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## GENERAL NOTICE

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### NOTICE 1532 OF 2009

## INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

### DISCUSSION DOCUMENT ON OWNERSHIP AND CONTROL NOVEMBER 2009

The Independent Communications Authority of South Africa ("the Authority") hereby gives notice of its intentions, in terms of the Electronic Communications Act, 2005 (Act No. 36 of 2005) ("The Act"), to publish its discussion document on ownership and control issues.

The Authority invites written submissions relating to the discussion document from all interested parties. The closing date for submissions is **19 February 2010** by no later than 16h00 (there will be no extensions), by post, hand delivery, facsimile transmission or electronically (Microsoft Word or Adobe PDF file) for the attention of and should be directed to:

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Where possible, written representations should also be e-mailed to: [nndlovu@icasa.org.za](mailto:nndlovu@icasa.org.za) or [lpholosi@icasa.org.za](mailto:lpholosi@icasa.org.za)

The Authority will consider all submissions when drafting regulations for further public comment. In order to facilitate focused discussion, each section of this discussion document is accompanied by a set of questions which should be engaged by all stakeholders.

The Authority may publish all or any part of the written submissions on its website; [www.icasa.org.za](http://www.icasa.org.za). The Authority will consider stakeholders to have consented to the publishing by making a submission, unless it is clearly specified otherwise in a submission.

Stakeholders are kindly advised to indicate any objection to the release of information contained in a submission, which is considered as confidential. Motivations in this regard shall include reason(s) for such information not to be made public. The Authority will take into account all such objections when responding to requests for copies and information on submissions to this document.

Persons submitting written representations are further invited to indicate, as part of their submissions, whether they require an opportunity to make oral representations and the estimated duration thereof, which duration shall not exceed one hour.

The Authority will review and analyze all submissions received from stakeholders in response to this DISCUSSION DOCUMENT. Findings emanating from this consultation exercise will form a foundation in the development of draft regulations for further public consultation.

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**PARIS MASHILE**  
**CHAIRPERSON**

## PREAMBLE

In view of the legislative framework and the different policy intentions embodied in the Electronic Communications Act, 2005 (Act No. 36 of 2005) (ECA), this consultation document has been divided into two distinct sections:

**Section A** provides a discussion on ownership and control issues centred on individual broadcasting services. The Authority is guided by Sections 2, 4, 13(4-5) and 65 (7) of the ECA and Sections 4 (3)(k) of the ICASA Act (Act No. 13 of 2000).

**Section B** provides a discussion on ownership and control issues relevant to individual electronic communications services (ECS) and electronic communications network services (ECNS). The Authority is guided by Sections 2, 4 and 13(3) and (5) of the ECA and Section 4 (3)(k) of the ICASA Act, 2000.

### Timeframe:

The following deadlines are recommended for the Authority's consultation:

- a) After the consideration of the comments the Authority,
  - o will publish a findings document and draft regulations pertaining to ECS and ECNS
  - o develop and submit recommendations relating to broadcasting to the Minister in accordance with Section 65(7) of the ECA.
  
- b) The Authority intends to finalise the regulations by May 2010

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## **SECTION A: INDIVIDUAL BROADCASTING SERVICES**

### **1. PURPOSE**

The purpose of this consultation is to seek input from stakeholders on the Authority's approach to the issues contained in this consultation document.

As part of the consultation process a general and brief background to the history of ownership and control regulations in South Africa is provided. This is followed by a discussion of the legislative framework and international benchmark study used to guide the Authority.

### **2. BACKGROUND**

- 2.1 The Authority published a discussion paper (2002), which led to public hearings and a position paper (2004) on the review of ownership and control of broadcasting services and existing commercial sound broadcasting licences. This was done within the framework of and in line with the requirements of Sections 48, 49, 50, 52 and paragraphs 1 and 3 of Schedule 2 to the Independent Broadcasting Authority Act, 1993 (Act No. 153 of 1993).
- 2.2 The recommendations were mailed to the Ministry of Communications, whilst a legislative review was underway which led to a promulgation of a new ECA. Although the Authority's recommendations were not tabled in Parliament, sections relating to ownership and control were transposed verbatim from the Independent Broadcasting Act, under Sections 2, 13(4), 64, 65 and 66 of the ECA. The ECA effectively retained the Authority's powers as outlined in the IBA Act, namely to limit control of commercial broadcasting services and cross-media control of commercial broadcasting services.

### **3 LEGISLATIVE FRAMEWORK**

- 3.1 The Authority's Constitutional and statutory mandate (section 2(g) of the ECA) requires it to regulate broadcasting activities in the public interest.<sup>i</sup>

- 3.2 Section 4 (3)(h) and (m) of the ICASA Act states that the Authority may conduct research on all matters affecting the postal and communications sectors in order to exercise its powers and perform its duties,<sup>ii</sup> and that it may undertake inquiries on any matter within its jurisdiction<sup>iii</sup>.
- 3.3 In terms of Section 13 (4) of the ECA, the Authority may by regulation restrict the ownership or control of an individual licence.
- 3.4 The Authority may, subject to Chapter 9, by regulation, set a limit on, or restrict, the ownership or control of an individual licence for broadcasting services.<sup>iv</sup> Section 13 (4) deals with limitation for the express purpose of promoting a diversity of views and opinions. Further, the provisions of section 13(5) suggest that ownership and control provisions must be preceded by research and consultation. The ECA provides expressly that any regulation made in terms of section 13(4) must have regard for the objects of the ECA and must follow the inquiry outlined in Chapter 4B of the ICASA Act. This sets a more extensive process for regulation making requiring a sixty (60) day comment period.
- 3.5 In formulating the regulations in terms of section 13(4) of the ECA, the Authority will take into account section 2(d) (h) (i) (k) (p) (w) of the ECA.<sup>v</sup>

## **4 RESEARCH**

### **4.1 International Benchmarking**

The Authority conducted studies that reflect on diversity of ownership and control in other jurisdictions and the following observations were made

#### 4.1.1 Australia

4.1.1.1 The Australian broadcast sector is not as developed and competitive as the USA and United Kingdom sectors. However, it does offer lessons to South Africa on how to promote investment and competition without compromising diversity of the broadcast media sector. Foreign investment is encouraged, though not at the expense of local ownership. It is apparent that a delicate balance is required to ensure that local people effectively control the broadcasting sector whilst compelling the market to open-up the broadcast airwaves to foreign investors.

4.1.1.2 Broadcast ownership and control in Australia is regulated under the Broadcasting Services Amendment (BSA) (Media Ownership) Act 2006. The Act amended the BSA Act of 1992.<sup>vi</sup> The amendment of the BSA Act of 1992 was primarily driven by the government, which felt that while the broadcast media sector was developing, the ownership laws remained stagnant, and somewhat hindered further growth and development of the sector.

