

- 26.6 "Financial interest" is defined for the purposes of the Act as –
- "an interest that may or may not have voting rights attached to it but which gives the person or entity an equity or debt interest directly through shares or other securities or indirectly through an agreement giving it –
- (a) the power to control the licensee; or
 - (b) an effective say over the affairs of the licensee".
- 26.7 Sections 65 and 66 of the Act impose limitations on control of multiple commercial broadcasting services and on cross-media control of commercial broadcasting services and newspapers, respectively.
- 26.8 Section 65(4) of the Act provides that no person may –
- 26.8.1 be in a position to exercise control over more than two AM commercial broadcasting service licences;
 - 26.8.2 be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two AM commercial broadcasting service licences;
 - 26.8.3 be in a position to exercise control over two AM commercial broadcasting service licences and be a director of any company which is in a position to exercise control over any other AM commercial broadcasting service licence.
- 26.9 In terms of section 65(5) of the Act, a "person referred to in [section 65(4)] must not be in a position to control two commercial broadcasting service licences in the AM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas".
- 26.10 A "licence area" is defined in the Act as "the geographical area specified in a licence". A licence area is determined with reference to the geographic area that may be reached by the transmission of a broadcast signal on the relevant frequency at the applicable power level.
- 26.11 "Control" is not defined for the purposes of section 65 of the Act.
- 26.12 In terms of section 65(6) of the Act, the Authority may, on application by any person, on good cause shown and without departing from the objects and principles

enunciated in section 2 of the Act, exempt that person from the restrictions on controlling more than two AM or FM commercial broadcasting service licences imposed by section 65.

26.13 Section 66 of the Act deals with "cross-media" control and provides, amongst other things, that:

26.13.1 no person who controls a newspaper may acquire or retain "financial control" of both a commercial television broadcasting service licence and a commercial sound broadcasting service;

26.13.2 no person who is in a position to control a newspaper may be in a position to control either a commercial television broadcasting service licence or a commercial sound broadcasting service licence, in an area where the newspaper has an average ABC circulation of 20% of the total newspaper readership in the area, if the licence area of the commercial broadcasting service licence overlaps substantially with the circulation area of the newspaper concerned.

26.14 Section 66(4) of the Act provides that "substantial overlap" means an overlap by 50% or more.

26.15 Section 66(5) of the Act provides that a 20% shareholding in a commercial broadcasting service "is considered as constituting control".

26.16 In terms of section 66(6) of the Act, the Authority may on good cause shown and without departing from the objects and principles enunciated in section 2 of the Act, exempt affected persons from any of the limitations imposed by section 66.

27. The Private Sound Broadcasting Position Paper sets out the policy considerations which the Authority will generally take into account in evaluating applications for commercial sound broadcasting licences in terms of the criteria set out in section 51 of the Act and in light of the regulatory objectives in section 2 of the Act.

27.1 Paragraph 3.1 of the Private Sound Broadcasting Position Paper states that the Authority will require all licensees to provide news for a total of 30 minutes of an 18-hour day on a regular basis during the day. The origin and diversity of news sources are factors the Authority will take into consideration in choosing the

successful applicant.

- 27.2 Paragraph 3.2 states that the Authority will take format and language into account in the context of promoting diversity in the range of sound broadcasting services and that maintaining diversity in commercial sound broadcasting services is an important consideration. It is stated, further, that the format proposed by an applicant will become a condition of its licence, if granted. The approach that has been adopted by the Authority is that, if an applicant wishes to change more than 15% of its format during the South African performance period (the 18-hour broadcast period from 05h00 to 23h00), it is required to apply for an amendment to its licence. Such an application must now be made in terms of section 10 of the Act.
- 27.3 Paragraph 3.3 states that the Authority will not normally specify the broadcast language of a commercial sound broadcasting service but seeks to encourage broadcasting in all South African languages.
- 27.4 Paragraph 3.4 states that the Authority will take the requirements of regulations addressing South African music content into account. The applicable regulations in this regard are the South African Music Content Regulations⁴⁴ (the **Content Regulations**).
- 27.5 Paragraph 5.1 states that the Authority will require applicants to submit detailed information about their financial resources, business plans and relevant cash flow projections showing a realistic calculation of the expected levels of costs and revenues, in accordance with the requirements set out in the relevant application form. This is on the basis that the Authority needs to satisfy itself that an applicant has secured access to initial funding to establish and maintain the proposed broadcasting service as set out in the financial plans submitted to the Authority. However, the selection of successful applicants will not necessarily be based on highest potential profitability. The assessment of applications for a broadcasting licence will be based upon the proposals presented in the completed application.
- 27.6 Paragraph 5.2 states, in relation to business plans, that, in determining the financial feasibility and general quality of the proposals in the applications, the Authority will be guided by:

