC issued certificate in accordance with the ICT Sector Code, confirming their B-BBEE Contributor Status Level on an annual basis during the transitional periods.

20.5 **Regulation 7(5) – Suspension of certain regulations**

- 20.5.1 The purpose of this regulation is to confirm that the operation of regulations 4(1), 4(2), and 4(3) are suspended until a future commencement date to be published by the Authority.
- 20.5.2 The reason for the suspension is to ensure that all legislative and regulatory steps have been taken in respect of such provisions prior to the commencement of the provisions, including approaching the Department of Trade and Industry regarding the B-BBEE related requirements to ensure compliance with the B-BBEE Act.

21. **General**

- 21.1 The Authority's understanding of the HDG Equity Requirement as provided for in the EC Act is that equity ownership by any person(s) who fall within the applicable categories will suffice for complying with the HDG Equity Requirement. Having equity ownership from all the applicable categories is not a requirement.

- 21.2 The Authority has decided not to include provisions relating to the limitation and control of ownership in these Regulations because such provisions will relate to more than just the promotion and advancement of B-BBEE and HDG. The Authority intends pursuing the limitation and control of ownership aspects referred to in the Position Paper in future regulatory reviews.
- 21.3 Notwithstanding that these aspects will be dealt with in future, the Authority has noticed that there is some confusion, particularly regarding the issue of “control”. For the purposes of clarity, the Authority accordingly deems it appropriate to outline its approach to control in the memorandum attached hereto as **Annexure A**.

Annexure A**Memorandum Regarding Control****1. Introduction**

- 1.1 The Electronic Communications Act, 2005 ("ECA") contains a number of references to the term "control", but these terms are not defined in the ECA.
- 1.2 It has become apparent to the Authority that stakeholders have differing views and interpretations as to what constitutes "control". The Authority therefore considered it appropriate to issue this memorandum to explain how it views this concept.
- 1.3 The Authority follows the approach to control set out in the Competition Act, 1998. Accordingly, it considers that a party controls a licensee in the following circumstances:
 - 1.3.1 it owns more than 50% of the shares of the licensee.
 - 1.3.2 it is entitled to vote a majority of the votes that may be cast at a general meeting of the licensee, or has the ability to control the voting of a majority of those votes, either directly or through an entity that it controls.
 - 1.3.3 it is able to appoint or to veto the appointment of a majority of the directors of the licensee.
 - 1.3.4 it is a holding company, and the licensee is a subsidiary as contemplated in section 3(1) of the Companies Act, 2008.
 - 1.3.5 it has the ability to materially influence the policy of the licensee in a manner comparable to a person, who in ordinary commercial practice, can exercise an element of control referred to above.
- 1.4 Note that these are examples, and not an exhaustive list.

- 1.5 It can therefore be seen that a party may hold less than 50% of the shares in a licensee, or hold or control less than 50% of the votes, and yet still be considered to “control” the licensee because it has “material influence” over the licensee. **Material influence** A party will be considered to exercise material influence over a licensee where it has the ability to influence the strategic direction of the licensee.
- 2.2 Put differently, material influence will be judged by reference to whether the actions, conduct or rights (even without implementation of such rights) are strategic (in the sense of being able to direct strategy or policy of the licensee) as against being designed or granted to protect the financial interests or investment in the licensee of the party holding those rights.
- 2.3 The ability to direct and control or the factual direction of representatives on the board of directors of a licensee by a shareholder will give rise to potential control if the issues concerned are strategic. Veto rights on these issues will thus normally be regarded as giving rise to control.
- 2.4 Examples of veto rights that would confer control would include where the party has minority protection rights which would enable it to veto strategically important decisions such as the appointment of directors and the adoption of the budget or business plan.
- 2.5 Veto rights in respect of the conclusion of contracts, other than contracts concluded in the ordinary course of business may, depending on the facts, amount to material influence. A crucial question is whether the rights amount merely to a protection of an investment (which would not generally be considered to confer material influence) or would enable the party holding the rights to exercise strategic influence (which would be considered to amount to material influence and thus control).
- 2.6 Where agreements are concluded between shareholders (such as a shareholders’ agreement between all of them, or a voting pool agreement between some of them) in terms of which they agree to act together – in concert – to achieve a specific objective is likely to be considered as establishing joint control between the parties to such agreement if:
- 2.6.1 the agreement relates to or covers strategic issues, as opposed to financial issues;

2.6.2 the effect of the agreement is that the parties are able to vote or direct or materially influence the outcome of a decision on such issues.

2.7 A party may have control over a licensee, despite holding less than 50% of the shares in the licensee, where the licensee is a widely held public company. As the Competition Tribunal commented in Ethos Private Equity Fund / Tsebo Outsourcing

"Typically this would be the shareholder of a widely held public company, where no shareholder had an interest in the company above 50%, and that shareholder might, because not all shareholders in public companies vote their shares, command the majority of the votes at a general meeting of the company, notwithstanding that its share of the company's total voting rights is well below half."

2.8 However, where other shareholders include institutions, experienced and shrewd investors, a single shareholder may not have control – see for example Johnnic Holdings / HCI, where the Tribunal found that HCI did not have *de facto* control of Johnnic based on previous percentage of voted shares, stating that –

The other shareholders in Johnnic, holding altogether 60%, are in the main, as to some 44.5%, substantial and in some cases powerful institutions, experienced and shrewd investors, well capable of advancing and defending their own interests when they find it necessary by exerting their muscle in the affairs of Johnnic.

- 2.9 Intention is an important factor in analysing 'control'. If a shareholder with less than 50% shareholding has no intention to control a licensee (and merely wishes to protect its investment for example), this may be a factor to take into account when determining whether or not that party does indeed control a licensee.

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001
Contact Centre Tel: 012-748 6200. eMail: info.egazette@gpw.gov.za
Publications: Tel: (012) 748 6053, 748 6061, 748 6065