4.1.1.3 The BSA amendment Act of 2006 repealed restrictions on foreign ownership and control. The government argued that there was no need to have specific restrictions on foreign ownership of Australian broadcast services as the foreign investment policy regulated all foreign owned entities in Australia.<sup>vii</sup> Removing broadcast specific ownership rules in favour of the foreign investment policy is meant to bring a standard treatment on how foreign investors do business in Australia. It does not mean that foreign investors can swamp the Australian broadcast sector, as they will still be subjected to the rigours of investment policy.<sup>1</sup>

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<sup>1</sup> The debates on the implications of broadcast foreign ownership in Canada have raised a few important points that differentiate between foreign ownership of the telecommunications (ECNS) sector and broadcasting. From the Canadian perspective the arguments have been that:

- There is little reason for the broadcasting sector to have more relaxed foreign ownership rules than the telecom sector.
- If the federal government moves to liberalise foreign ownership of telecom, it must be prepared to prevent any asymmetric regulation in the carriage space.

#### 4.1.2 United States of America (USA)

- 4.1.2.1 The American broadcast sector is probably the most developed and competitive around the globe and contrary to popular belief, it continues to regulate ownership and control in the broadcasting sector. It accommodates a variety of local and national radio and television stations that include both the public and commercial broadcasters. The important lesson the Authority can identify from the USA is how to ensure that there is diversity in the broadcast sector without compromising viability of the sector and competition.
- 4.1.2.2 The USA has made three substantial amendments to its media ownership regulations in the past fifteen years. The first change was in 1996 through the Telecommunications Act, which amended the 1934 Communications Act.<sup>viii</sup> The 1996 Telecommunications Act relaxed many ownership restrictions and allowed some form of consolidation.<sup>ix</sup>
- 4.1.2.3 However, the 1996 Telecommunications Act also caused a major public outcry. In response, the US Congress instructed the Federal Communications Commission (FCC) to conduct an inquiry that led to the review of the ownership laws in 2003.<sup>x</sup> The changes made in 2003 were challenged in court and this led to another review in 2007. In the latest review some of the 2003 restrictions that were challenged in court were relaxed.<sup>xi</sup>
- 4.1.2.4 The FCC has retained its ban on mergers among many of the top four national broadcast networks. The American Authority determined that its existing dual network prohibition continues to be necessary to promote competition in the national television advertising and program acquisition markets.<sup>xii</sup> The rule also promotes localism by preserving the balance of negotiating power between networks and affiliates.<sup>xiii</sup> If the rule was eliminated and two of the top four networks were to merge, affiliates of those two networks would have fewer networks to turn to for affiliation.<sup>xiv</sup>

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- [The principal objective is to maintain]... Canadian-content regime at the programmer level, without the risk of losing the benefits that may come from foreign capital at the carriage and distribution level.

4.1.2.5 The FCC also put limitations in local multiple ownership, national TV ownership, local radio ownership, cross-media ownership.<sup>xv</sup> The system applied by the FCC to limit ownership was designed to promote diversity while also encouraging competition. Just like the Australian ownership restriction rules, it is based on market share rather than the actual numbers one entity may own. Secondly, the idea behind ownership limits is to ensure that no single broadcaster becomes dominant and thereby limit the public's access to an alternative national television broadcaster.

### 4.1.3 Asian Countries

4.1.3.1 Broadcast ownership and control in Malaysia is regulated under the Communications and Multimedia Act 1998 (CMA 1998).<sup>xvi</sup> The CMA regulations are largely focused on general and specific competition issues in the broadcast sector. The regulated areas of competition include prohibition on anticompetitive conduct, prohibition on collusive agreements, prohibition on tying or linking agreements.<sup>xvii</sup>

4.1.3.2 Foreign companies and individuals are prohibited from owning or applying for a broadcast licence.<sup>xviii</sup> Foreign companies and individuals are only allowed to buy equity stakes, which are limited to 30 percent to ensure that Malaysians own and control the broadcast sector.<sup>xix</sup> However, foreign companies that bring technological services, expertise and infrastructure not available in Malaysia are classified as multimedia super-corridor (MSC) companies and are not subject to local equity restrictions. Such companies are allowed to be fully foreign owned.<sup>xx</sup>

4.1.3.3 The Malaysian government developed a guidelines called Guidelines of the Foreign Investment Committee (the FIC), which are used to control foreign ownership in the broadcast sector.<sup>xxi</sup> The FIC guidelines are applicable to both foreign and local mergers and acquisitions, though not all local mergers and acquisitions are subject to FIC guidelines.<sup>xxii</sup> "The purpose of the FIC

guidelines is to ensure that the pattern of ownership and control of private enterprises in the country is consistent with government policies such as the New Economic Policy / National Development Policy.<sup>xxiii</sup>

In Hong Kong the licensing regime does not restrict ownership per se but restrict persons and companies from exercising control on licensed broadcasters and these restrictions are based on residency requirements rather than nationality or citizenship. The goal is to "ensure that such services remain firmly rooted in the hands of persons ordinarily residing in Hong Kong and who are more likely to have the best interest of Hong Kong at heart"

4.1.3.4 Under the Broadcasting Ordinance, the majority of the directors of a licensee company should be ordinary resident in Hong Kong (i.e. those who meet the residency requirement of living in Hong Kong for one continuous period of 7 years) (Section 10(1) (b)). It also requires that the principle officers, including those who select the programmes, have to satisfy the same residency requirement (Section 10(1) (e)). Section 17E and 17F limit the percentage of voting shares a non-resident may acquire or hold and subject such acquisition or holding to the approval of the Broadcasting Authority. Section 17D in the Ordinance sets a 49% ceiling on the total voting control of a licensee.

4.1.3.5 Similar restrictions apply to a sound broadcasting licensee. Under the Telecommunications Ordinance, the aggregate of the voting shares that can be held by "unqualified" person shall not exceed 49% of the total number of voting shares of a sound broadcasting licensee.

4.1.3.6 The 49% ceiling remains untouched throughout the years when the Television Ordinance and Telecommunications Ordinance were being updated and reviewed. Satellite TV broadcasting licensees used to be bound by such restriction, but the restriction on foreign ownership to 49 % was lifted in early 1998. The requirement that the majority of directors of a satellite broadcasting company will have to be Hong Kong residents have also been relaxed.

4.1.3.7 This uniqueness has to be understood against the background of Hong Kong, which has traditionally been a free port relying very heavily on foreign investment. These unique restrictions allow the Government to approve higher levels of foreign investment without compromising local control.

#### **4.1.4 South Americas**

4.1.4.1 In Argentina, Operating licences are granted only to Argentine individuals or Argentina-owned companies. Special authorisations may be granted on the basis of bilateral treaties.

4.1.4.2 In Chile, the owner and director or acting director of a concession for radio stations must be Chilean with domicile and residency in Chile. If the holder of the concession is a corporation or a joint ownership, it is considered Chilean if 85 per cent of the equity capital or joint ownership rights are held by Chilean individuals or juridical persons (defined again as 85 per cent Chilean capital ownership). The president, directors, managers, administrators and legal representatives of the corporation owning a commercial television station must be Chileans. In addition, the director or acting director must have domicile and residency in Chile.

4.1.4.3 In Peru, only Peruvian nationals or corporations organised under Peruvian law and domiciled in Peru may be authorised or licensed to offer free-to-air radio communications. Foreign nationals may not own more than 40% of the total shares or equity in such a corporation and must be owners or shareholders in a radio or television broadcast enterprise in their country of origin. No foreign national may receive or hold an authorisation or a license directly or through a sole ownership.