⁴⁴ Published under GN 153 in *Government Gazette* 28453 of 31 January 2006.

- 27.6.1 the applicant's capacity to explain its broadcasting plans and vision for the proposed service and its ability to run a distinctive and profitable radio station;
- 27.6.2 the reliability of the financial and business plans submitted and any assumptions made, together with the general financial soundness of the proposal;
- 27.6.3 the diversity of the proposed ownership and management structures;
- 27.6.4 the social value of the proposed radio station and of the role which it will play in the wider context of development in South Africa;
- 27.6.5 the applicant's ability to provide all the necessary resources, including adequate staffing levels, to run the proposed service successfully.
- 27.7 In relation to the market studies that applicants are required to submit, paragraph 5.3 of the Private Sound Broadcasting Position Paper states that the applicant must present sufficient information to satisfy the Authority that its proposal satisfactorily assesses its market potential and should address the key areas of what, where, why, when, how and who the broadcasting service will target. Applicants should also submit a survey which indicates demand for the proposed service. (This is also a requirement of the ITA, which required primary research to be submitted in support of an application.) In preparing their market studies applicants were to:
- 27.7.1 take into account the contribution that the proposed service would make to the achievement of the objectives of the IBA Act, ⁴⁵ particularly the development of local content programming;
- 27.7.2 take into account the development and distribution of the proposed broadcasting service taking into account any potential new technologies for distribution;
- 27.7.3 analyse the market and potential advertising revenues, taking into account the results of surveys which substantiate the financial projections;

⁴⁵ The IBA Act was repealed by the Act. In this regard, reference should be made to the objects of the Act.

- 27.7.4 demonstrate financial feasibility consistent with the requirements indicated by the applicant's financial projections;
- 27.7.5 indicate the anticipated audience reach of the new service;
- 27.7.6 provide a demographic profile of the potential listenership and a demonstration of how the proposed service is envisaged to obtain a viable share of the market bearing in mind the activities of potential or existing competitive services and media;
- 27.7.7 indicate the likely impact of the proposed sound broadcasting service on the radio segment of the electronic media market and the advertising market with specific reference to the advertising revenue source in the short to medium term;
- 27.7.8 indicate the attitudes and views of advertisers and media buyers towards the proposed service;
- 27.7.9 provide comment and analysis on general market trends;
- 27.7.10 indicate the target audience for the commercial service;
- 27.7.11 identify potential or existing competitors, their likely audience rating, advertising, revenue and market share, and other key competitive issues;
- 27.7.12 indicate programme trends; and
- 27.7.13 address sales and marketing related issues such as sales methods and representation, discount and credit terms, promotion and advertising of the proposed station.
- 27.8 In line with the requirement in the Act that the Authority must promote the empowerment of HDPs, paragraph 7 of the Private Sound Broadcasting Position Paper states that the Authority will take into account:
- 27.8.1 the extent to which financial interests in the applicant reflect the inclusion of HDPs;

