

SUBMISSION TO THE INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA

**TELKOM'S WRITTEN REPRESENTATIONS ON ICASA'S DRAFT REGULATIONS
IN RESPECT OF THE LIMITATIONS OF CONTROL AND EQUITY OWNERSHIP BY
HISTORICALLY DISADVANTAGED GROUPS (HDGS) AND THE APPLICATION OF
THE ICT SECTOR CODE**

A INTRODUCTION

1 Telkom would like to thank the Authority for the opportunity to comment on the Draft Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDGs) and the Application of the ICT Sector Code published in Government Gazette no. 43021 dated 14 February 2020 (the 'Draft Regulations').¹

2 Telkom supports the promotion of Broad-Based Black Economic Empowerment (B-BBEE) and HDG equity ownership, but emphasises the need for a process guided by sound principles and analysis, as well as the harmonisation of existing regulations and legislation with regards to B-BBEE and HDG equity ownership.

3 Telkom has structured its submission as follows:

Section A: Introduction

Section B: Executive Summary

Section C: Exemptions from the 30% HDG requirement

Section D: Harmonisation of legislation and regulations

Section E: Certification of HDG equity ownership

Section F: Maintenance of 30% HDG equity ownership and 30% black ownership

B. Executive summary

4 Telkom welcomes the Authority's commitment to promote B-BBEE and HDG equity ownership. Telkom however submits that Government ownership should be taken into account when determining HDG equity ownership. Telkom further argues for the application of B-BBEE and HDG equity requirements to both

¹ On 8 June 2017, Telkom submitted written comments on the Discussion Document on Equity Ownership by Historically Disadvantaged Groups (HDGs) and the application of the ICT Sector Codes in the ICT sector (the 'Discussion Document') published in Government Gazette no. 40759 dated 31 March 2017. Various arguments made in this submission were also raised by Telkom in the aforementioned submission.

individual and class licensees.

- 5 In our view, there should be no distinction between wholly owned government entities and entities where government is a major shareholder, such as Telkom. If wholly owned government entities are considered as being exempt from the regulations, Telkom should also be exempt. Alternatively, government ownership must be taken into account in the case of Telkom when considering HDG equity.
- 6 Furthermore, Telkom proposes the alignment and harmonisation of the definitions of 'Black' and 'HDG' between the ICT Sector Code and the Electronic Communications Act (ECA) as well as other relevant regulations with regards to definitions of HDGs, scope of application, compliance and proof of ownership and control. The current non-alignment as well as other issues set out in this submission, results in difficulties with regard to the measurement of HDG equity ownership.
- 7 In addition, Telkom notes that it may be exempted from the provision of certain information regarding HDG equity ownership in light of its status as a listed company. Notwithstanding, should reporting on HDG equity ownership be required, we emphasise that the reporting by listed companies should be aligned with the release of their annual financial results as *ad hoc* requests for verification of HDG equity ownership pose various practical difficulties.

We proceed to discuss the various issues below.

C Exemptions from the 30% HDG requirement

Exemption of wholly owned government entities

- 8 Telkom is of the view that there is no basis for the differentiation between wholly owned government entities and entities where the government is a major shareholder, such as Telkom. Telkom is listed in Schedule 2 of the Public Finance Management Act (PFMA) as a major public entity, in the same group as wholly owned government entities such as Eskom and Transnet. If wholly owned

government entities are exempt from the regulations, Telkom should also be exempt.

- 9 Telkom's is not in a position to restructure ownership by disposing of Government's shareholding in Telkom in order to increase the ownership element of the B-BBEE scorecard. In contrast, Telkom's competitors do not have significant state ownership and therefore have the flexibility to reorganise their ownership structures. They can increase black shareholders in their equity and improve their B-BBEE ranking. Telkom is not similarly positioned.
- 10 We are of the view that, in the event that Telkom is not exempted from the Draft Regulations and is thus treated the same as wholly owned government entities listed (together with Telkom) as public entities in schedule 2 of the PFMA, then Government ownership should be taken into account when determining HDG equity ownership.
- 11 We are further of the view that the discrimination between wholly owned government entities and entities such as Telkom with a 40.51% government shareholding is unfair. Government's objectives include the promotion B-BBEE and HDGs, and dividends earned by government are paid into the National Revenue Fund and are ultimately applied to advance social objectives which benefit the people of South Africa.
- 12 The remainder of the comments in this submission are subject to Telkom's submission that it should be afforded the same exclusion as wholly owned government entities.

Class licences

- 13 Telkom is of the view that an HDG equity requirement should be imposed on individual and class licensees equally by means of the respective licenses, and that there is no reason for distinguishing between licence holders in terms of HDG

equity ownership.² It is unclear why class licensees should be exempt. We agree with the Authority's views as set out in its Discussion Document³ that it should not exclude a broad sector of licensees from being part of the transformation agenda and through its regulation making powers, and in accordance with the objects of the Electronic Communications Act of 2005 (ECA), it may impose HDG equity requirements on class licensees.