4.1.4.4 If a foreign national is, directly or indirectly, a shareholder, partner, or associate in a corporation, that corporation may not hold a broadcasting authorization in a zone bordering that foreign national's country of origin, except in a case of public necessity authorized by the Council of Ministers. This restriction does not apply to corporations with foreign equity which have

two or more current authorizations, as long as they are of the same frequency band.

#### **4.1.5 Tanzania**

4.1.5.1 The Broadcast sector in Tanzania is not as developed as the South African sector; however it is important to look at how the East African nation has approached the regulation of broadcast ownership and control.

4.1.5.2 Foreign ownership is restricted to 49 percent to ensure that control remains in the hands of Tanzanians.<sup>xxiv</sup> Foreign restrictions are extended to professional employment; the IBP also states that, "[t]he management of media outlets shall be in the hands of nationals."<sup>xxv</sup> "Foreigners shall be employed only as technical experts in areas where such expertise is not available."<sup>xxvi</sup>

The table below further indicates how different countries restrict foreign ownership in broadcasting services:

<b>Foreign Ownership Restrictions in Broadcasting<sup>2</sup></b>	
<b>Country</b>	<b>Foreign Ownership Limitations</b>
Australia	Commercial television 15%; no two foreign owners' together greater than 20%; no more than 20% directors foreign; 35% foreign in aggregate.
Austria	49% terrestrial, cable and DBS
Belgium	Flemish none; French n/a
Canada	20% (33.3% for a holding corporation)
Czech Republic	Each foreign owner has to satisfy the conditions for an undertaking in the Czech Republic according to the Code of Commerce (no specifics given)
France	For terrestrial television, according to Art. 40 of the law of 30 September 1985 as amended, the same "foreign" other than European Union) natural or legal person may not hold more than 20% of the capital or writing rights of an entity which holds an authorisation to distribute a radio or television service for a service that is delivered in French. For the other electronic networks, no limitation
Greece	Terrestrial "free access" television 25%
Italy	None for EEA countries, other countries limit based on reciprocity. A legal entity based in a foreign country cannot control a national terrestrial broadcaster, if that country does not apply a reciprocity conditional clause.
Japan	Terrestrial broadcaster, programme-supplying broadcaster on DBS. There is a foreign ownership restriction on terrestrial broadcasting which limits foreign persons and other (foreign government or its representative, foreign judicial person/organisation from holding more than 20% of the voting shares of licensees of terrestrial broadcasting radio station.  Facility-supplying on DBS. Foreigners or foreign controlled enterprises are not granted licences for broadcasting stations. In these cases, "foreign controlled" means that an enterprise is represented by foreigners, one-third or more of the directors are foreigners; or one-third or more of the total voting rights are owned by foreigners.  Cable television broadcaster, broadcaster on telecommunications services, no regulation
Korea	Terrestrial prohibited, cable 49%, Satellite 33%
Mexico	Prohibited for terrestrial TV; Foreign investment shall not exceed

<sup>2</sup> OECD Communications Outlook 2007 Pg 204, By Organisation for Economic Co-operation and Development, Publishing OECD Publishing

	49% of the total capital for MMDS, DBS and Cable, some possible exceptions in case of cellular telephone services
New Zealand	No specific limits but foreign investments requires approval of the overseas investment commission
Poland	Companies having foreign shareholders may be awarded a broadcasting licence if the stake held by foreign person in the share capital of the company does not exceed 49% and persons of Polish nationality who permanently reside in Poland constitute a majority of the members of the Board of Management of the said company
Spain	Capital share of persons who are not from any members state of the EU cannot exceed directly or indirectly 25% of the total amount
Switzerland	Art. 11(3) LRTV and Art. 27(2)(3) of the ordinance of the federal council on radio and television(ORTV): the person requesting a Swiss licence for the distribution of radio or television programme must be a legal person whose headquarters are in Switzerland and under Swiss control(that is, more than half of the equity or shares are in Swiss hands and these persons hold more than half of voting rights at general assemblies or shareholders meetings). the person requesting can also be a natural person domiciled in Switzerland or a legal person under foreign control but whose headquarters are in Switzerland, to the extent that the foreign state offers the same degree of reciprocity to Swiss citizens or legal person under Swiss control.
Turkey	Radio and Television 25%
UK	None
US	Limited to 20% of any entity

## 4.2 Local Studies of the Broadcasting Sector

The authority has been collecting shareholder data from licensees over the past few years in terms of the Telecommunications Act. The data was synthesised internally and summarised. Table A depicts the current status of Historically Disadvantaged Groups, areas broadcast and language used in the broadcasting sector.

TABLE A: INDIVIDUAL BROADCASTING SERVICES LICENSEES

	NAME OF LICENSEE AND CURRENT HDI SHAREHOLDING	-30%	LICENCE AREA	Language	30%+ HDI	50%+ HDI	100 % HDI
1	Umoya Communications (Pty Ltd (Algoa FM)	28.90%	Greater Port Elizabeth, East London and Border Environs	English			
2	Primedia (Pty) Ltd (567 Cape Talk)		Capetown	English	46.61%		
3	Primedia (Pty) Ltd (Talk Radio 702)		Gauteng	English	46.61%		
4	KFM Radio (Pty) Ltd (KFM)		Greater part of the Western and Southern Cape	Afrikaans & English	49.10%		
5	Seyalemoya Communications (Pty) Ltd (OFM)		Free State, Northern Cape and parts of the North West	English (50%) & Afrikaans (50%)	49.80%		
6	Primedia (Pty) Ltd (94.7 Highveld Stereo)		Southern Gauteng	English	46.61%		
7	Radio iGagasi 99.5 (Pty) Ltd (iGagasi 99.5)		Durban Metropolitan	English			√
8	Radio Heart 104.9 (Pty) Ltd (Heart 104.9 FM)		Cape Town	English			√
9	Jacaranda FM (Pty) Ltd (Jacaranda 94.2)		Parts of Gauteng, Limpopo North West and Mpumalanga	English (50%) & Afrikaans		80%	
10	Kaya FM (Pty) Ltd (Kaya FM)		Johannesburg	English		75.10%	
11	Yired FM (Pty) Ltd (YFM)		Johannesburg	English, IsiZulu & Sesotho			√
12	East Coast Radio (Pty) Ltd (East Coast Radio)		KwaZulu-Natal	English			√
13	Classic FM SA (Pty) Ltd (Classic FM)		Johannesburg	English	37.74%		
14	Etv (Pty) Ltd (e.tv)		National coverage provided that any given time the minimum population coverage shall be 77%	English subject to specific language requirements set out in their licence			√
15	Electronic Media Network (Pty) Ltd (MNET)		Republic or any part thereof	The discretion with the Licensee	33.33%		
16	Capricon FM (Pty) Ltd		Limpopo Province	English (90%) & 10% shared between Sepedi, Tshi-Venda and Xi-Tsonga		90%	
17	M-Power (Pty) Ltd		Mpumalanga Province	English		52.5%	
18	Golden Dividend (Pty) Ltd (Radio Northwest)		North West Province	English (80%) & other languages (20%)		67%	
19	Telkom Media (Pty) Ltd (ICE)		National Coverage	The discretion lies with the Licensee	48.2%		
20	Multichoice (Pty) Ltd (DSTV)		National Coverage	The discretion lies with the Licensee	33.33%		
21	On Digital Media Ltd		National Coverage	The discretion lies with the Licensee		68.87%	

From the above we can conclude that policy interventions in the broadcasting sector have ensured that ownership by locals has improved dramatically in the past 10 years. Further, obligations derived from licensee's applications and representations submitted in terms of the Invitation To Apply (ITA) ensured that licensees comply with ownership and control obligations.