- 27.8.2 the nature and extent of decision-making by HDPs in the business venture;
- 27.8.3 the extent to which historically disadvantaged staff are empowered through training and development programmes as well as the extent to which such staff are included in senior managerial, administrative and editorial decision-making positions; and
- 27.8.4 whether an applicant has an effective policy and implementation strategy in respect of empowerment.
28. As set out above, in evaluating applications, the Authority also takes account of the requirements of the Content Regulations. The Content Regulations provide that commercial sound broadcasting licensees which devote 15% or more of their broadcasting time during the performance period to the broadcasting of music, must ensure that, within 18 months of the Content Regulations coming into effect, a minimum of 25% of the musical works broadcast in the performance period consist of South African music and that such South African music is spread reasonably evenly throughout this period.⁴⁶ As such, new licensees must comply with the Content Regulations from the outset of their operations.
29. In determining which applicant/s would be awarded licences, the Authority took into account the following evaluation criteria as set out in the ITA:⁴⁷

⁴⁶ Regulation 3.2 of the Content Regulations.

⁴⁷ ITA, Schedule A, para 21.

Item	Criteria Description	Weight
	Phase 1: Prequalification	-
1.	Compliance with ITA requirements	
	The minimum points required is 60. The licences will be awarded to the Applicant/s who score the highest points.	
	Phase 2: Functionality	
1.	Market research: Demand, Need and Support of the proposed service	30
2.	Viability, efficacy and quality of the Applicant's technical plan	20
3.	Viability of the business plan and financial means of the Applicant	30
4.	Capability, expertise and experience of the Applicant and its employees in business in general and in broadcasting in particular	20
Total		100

F GENERAL FINDINGS

30. The Authority has made the following general findings in relation to the licensing process for I-BS licences in the primary markets. These findings do not apply to all applicants:
- 30.1 Certain applicants failed to procure all relevant documentation prior to submitting their applications.
- 30.2 Certain applicants failed to familiarise themselves with the procedural requirements that are applicable to licensing processes. For example, as discussed above, a number of applicants failed to submit complete applications that complied substantially with the procedural requirements stipulated in the ITA. As stated above, the Processes and Procedures Regulations provide that where an application for a licence does not comply with the requirements of the ITA, the Authority has the discretion to reject the application, or to direct the applicant to furnish the required information within the specified period failing which the Authority may reject the application.
31. Most applicants requested that certain information be treated confidentially. In this regard, section 4D of the ICASA Act provides that, when a person submits information to the Authority, that person may request that the information be treated as confidential information. The request for confidentiality should be accompanied by a written statement explaining why the specific information should be treated as confidential. The Authority is then required to make a determination as to whether or not confidentiality will be granted within 14 days of receiving the information and provide reasons to the person concerned in relation to its determination. Where the Authority determines that a request for confidentiality cannot be acceded to, the person who submitted the information must be given an opportunity to withdraw it. Certain information must be treated as confidential information, where the person submitting the information requests it. This is information that is: trade secrets; financial, commercial, scientific or technical information other than trade secrets, the disclosure of which is likely to cause harm to the commercial or financial interests of such person; information, the disclosure of which could reasonably be expected to put the person at a disadvantage in contractual or other negotiations, or to prejudice the person in commercial competition; the names of prospective employees; and business plans of a licensee. The Authority considered all requests for confidentiality that were made during the current licensing process in line with these requirements and notified each applicant who had made such a request of its decision.

32. The reasons for the Authority's decisions as given in this document are intended to provide an overview of the grounds on which the Authority decided to grant licences to specific applicants and to turn down other applications, mainly taking into account whether (and, if so, to what extent) each applicant complied with the applicable requirements set out in the ITA, the Act and the Private Sound Position Paper. Ultimately, the Authority had to make an assessment, in the context of these statutory and policy factors, as to which of the applicants in the primary markets best satisfied the applicable requirements.

G INTERPRETATION OF KEY PROVISIONS OF THE ACT

Introduction

33. In assessing the various applications that were submitted in response to the ITA, it was necessary for the Authority to evaluate whether granting a licence to a particular applicant would violate any of the restrictions imposed by any of sections 64, 65 or 66 of the Act. As discussed above in Section E (Relevant Criteria and Considerations), section 64 of the Act imposes restrictions on foreign control of broadcasting services, section 65 imposes limitations on the number of broadcasting licences that may be held by a particular person and section 66 imposes cross-media restrictions on persons who have interests in print media as well as broadcasting services.
34. In assessing the various applications that were submitted in response to the ITA, it was further necessary for the Authority to evaluate whether granting a licence to a particular applicant would violate section 52 of the Act. As discussed above in Section E (Relevant Criteria and Considerations), section 52 of the Act imposes restrictions on the awarding of broadcasting service licences to any party, movement, organisation, body or alliance which is of a party-political nature.