D Harmonisation of legislation and regulations

- 14 We note that the Authority has defined HDGs. Telkom is of the view that the definitions of 'Black' and 'HDG' must be aligned and harmonised between the ICT Sector Code and the ECA as well as other relevant regulations with regards to definitions of HDGs, scope of application, compliance and proof of ownership and control.
- 15 The definition of HDGs in the Ownership and Control Regulations of 2003⁴ refers to HDGs as "natural persons, who before the Constitution came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion." The Draft Regulations define HDGs as *black persons, women, persons with disabilities and the youth* who before the Constitution came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion. The ECA does not contain an explicit definition of HDGs.
- 16 The B-BBEE Act defines 'Black People' as Africans, Coloureds and Indians, but does not define HDGs. Under the ICT Sector Code, there is enhanced recognition for certain categories of Black People namely Black Women, Black People with disabilities, Black Youth, Black People living in rural areas and Black Unemployed People.

³ Discussion Document: equity ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code in the ICT Sector in terms of section S4B of the ICASA Act 2000, as amended, GG 40759, 31 March 2017.

⁴ Section 1(1) of the Regulations in respect of the Limitation Of Ownership and Control of Telecommunication Services in terms of section 52, dated 16 January 2003.

- 17 In terms of the ICT Sector Code, the compliance requirements for B-BBEE vary according to the size of the entity, as measured by its annual turnover. B-BBEE ownership is one element of the ICT Sector Scorecard. Telkom proposes that HDG equity ownership should be defined clearly in the ICT Sector Code and HDG equity / B-BBEE ownership should be a compulsory element of the ICT Sector Scorecard, irrespective of the income levels and size of the entity.
- 18 The Processes and Procedures Regulations for Individual Licences, 2010, define as 'South African citizens who are Black people, women or people with disabilities and black people are defined to include Africans, Indians and Coloureds.'⁵
- 19 Although Telkom is not opposed to the proposed measurement of HDG ownership, we are of the view that it is imperative the issues regarding the alignment of various acts and regulations be addressed before finalisation of the Draft Regulations.

E Certification of HDG equity ownership

20 We note that in terms of the Draft Regulations, listed licensees must submit an independent assurance report indicating compliance with the HDG equity requirement as part of its annual compliance process. In terms of the Ownership and Control Regulations,⁶ a licensee must retain records of the ownership and control interests held by HDGs persons during the first two years of the initial grant of the licence, but may exclude such information for ownership interests trading on the JSE or any other internationally recognised securities exchange. The Authority may also on request of a licensee waive the obligation to provide information regarding ownership interests and control interests by HDGs where the licensee's issued share capital is listed on the JSE and the information is not kept in the ordinary course.⁷

21 In the event that information with regards to HDG is requested, Telkom will require

⁵ GG no 24288 of 31 March 2008.

⁶ Regulation 3 of the Regulations In Respect Of The Limitation Of Ownership And Control of Telecommunication Services in terms of section 52, dated 16 January 2003 (LOCT regulations)

⁷ See regulation 3 of the LOCT regulations.

additional resources, as HDG ownership must be verified by an accredited agency. Currently, only black ownership is measured by Telkom's verification agencies. It is unclear why an independent assurance report is necessary in addition to verification certificate from an accreditation agency, as it would result in unnecessary costs being incurred.

- 22 The provision of supplementary information re HDG equity ownership at any time upon request by the Authority is problematic. Reporting will not be possible when the company is in a closed period. Telkom as a listed company complies with Stock Exchange News Service (SENS) procedural requirements that may restrict it in disclosing any shareholding information at the time of the Authority's request.
- 23 Telkom's shareholding also comprises of 44.80% free-float stock which are traded on a daily basis, and it is impractical and burdensome to verify free-float stock on a regular basis due to constant changes in this shareholding. We therefore caution that such a request for supplementary information must be considered annually in alignment with the yearly B-BBEE verification process.
- 24 Finally, there is already a requirement for listed entities to report to the JSE by submitting a B-BBEE compliance report, a B-BBEE certificate from a SANAS accredited verification agency and signed off Financial reports. The Authority could consider standardising reports. Telkom proposes leveraging some of the information in these reports to ensure consistency and alignment.

F Maintenance of 30% HDG equity ownership and 30% black ownership

- 25 We note that individual licensees will be required to ensure that their ownership equity held by HDPs is at least 30% at any given time during a license period (20 years for individual licenses). There is currently no similar obligation under the ECA. The licenses were granted for a period of 20 years, which means that Telkom must ensure compliance with the 30% requirements until 2029. Telkom's ownership includes free float shareholding which is subject to daily changes over which Telkom has no control.

- 26 Further, in terms of the Draft Regulations, a licensee must ensure that both its HDG equity ownership and its ownership by black people respectively, do not fall below 30% for the duration of the license period. This is problematic Black people are a subset of HDGs which may result in double counting. A harmonisation of the definitions as set out in section E above finalisation of the Draft Regulations is therefore essential.
- 27 Telkom proposes that licensees be granted 5 years to comply with requirement of 30% BEE equity ownership, and further propose an amendment of HDG requirements in the ECA to allow for progressive compliance by licensees. In addition to this, we suggest that incentives for compliance be considered.

Telkom would like to reiterate its support for the Authority's efforts to promote the advancement of B-BBEE and HDG in the ICT sector. We trust that our comments are of assistance.

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