However, the Authority did not request licensees to breakdown the shareholding representation into gender, youth and ability.

Nevertheless, it is clear from the table that English is predominant and that the majority of the broadcasters serve select cities. The reality projected above raises several questions. For the purposes of Section 13(4) of the ECA, the question that this consultation document will focus on is whether the broadcast sector in South Africa reflects the diversity of views and opinions to the extent desired by the public.

## **5. Questions**

Stakeholders are specifically asked to submit meaningful and detailed comments in relation to the following questions:

- (i) Should the ownership and control restrictions in South Africa be guided by market share of licensees as a measure to ensure that those who have the largest market share contribute the most to meeting the goals of the legislation eg BBEEE Act?
  - (a) A further consideration is how effective is regulation of market share, can it be used as an instrument to diversify views and opinions or is best used to manage competition?
  - (b) Is regulation of market share perhaps not best applied in primary markets where broadcasters are competing for target audiences, and indirectly also competing for advertising- with attached revenue? If so, what form of regulation is applicable in secondary markets and rural areas, and is it ideal to adopt different interventions for different markets?

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- (ii) On one level it can be argued that easing current restrictions on foreign ownership has the potential of injecting more investment into the sector and thereby encouraging diversity of views, especially where local investors are cash-strapped. On another level others contend that foreign investment, if not managed, could diminish local opportunities and enterprise and thereby limit diversity of views and opinions at the local level.
    - (a) Can exemptions be given to foreign investors who contribute to the socio-economy, and how significant should such contributions be?
    - (b) Can relaxation of foreign ownership be off-set by increased restriction on control, through amongst others, limited employment of foreign professionals, reservation of critical professional and senior positions for nationals, and thus promoting diversity of opinions and views?
  - (iii) What constitutes control of an individual licence?
  - (iv) Should that exemptions apply to compliance with BBEEE be incorporated in new regulations of ownership and control, if so in which instances?
  - (v) What factors should the regulator consider when promoting diversity of views and opinions through ownership and control regulation?
  - (vi) Chapter 9 focuses on restrictions on horizontal integration, in spite of convergence. Should the regulations not address vertical integration in the broadcasting and electronic communications sectors?
  - (vii) What measures should be used to ensure that ownership or control restrictions on new services, for example, mobile television services, IPTV/VOD services and Direct Audio Broadcasting reflect diverse opinions and views of all, including the poor?
  - (viii) Does increase in ownership by historically disadvantaged groups lead to proportional increase in diverse opinions and views? If yes explain, if no explain.

- (ix) The ECA is silent on ownership and control of Class Broadcast Services. Should this be viewed as partial relaxation of control and ownership restrictions of small players, and should the focus on individual Broadcasters remain?
- (x) What ownership and control restrictions, if any, should be placed on listed individual broadcast licences to ensure that in the process of listing diversity of opinions and views is widened?
- (xi) How should we advance BBEEE in the broadcasting sector?
- (xii) It has been indicated that the Authority could not assess the regional representation, gender balance and extent of inclusion of disabled people in the shareholding structure of the Broadcasting operators, should future regulations require licensees to present this data? If not, explain.
- (xiii) What values or percentages should be allocated to gender, youth and regional representation to ensure that broadcasters diversify views and opinions?
- (xiv) See questions (i), (iii) and (xiv) on BBEEE on pages 36- 38, are they relevant to the broadcasting sector?
- (xv) Any other relevant issue you would like to suggest or comment upon?
- (xvi) What is your view of the approach adopted by the Authority?

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- 2) Electronic Communications Act No 36 of 2005 (English text signed by the President.)(Assented to 11 April 2006.) Government Gazette Vol. 490, No. 364. 18 April 2006.
- 3) Independent Communications Authority of South Africa Act, 2000 No. 13 of 2000 [As amended by: Broadcasting Amendment Act, No. 64 of 2002] (English text signed by the President.)(Assented to 1 May 2000.)
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- 5) McChesney, R. 1997. Corporate Media and the Threat to Democracy. New York: Seven Stories Press.
- 6) <http://www.fcc.gov/cgb/consumerfacts/reviewrules.html>
- 7) [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf)
- 8) [http://www.ibls.com/internet\\_law\\_news\\_portal\\_view.aspx?id=1767&s=latestnews](http://www.ibls.com/internet_law_news_portal_view.aspx?id=1767&s=latestnews)

## 7. References

- <sup>i</sup> Section 192 of the Constitution of the Republic of South Africa.
- <sup>ii</sup> Section (3)(h) of the ICASA Act 13 of 2000
- <sup>iii</sup> Section (3) (m) of the ICASA Act 13 of 2000
- <sup>iv</sup> Section 13 (3) and (4) of the ECA
- <sup>v</sup> Section 2 of the ECA
- <sup>vi</sup> Retrieved from [http://www.apb.gov.au/library/INTGUIDE/SP/media\\_regulations.htm](http://www.apb.gov.au/library/INTGUIDE/SP/media_regulations.htm)
- <sup>vii</sup> Retrieved from [http://www.ibls.com/internet\\_law\\_news\\_portal\\_view.aspx?id=1767&s=latestnews](http://www.ibls.com/internet_law_news_portal_view.aspx?id=1767&s=latestnews)
- <sup>viii</sup> Retrieved from [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf)
- <sup>ix</sup> Ibid.
- <sup>x</sup> Retrieved from <http://www.fcc.gov/cgb/consumerfacts/reviewrules.html>
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- <sup>xv</sup> Ibid.
- <sup>xvi</sup> Act 588, Communications and Multimedia Act 1998 [REPRINT 2002], Incorporating latest amendment - Act A1220/2004
- <sup>xvii</sup> Ibid.
- <sup>xviii</sup> Ibid.
- <sup>xix</sup> Ibid.
- <sup>xx</sup> Cassey L, Competition Regulation in Malaysia. Faculty of Economics & Administration, University of Malaya.3 March 2004
- <sup>xxi</sup> Ibid.
- <sup>xxii</sup> Ibid.
- <sup>xxiii</sup> Ibid.
- <sup>xxiv</sup> Ibid.
- <sup>xxv</sup> Ibid.
- <sup>xxvi</sup> Ibid.

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**SECTION B: INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICES AND ELECTRONIC COMMUNICATIONS NETWORK SERVICES.****1. PURPOSE**

The purpose of Part B of this consultation is to seek input from stakeholders on issues which should be considered for the formulation of ownership and control regulations pertaining to individual ECS and ECNS.