Background to the inclusion of sections 64, 65 and 66 in the Act

35. Section 64 of the Act is formulated in terms very similar to those of section 48 of the IBA Act, which was, as discussed above, repealed by the Act in 2006. Section 48 provided, in this regard, that one or more foreign persons could not exercise "control" over a commercial broadcasting service licensee and could not "have [a] financial interest or interest either in voting shares or paid-up capital in a private broadcasting licensee exceeding twenty per cent." As is now the case with the Act, the IBA Act defined "financial interest". The definition in the IBA Act was in very similar terms to the definition that is now contained in the Act and provided that a "financial interest" for the purposes of the IBA Act was an "interest that may not have voting rights attached to it but which gives the person or entity a financial interest directly via shares or indirectly via an agreement giving it the power to have control of the licensee or effective say over the affairs of the licensee".
36. In turn, sections 65(2), (3), (4), (5) and (6) of the Act are very similar to sections 49(2), (3), (4), (5) and (6)(a) of the IBA Act and sections 66(2), (3), (4), (5) and (6) of the Act are drafted in very similar terms to sections 50(2)(a) to (d) and (3) of the IBA Act. In particular, section 50(2)(d) of the IBA Act provided that "A 20% shareholding in a radio or television licence

shall be deemed to constitute control". This is similar to section 66(5) of the current Act (which provides that: "A twenty (20) percent shareholding in a commercial broadcasting service licence, in either the television broadcasting service or sound broadcasting service, is considered as constituting control"). Unlike the Act, the IBA Act also specified, in Schedule 2, details in relation to what constituted "control" for the purposes of that Act.⁴⁸ In addition, Schedule 2 to the IBA Act provided details in relation to what constituted deemed control of a company. In this regard, Item 3 of Schedule 2 provided that -

"Without derogating from the provisions of any law or from the common law, and in the absence of proof to the contrary, 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 equity shareholding in the company exceeding twenty-five percent or has other financial interests therein equal to at least twenty-five percent of its nett assets".

37. The effect of these provisions was that, although a shareholder was considered to have control of a company when it held 25% of the shares in that company, in terms of section 50(1)(d) of the IBA Act, the IBA Act also provided that a 20% shareholding was sufficient for control of a broadcasting service licensee to exist.

⁴⁸ Item 1 of Schedule 2 to the IBA Act provided that -

(1) For the purposes of [the IBA Act], a person shall control or be in a position to exercise control over any existing or prospective private broadcasting licensee if, *inter alia* -

- (a) such person, either alone or together with an associate, is in a position to exercise control over such broadcasting licensee;
- (b) such person, either alone or together with an associate, is in a position to exercise direct or indirect control over the selection or provision of a significant proportion of the programmes broadcast or proposed to be broadcast by such broadcasting licensee;
- (c) such person, either alone or together with an associate, is in a position to exercise direct or indirect control over a significant proportion of the operations of such a broadcasting licensee in providing a broadcasting service under the broadcasting licence;
- (d) such person, either alone or together with an associate, is in a position -
 - (i) where the licensee or prospective licensee is a company, to veto any action taken by the board of directors of such licensee or to appoint or secure or veto the appointment of at least half of the board of directors of such licensee; or
 - (ii) to give or exercise in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the broadcasting licensee; or
- (e) the existing or prospective broadcasting licensee or, where such a licensee is a company, more than fifty percent of the directors of such company -
 - (i) acts or is accustomed to act; or
 - (ii) under a contract, arrangement or understanding (whether formal or informal) is destined, required or expected to act,

in accordance with the directions, instructions or wishes of, or in concert with, such person or such person and his or her associate acting together or, if such person is a company, the directors of the latter company.