The Independent Communications Authority of South Africa's ("the Authority") statutory mandate requires it to regulate electronic communications in the public interest. Accordingly, in order to achieve this mandate the Authority is empowered by section 4(3)(k) of the ICASA Act to make regulations on empowerment requirements in terms of the BBBEE Act, 2003 (Act 53 of 2003)". Further, section 13 of the ECA enables the Authority, to set a limit on or restrict the ownership or control of individual licensees within the electronic communications sector in order to advance ownership by historically disadvantaged persons and competition as indicated earlier.

In prescribing the regulations on ownership and control the Authority would be guided by the following policy objectives, namely the need to:

- promote the ownership and control of electronic communications services by historically disadvantaged groups;
- promote competition within the ICT sector;
- promote the empowerment of historically disadvantaged groups, including black people, with particular attention to the needs of women, opportunities for the youth and challenges for people with disabilities;
- encourage investment in the electronic communications sector; and
- develop and promote the SMME's and cooperatives

**2. BACKGROUND**

2.1 Historically legislative provisions relating to electronic communications services (ECS) and electronic communications network services (ECNS) can

be located in the Telecommunications Act, 1996 (Act 102 Of 1996) or TA which sought to:

- 2.1.1.1 the encourage ownership and control of telecommunications services by persons from historically disadvantaged groups;
  - 2.1.1.2 promote small, medium and micro-enterprises within the telecommunications industry;
  - 2.1.1.3 promote and advance women in the telecommunications industry
- 2.1.2 The Minister of Communications published the First Ownership and Control Regulations in 2002. These First Ownership and Control Regulations were published in terms of sections 96 and 52 of the TA. Section 96 of the TA empowered the Authority to make regulations in relation to "any matter which in terms of [the TA] shall or may be prescribed by regulation", as well as with regard to technical matters and matters of procedure or form. All such regulations were required to be approved and published in the Government Gazette by the Minister.

Section 52(1) of the TA provided that –

"The Authority may by regulation restrict or prohibit the ownership or control of or the holding of any financial or voting interest in –

- (a) a telecommunication service of any category or kind;
- (b) two or more telecommunication services of the same category or kind;
- (c) a telecommunication service of one category or kind and another telecommunication service of a different category or kind".

The First Ownership and Control Regulations provided, amongst other things, that the Authority's prior written approval was required for the transfer of any "ownership interest or control interest in a licensee" where the transfer resulted in (i) an effective change of the control interest or ownership interest in the licensee, (ii) an increase in the ownership interests or control interests held by foreign persons or (iii) a decrease in the ownership interests or control interests held by historically disadvantaged persons ("HDPs"). An "ownership

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interest” was defined as “any direct or indirect ownership of equity shareholding of more than 1,5 per cent in a licensee”, while a “control interest” was defined as referring to a situation where a person –

- (a) directly or indirectly beneficially owns more than twenty five percent of the issued share capital of the licensee; and/or
- (b) is entitled to vote more than twenty five percent of 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 a controlled entity of the licensee; and/or
- (c) is able to appoint or veto the appointment of a majority of the directors of the licensee; and/or
- (d) is a holding company and the licensee is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act [61 of 1973]; and/or
- (e) in the case where the licensee is a trust, has the ability to vote more than twenty five percent of votes that may be cast at a general meeting of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust; and/or
- (f) in the case of a close corporation, owns more than twenty five percent of the member's interest, or controls directly or has the right to control more than twenty five percent of the members votes in the close corporation; and/or
- (g) has the ability to materially influence the policy of the licensee in a manner comparable to a person who in the ordinary commercial

practice can exercise an element of control referred to in paragraphs (a) to (f)".

The First Ownership and Control Regulations were repealed in 2003, when the Ownership and Control Regulations were promulgated. Subject to the discussion below, these Ownership and Control Regulations remain in effect in terms of the ECA.

#### 2.1.3 The Ownership and Control Regulations provide that –

"No person who holds an ownership interest or control interest in a licensee in any telecommunication service category in a concentrated market, or an affiliate of such person, shall hold an ownership interest or control interest in another licensee in the same telecommunication service category".

Any transfer of shares which results in the breach of this provision is void.

A "concentrated market" is defined in the Ownership and Control Regulations as any telecommunication service category in which "there are fewer than five licensees" xxvi or which is determined by the Authority to be a concentrated market "after taking into consideration the intensity of competition among the operators in any particular market".

In terms of regulations 4 and 5, the Authority's approval was required where the transfer results in a transfer control interest in the licensee or a decrease in the ownership interest held by HDP's within the first two years of being issued with the licence. However, licensees trading on the JSE Stock Exchange or internationally recognised securities exchange, licensees who operated in a market which was not concentrated, and licensees whose ownership or control interest is held by the government were exempted from the latter obligation.

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### **3. LEGISLATIVE FRAMEWORK**

The legislative framework is guided by the ECA, ICASA and the BBEEE ACT.

#### **(i) The ECA**

Section 2(h) of the ECA states that the primary object of the Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to "promote the empowerment of historically disadvantaged persons, including black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities". In order to achieve this section 13(3) of the ECA empowers the Authority to prescribe regulations that sets out to limit or restrict the ownership or control of individual licences.

The Act also entrenches a 30% equity ownership by HDP's in prospective licensees.

#### **(ii) The ICASA Act**

Section 4(3)(k) of the ICASA Act states that "the Authority may make regulations on empowerment requirements in terms of the Broad Based Black Economic Empowerment Act, 2003 (Act 53 of 2003)".

#### **(iii) The Broad Based Black Economic Empowerment Act , 53 of 2000 (BBBEE Act)**

The BBBEE Act aims to promote and facilitate broad based black economic empowerment. It seeks to:

- promote access to finance for black economic empowerment;
- achieve a substantial change in the racial composition of ownership and management structures;
- promote investment programmes that lead to broad-based and meaningful participation into the mainstream economy.

Importantly, the Act defines broad-based black economic empowerment in terms of the economic empowerment all black people including women,

workers, youth, people with disabilities and people living in rural areas through diverse economic strategies that include but are not limited to:

- Increasing the number of black people that manage, own and control enterprises and productive assets;
- Facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
- Investment in enterprises that are owned by black people.

Section 2 of the BBBEE seeks to ensure meaningful participation of black people into the mainstream economy of South Africa and an increase in the extent to which black women own and manage existing and new enterprises.

Section 9 of the BBBEE Act empowers the Minister of Trade and Industry to issue codes of good practice on black economic empowerment. The purposes of the codes are, amongst other things, to provide further interpretation and definitions of broad based black economic empowerment of different categories of black empowerment entities and to provide guidelines for those seeking to formulate transformation charters for their respective sectors.

The ICT sector has developed its own draft empowerment charter ("the ICT charter") in order to govern black economic empowerment. Although the charter is not legally binding it represents a commitment by the ICT sector towards accelerating broad based black economic empowerment and serves as a guide that is instrumental in achieving black economic empowerment in different sectors of the ICT.

#### (iv) Vans Regulations

The regulation imposes a 30% equity ownership by HDP's. Licensees were required to at least achieve a 15% limitation in the first year and the remainder in the second year.

### 4. RESEARCH

#### 4.1 International Benchmarking On Electronic Communications Services and Electronic Communications Network Services.

Whilst the ECA imposes foreign ownership restrictions on broadcasting services it is silent on foreign ownership restrictions on ECS and ECNS.

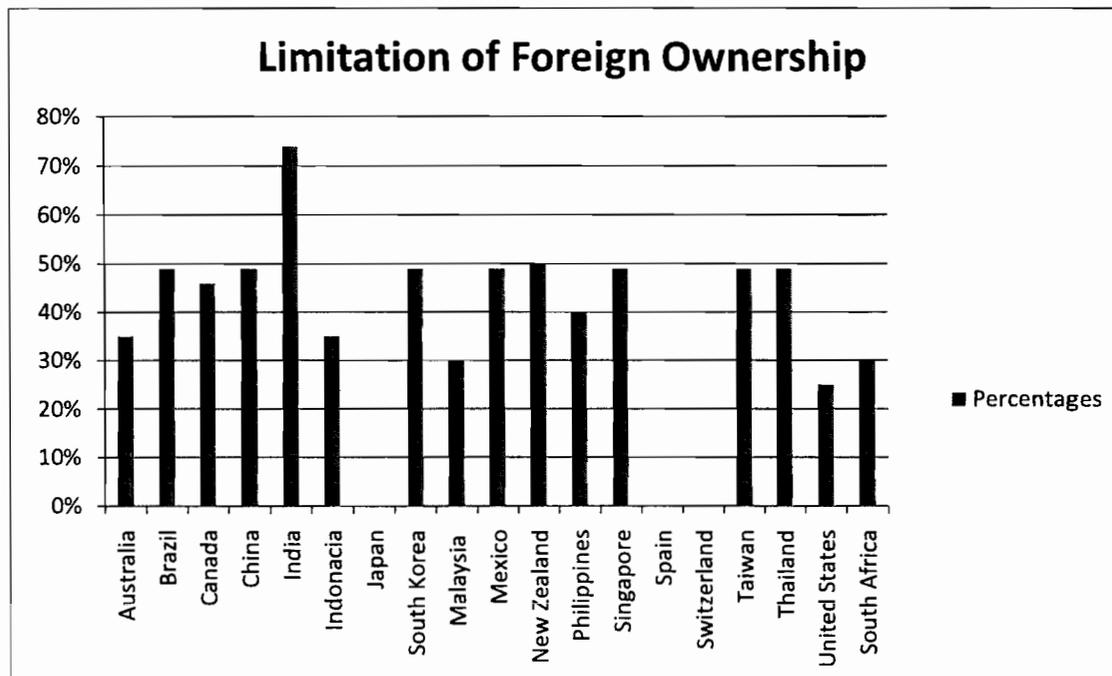
The Authority conducted a study on the foreign ownership and control restrictions of the following countries: Australia, Brazil, Canada, China, India, Indonesia, Japan, Malaysia, Mexico, South Korea, Singapore, United States and Taiwan. Table C below provides a summary of the data collected.

**TABLE C**

Item	Countries	Foreign Limitations or Restrictions	Reasons
1.	Australia	35% limit on total foreign ownership  5% limit on individual foreign ownership	Prior approval is required for foreign involvement in the establishment of new entrants to, or investment in the telecommunications sector
2.	Brazil	49%	According to federal Decree Law No. 2.617 of July 1998, public telecommunications services must be majority owned by Brazilian entities.

3.	Canada	46%	<p>The 46% limit is in respect of foreigners' voting shares of a telecommunication common carrier, including both direct holdings and indirect holdings through a holding company.</p> <p>20% limit of voting shares in facilities based carrier with 80% of board required to be Canadian citizens.</p>
4.	China	49%	Up to 50% limit for value-added services
5.	India	74%	The remaining 26% is owned by Indian citizens or companies.
6.	Indonesia	35%	
7.	Japan	0%	No restrictions on individuals and corporations investing in the incumbent PTO(s) in Japan.
8.	South Korea	49%	<p>Foreigners cannot hold more than 49% of a share issued by a facilities-based operator in Korea</p> <p>This also apply to foreign governments, foreign/domestic corporations with over 15% of its stock held by a foreign government or foreigner</p>
9.	Malaysia	30%	However permits >50% on condition that it is reduced after 3 years.
10.	Mexico	49%	The limitation applies except for cellular telephony services where permission is required from the Commission of Foreign investment for a greater level of foreign participation.

11.	New Zealand	49.9%	The limitation is in respect on Telecom New Zealand.  No restrictions on other operators.
12.	Philippines	40%	
13.	Singapore	49%	The limitation is in respect of facilities-based operators
14.	Spain	-	The right to operate networks and provide electronic communications services is reserved to residents of the European Union member states and foreign nationals when provided for by international agreements where Spain is a signatory party.  The government may provide exceptions to the rule for all other natural and legal persons.
15.	Switzerland	0%	Government is required to retain majority shareholding in Swisscom.
16.	Taiwan	49%	
17.	Thailand	49%	
18.	United States	20% directly 25% indirectly	The limitations are in relation to a US broadcast, common carrier, or aeronautical radio station.  FCC may allow higher level of indirect ownership unless it is not in the public interest.
19.	South Africa	30% limit on ownership by HDG's	There is currently no limitations on the ownership or control of Telecommunications(ECS and ECNS)



The graph above shows that many countries have an average foreign ownership limitation of 43%. Our study shows where foreign ownership restrictions were reduced other measures were incorporated to protect public interest considerations as in the case of India.

India in fact recently raised the foreign direct investment limit in the telecommunications sector from 49 per cent to 74 per cent in order to attract more investment in the sector. It immediately imposed various conditions on foreign investment to address national concerns which limit the impact of the changes.

These conditions include:

- (i) the majority of the Board of Directors, including the Chairman, Managing Director and Chief Executive Officer, must be resident Indian citizens;
- (ii) (ii) at least one resident Indian promoter must hold 10 per cent equity in any telecommunications company;
- (iii) (iii) the Chief Technical Officer and Chief Financial Officer must be resident Indian citizens;

- (iv) no sensitive information relating to subscribers and accounts can be transferred outside India; and (v) the identity of subscribers must be traceable at all times.

When considering restrictions of foreign ownership countries consider foreign direct investment, its advantages and disadvantages. These are briefly summarised as follows:

1. Foreign investment potentially brings superior technologies to developing countries;
2. It also leads to employment opportunities and growth of investments; the two factors that are important to economic viability of a country;
3. Foreign investment potentially encourages competition;
4. Foreign investment can help in bridging a host country's foreign exchange gap. In most cases investment requires imported inputs (e.g. services or human capital). Capital inflows from foreign investment ensures that foreign exchange will be available to purchase imports for investment in developing countries like South Africa;
5. Foreign investment is not necessarily commensurate with skills transfers;
6. Foreign investment needs imported inputs and this may not always be of benefit to the host country. This importation of inputs (services and human capital) may result in capital flight, profit repatriation etc.