(2) ...

(3) ...

- (4) More than one person may be in a position to exercise control over a licensee.

38. The IBA Act provided, in sections 49(7) and 50(1) respectively, similarly to what is now provided for in sections 65(7) and (8) and section 66(1) of the Act, that the Authority could make recommendations to the Minister of Communications (the **Minister**) in relation to the applicable limitations to be imposed in terms of the IBA on the control of television and radio licences and cross-media interests. In the case of proposed amendments to section 49 (regarding the number of commercial sound broadcasting service licences that could be controlled by a particular person), the Authority was first required to conduct an inquiry before making recommendations in relation to the amendment of the IBA Act and its recommendations had to be tabled by the Minister in the National Assembly within 14 days of receipt thereof.
39. The Position Paper was prepared following an inquiry which was conducted by the Authority pursuant to section 28 of the IBA Act. The Authority issued a Discussion Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences (the **Discussion Paper**) on 27 September 2002, to which interested parties were invited to respond. One of the issues raised in the Discussion Paper was the definition of “financial interest” in the IBA Act. The Authority then held public hearings in relation to the issues raised and parties’ responses, following which the Position Paper was published.
40. In the Position Paper, the Authority made various general recommendations in relation to potential amendments to sections 48, 49 and 50, as well as Schedule 2, of the IBA Act:
- 40.1 The Authority recommended that the 20% limitation on foreign ownership should be raised, but that foreigners should not necessarily be allowed to control commercial broadcasting services.⁴⁹ The Authority also recommended that it be empowered to exempt a particular person from the limits on foreign ownership.⁵⁰ Amendments to the wording of section 48 of the IBA Act, which would have removed the reference to “financial interest”, were also proposed for comment.⁵¹
- 40.2 It was recommended that the applicable legislation should not distinguish between AM and FM broadcasters and that there should not be a numerical limit on the number of commercial broadcasting service licences that could be controlled by a particular person but, instead, that a person should not be permitted to control more than 35% of the total number of commercial broadcasting services that were licensed

⁴⁹ Position Paper, pp 39; 44 – 45.

⁵⁰ Position Paper, p 46.

⁵¹ Position Paper, p 50.

to broadcast.⁵²

- 40.3 Another recommendation was that section 50(2)(b) of the IBA Act be amended to provide that no person who controlled a newspaper would be allowed to control a commercial broadcasting licence in an area where the newspaper had an average ABC circulation of 25% (rather than 20%) of the total newspaper circulation in that area.⁵³ This percentage had no bearing on the meaning of “control”, and was only concerned with the extent of a newspaper’s circulation.
- 40.4 A further recommendation related to item 3 of Schedule 2. The Authority proposed amending this item to retain a 25% shareholding threshold as the level at which a person would be deemed to have control of a company. In other words, the Authority expressed a preference for a 25% threshold, as opposed to the 20% threshold that was ultimately specified in section 66(5) of the Act.
41. The Authority then made various specific recommendations in relation to how sections 48, 49 and 50 should be amended. These were published in the Position Paper for public comment. The Authority indicated that, once it had received and taken into account any further written representations on the proposed amendments, the proposed amendments would be submitted to the Minister for tabling in Parliament.⁵⁴ The Authority presented two options for the amendment of the relevant sections: Option One, in terms of which sections 48, 49 and 50 of the IBA Act would be repealed and replaced by provisions empowering the Authority to set limits for foreign control and interests, restrictions on control of broadcasting service licences and cross-media limitations by regulation; and Option Two, in terms of which specific amendments were suggested to the then-current wording of sections 48, 49 and 50.
42. The Authority received various submissions from interested persons in response to the Position Paper and the proposed amendments to the wording of sections 48, 49 and 50 of the IBA Act. At around the same time, it became clear that the intention on the part of relevant policy-makers was to repeal the IBA Act, which regulated broadcasting services, and the Telecommunications Act 103 of 1996, which regulated telecommunications services, and to replace these statutes with a new statute, which regulated both sectors and which took account of the convergence of communications technologies. The Authority made recommendations to the Minister with regard to proposed amendments to the IBA Act but,

⁵² Position Paper, p 45.