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#### **4.2 Research on the South African ICT Market**

The Authority commissioned a market study on listed companies.

The market study revealed challenges in gathering information. In terms of the study "it is quite evident that companies generally do not have readily available, up-to-date and complete information on their respective BEE ownership. All of them could not or were reluctant to drill down to the actual individual natural persons owning the BEE equity. Only one company, at best, managed to give a breakdown of BEE ownership in terms of numbers of males, females, trusts and juristic persons."

Non-probability or quota sampling was used by ICASA to select the 6 JSE listed companies to be interviewed. The main limitation of the methodology used is that the process involved extensive telephoning, e-mailing and travelling. In addition, it was difficult to access both the chosen organization and the right level of person who would be able to give invaluable insight. On several occasions, ICASA had to be requested to intervene to get the respondents to fully cooperate. Despite this intervention, the revelation of persons behind the BEE ownership was not achieved.

The Authority's practice has been to specify, in broadcasting licensees' licence conditions, the names of its shareholders and their respective percentage shareholdings. The purpose of this practice is to ensure that control over a licensee and the percentage of shares held by historically disadvantaged persons in the licensee's issued share capital is not reduced without the Authority's prior approval.

The Authority has experienced challenges with regard to information on licensees' shareholding structure and their respective percentages. Some licensees have produced accurate information whereas some submitted less or no information.

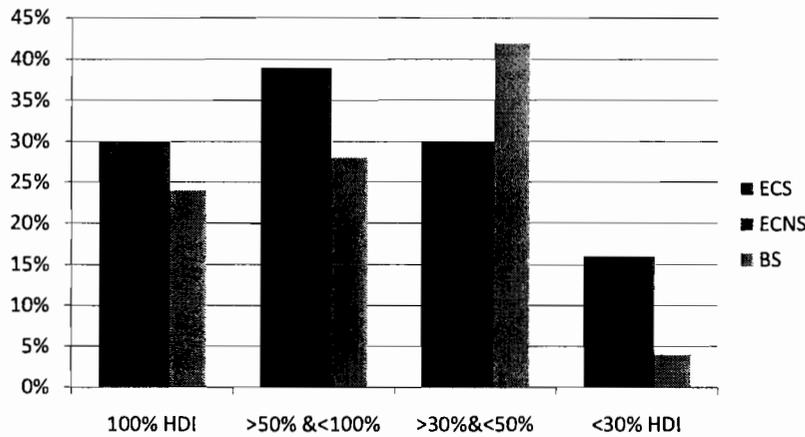
Nevertheless, in a separate internal study the authority sought to understand the shareholding profiles of individual ECS and ECNS licensees. The data is sourced from the annual submissions made by licensees and submissions made in terms of the licence conversion process. The majority of licensees failed to cooperate with the Authority in this regards (see Appendix C). Nevertheless, Table D below presents the summary of data collected.

HDI	ECS	ECNS	BS
100% HDI	30%	30%	24.00%
>50% & <100%	39%	39%	28%
>30% & <50%	30%	30%	42%
<30% HDI	16%	16%	4%

Table D

The graphical representation is as follows:

### Summary



From the above we can conclude that most Individual ECS and ECNS licensees have HDG shareholding that exceeds the 30% threshold presented in the ECA. This can be attributed to the fact that a large number of Vans who were converted to individual licensees were required to acquire 30% HDG/HDI shareholding in terms of their licence conditions/regulations.

## 5. DISCUSSION AND QUESTIONS FOR CONSULTATION

5.1 When formulating ownership and control regulations under the ECA the Authority needs to address the following issues:

5.1.1 How should the Authority deal with instances of transfer of control interest that takes place in small proportions of 5% over an extended period of more than five years? Should the Authority's approval still be required in such instances or would such transfer be deemed null and void on the basis that it amount to the transfer of a control interest?

5.1.2 How do we strike a balance between sections 2(d), (f) and (y) on the one hand and 2(h) and (p) on the other hand of the ECA? Can we reconcile these two policy objectives so that the need to empower HDI's and the need to ensure that regulatory measures developed by the Authority do not serve as a barrier to entry?

- (i) The BBBEE makes reference to "black people", whilst the ECA relates to "historically disadvantaged persons or groups" {See Section 2 (h) which articulates the primary objects of the Act and 9(2)(b) of the ECA.} Are these two concepts reconcilable?
- (ii) Section 9 (2) (b) allows the Authority to include the minimum percentage of equity ownership to be held by persons from historically disadvantaged groups who are applying for an individual licence. Should the envisaged ownership regulations adopt the same threshold?
- (iii) Whilst the term equity is not defined in the ECA, Section 10(a) of the Broad-Based Black Economic Empowerment Act 53 of 2003 ("the BBBEE Act") provides that "*Every organ of state and public entity must take into account and, as far as is reasonable possible, apply any relevant code of good practice issued in terms of this Act in determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law*". The codes are issued in terms of section 9 of the BBBEE Act. In terms thereof, clause 3.8 in Code 100 defines equity as follows:

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*“Equity, in relation to any form of enterprise, means the capital invested in that enterprise in respect of which the members have a claim against the enterprise or against the other members of that enterprise by reason of holding an equity interest. Analogous terms and concepts include, but are not limited to:*

- issued share capital in a company limited by shareholding or share capital in a co-operative society;
- the total of members’ interests in a close corporation; and
- the total interest of all the partners in a partnership”.

Is this definition helpful in the context of the ownership and control framework? If not, can you provide an alternative?

- (iv) How could the Authority better promote the ownership and control of electronic communications services by historically disadvantaged groups in listed companies?
- (v) Are the issues regulated in the limitation of ownership and control of telecommunications services in terms of section 52, 16 January 2003 (Notice R105, Government Gazette 24288 of 2003) still relevant under the Electronic communications Act, 2005 (Act 36 of 2005) (“The Act”)? What improvements, if any can be made to the 2003 ownership and control regulation?
- (vi) How could the Authority strike a balance between the need to promote the empowerment of historically disadvantaged persons on the one hand and the need to promote competition and encourage investment on the other hand? Are the two necessarily mutually exclusive?
- (vii) Do the provisions of the Act empower the Authority to prescribe regulations on foreign limitations in individual ECS and ECNS licences?
- (viii) Should the Authority regulate foreign ownership for electronic communications? If so to what extend?
- (ix) In regulating ownership and control for electronic communications what percentage should be allocated towards black people, black women, black youth and black disabled people? Should a score card be used?

- (x) Are restrictions and limitations on cross licence ownership relevant for electronic communications? If yes, to what extent and what measures should be put into place to ensure that convergence is encouraged in the process?
- (xi) To what extent should the Authority restrict the transfer of ownership and control interest in a licence?
- (xii) What factors should be considered in prescribing a limitation on ownership and control of an individual licence by foreign investors?
- (xiii) What is the effect of ownership limitation and restrictions on foreign investment? Can lessons be learnt from the broadcasting sector and should we be guided by limitations imposed in other countries?
- (xiv) What mechanism can be brought in place to ensure that existing licensees comply with the suggested limitation of equity ownership? What measures should be introduced to ensure that BBBEE is not diluted? In other sectors a lock-in period is used, how long should the lock-in period be, if any?
- (xv) What are the limitations to ensuring that electronic communication services and networks are controlled by South Africans?
- (xvi) Is it practical and desirable for the regulations or targets to be identical across each sub – sector (ECS vs. BS)?