⁵³ Position Paper, p 46.

⁵⁴ Position Paper, p 44.

given the intention to repeal and replace that Act, these amendments were ultimately not tabled in Parliament.

43. As such, the requirements that were previously imposed by sections 48, 49 and 50 of the IBA Act were essentially re-enacted in sections 64, 65 and 66 of the Act with some relatively minor changes. The one material difference is that, unlike the IBA Act, the Act does not include a list of instances of control and does not indicate what would be deemed generally to be control of a company.
44. The Authority commenced a further inquiry in relation to ownership and control issues in the telecommunications and broadcasting sectors in November 2009 with the publication of the Discussion Document on Ownership and Control (the **Ownership and Control Discussion Document**). In this Ownership and Control Discussion Document, interested parties were requested to provide input in relation to, amongst other things, the levels at which foreigners should be entitled to participate in commercial broadcasting services and what constitutes control for the purposes of the Act. The Authority conducted public hearings in relation to the issues raised in the Discussion Document in May 2010.
45. The Authority published the Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services (the **Ownership and Control Findings Document**) in September 2011. In the Ownership and Control Findings Document, the Authority indicated its intention to make recommendations to the Minister in relation to the amendment of the Act. The Authority also indicated that, as a matter of policy, for the purposes of broadcasting services “control should comprise 25% shareholding”. In addition, the Authority indicated that a person should be regarded as being in control of a licensed entity where it is in *de facto* control of that entity.⁵⁵ This was to make it absolutely clear that control rights can, accordingly, result from something other than an ownership interest (such as shareholding alone).
46. As indicated above, the determinations made in the Ownership and Control Findings Document were recommendations as to how in the Authority’s assessment, issues of ownership and control of broadcasting services *should be* regulated. The Ownership and Control Findings Document did not constitute a statement of how, in the Authority’s assessment, the provisions of the Act as they are currently drafted should be interpreted. Instead, the Findings Document was a statement of what, in the Authority’s assessment,

⁵⁵ Ownership and Control Findings Document, p 13.

would be an appropriate policy approach and how, in the Authority's assessment, certain provisions in the Act should be changed to reflect this policy approach. As appears from what is stated below, the recommendations in the Ownership and Control Findings Document suggest that a different approach be adopted from what, in the Authority's assessment, the Act currently provides for.

47. The Electronic Communications Amendment Bill, 2013 (the **Amendment Bill**) which will amend the Act was passed by the National Assembly on 12 November 2013 and was passed by the National Council of Provinces on 18 February 2014. The version of the Amendment Bill that was passed by Parliament does not include any significant changes to any of sections 64, 65 or 66 of the Act or any amendments which would affect the application of these provisions. Certain of the issues raised by the Authority in the context of the Ownership and Control Findings Document are under consideration in the context of the ICT Policy Review initiated by the erstwhile Minister.
48. While the Authority has recommended to the Minister that certain changes be effected to the Act to, amongst other things, clarify issues regarding the control of a broadcasting service licensee, until the Act is amended and in the context of the current primary markets licensing process, the Authority has to apply the Act in its current form. This in essence means that the Authority has had to consider what the correct interpretation is of certain provisions of the Act. In the context of this licensing process, the Authority adopted a similar approach to that which it adopted in the context of the previous Primary Markets Licensing Process. This approach is set out again below for ease of reference. The approach adopted by the Authority is presently the subject of litigation brought pursuant to the previous Primary Markets Licensing Process. The Authority will consider the court's findings when judgment is handed down.

Interpretation issues to be decided

49. Section 64 of the Act imposes restrictions on the foreign control of commercial broadcasting services. Section 64(1) of the Act consists of two parts:
 - 49.1 on the one hand, section 64(1)(a) provides that a foreigner may not directly or indirectly "exercise control over a commercial broadcasting licensee";
 - 49.2 on the other hand, section 64(1)(b) provides that a foreigner may not directly or indirectly have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding 20%.