## 6. Bibliography

- 1) Research Note: Organisation for Economic Cooperation and Development Communications Outlook 2003- <http://www.aph.gov.au/library>
- 2) Asian Development Outlook 2004 part 3 of the Foreign Direct Investment in Developing Asia
- 3) <http://www.ictregulationtoolkit.org/en/PracticeNote.2551.html>

## 7. APPENDIX A : RESULTS OF INTERVIEWS CONDUCTED WITH LISTED COMPANIES

There was a fair amount of convergence of responses to this issue with the common theme being that BEE is not yet comprehensive enough. Responses were along the following lines.

- *"BEE is not comprehensive enough... There is still a lot that needs to be done in terms of BEE ownership and more importantly, control..."*
- *"The broadcasting sector has been one of the sectors which actually pioneered BEE with early transactions involving the sale of the six SABC regional radio stations.... It is imperative though that when we examine state of BEE in the sector, we do not fall into the dangerous trap of confining focus on BEE to equity... It will never be possible to determine the exact status of BEE in the sector without looking in-depth at the elements reflected in the balanced scorecard."*
- *"The sector is not yet transformed....."*
- *"The commercial radio sector has made great strides in incorporating BEE as part of its business strategies.... However, transformation within some stations is lacking..."*
- *"Companies are generally fully committed to all the elements of BEE and not just the equity ownership..."*

### 7.1 What needs to be done for the Sector to realize its full BEE potential?

There is a strong perception that the regulations need to be unpacked, with the intention of making those regulations and rules uniform for each sub-sector. Currently, the rules are not the same, being on a personal to holder basis driven by concomitant promises of performance. This naturally makes monitoring difficult thereby creating opportunities for fashioning smoke and mirrors about BEE compliance.

Some of the responses were as follows:

- *"The Regulator must ensure that all are subject to the same rules of the game, the Regulator needs to guard against a situation where in some receive preferential treatment at the expense of others. There must be no contradiction in the operations and approach in the work of the Authority. Unfortunately we have witnessed some concerning developments in this regard."*
- *"The regulatory regime must be able to offer clear, coherent and aligned regulations that are designed to grow the sector, and enable the sector to make the necessary contributions to the economy."*

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- *“Government has to enforce that up to 30% of the shareholding be effectively owned by blacks on a perpetual basis – similar to the Infraco / Pay TV license conditions. There has to be a lock-in period of at least 5 years, and thereafter, the shares can be sold but only to other blacks... Government also needs to effectively facilitate BEE transactions through well structured, low interest debt instruments using vehicles like IDC & NEF (as happened with the MTN BEE deal).”*
  - *“The eventual finalization of the ICT Charter will play a critical role in moving BEE forward in this sector”*
  - *“The conflicts between various regulations dealing with the same subject matter need to be eliminated by reducing and streamlining regulation. It would be helpful if the various government departments and institutions would work together toward a single solution... which reflects a true understanding of the “risk” component of equity ownership...”*

It was also noted that to fully realize its BEE potential, the sector and its regulators should adopt and embrace the balanced scorecard approach as it incorporates all the elements that are necessary to ensure real empowerment.

The sector Charter is said to have a critical role to play for the sector to realize its full BEE potential. There actually is a huge concern that the Charter might fail to be gazetted as some of the earlier proponents of the Charter are now attempting to abandon ship. There is therefore a view that ICASA, as the Regulator has to intervene in order to ensure that the invaluable work that has been produced by the ICT Charter Working Group does not go to waste. That work, it would seem, is too important to neglect and, too urgent to further delay.

## **7.2 Does BEE compliance add value to the business?**

The general consensus was that BEE, in itself, does not create value per se. It is however a critical component of the transformation process, including bridging the digital divide, and has to be fully embraced. What actually adds or creates value in the business is the licence granted by ICASA and therein lays the key driver for effective and sustainable BEE ownership and control.

Another view was that:

*“Within the sector, BEE at ownership level is not critical to maximizing value. Staff ownership schemes would be more beneficial, as they would lead to greater loyalty and pride in the sector. This would have a natural spin-off for shareholder-value”*

One respondent had a slightly different take:

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*"Implementing a Broad Based BEE strategy, and not just BEE equity ownership, does assist, not only in maximizing shareholder value but also in practicing good corporate governance..."*

### **7.3 What would be the optimum BEE equity shareholding %?**

There were varied responses with one saying that 50% would be ideal as this would ensure actual control as defined from a commercial perspective – Companies Act, IFRS, etc. However, funding such a huge shareholding would obviously be a challenge. Should that be the case, the percentage of equity shareholding could be reduced as long as effective control is not compromised, possibly using negative control instruments like shareholders agreements and special class shares.

Another respondent was of the view that a minimum of 25% black ownership, in line with the DTI Codes of Good Practise would be ideal as that creates congruence with a target already in place.

Two favoured a 30% black ownership to create the critical mass to ensure effective control and/or make ownership accessible to broad based groups and the smaller BEE investors:

*"BEE equity ownership should be accompanied by commensurate control of the enterprises, as well as efficient implementation of the other 6 BBBEE elements."*

There was also a divergent view advocating for an absolute value of BEE ownership rather than a % ownership, given the widely different sizes, structures and strategies of the companies operating in the ICT sector.

Two respondents noted that the skewed focus on equity ownership is misplaced as there is need to look at the whole basket represented by the balanced scorecard. Apparently, such an approach has been endorsed by trade unions over and over again.

It was further noted that, of critical importance is the need to capture whatever the BEE ownership and control requirements are, in a concise, easy-to-monitor way in the value creator, as in the licence.

### **7.4 As a JSE listed company, how do you ensure the BEE equity shareholding and concomitant control is not diluted?**

The general sentiment amongst respondents was that it is very difficult to establish the true BEE equity ownership component in the first place, let alone monitor it, as shares are continuously changing hands:

- *"Currently there is no mechanism in place to ensure non dilution neither is there a sector wide mechanism..... The draft ICT Charter does seem, however, to make provision for such a mechanism..."*
- *"Dilution of shareholding is a natural phenomenon of business, particularly in the listed companies."*
  
- *"It is extremely challenging to keep BEE equity stakes in for a sustained period and not allow dilution from the very specific structures put in place... Due to the lack of transparency on the JSE systems of any ownership it is impossible to keep consistent a BEE ownership level that is recognised..."*

Even genuinely empowered companies like Kagiso are not yet in a position to drill down through the flow through principle, to the ultimate individual historically disadvantaged person owning an interest.

Some interviewees noted that the one practical way of ensuring the target BEE ownership and control is maintained all the time is through annual licence renewals, with the onus being on licensees to prove beyond reasonable doubt that BEE ownership and control targets as per the licence were met and remain in place. The Authority could design an effective but user friendly template for assessing compliance in this regard.

A counter suggestion was that of the concept of "once empowered always empowered". This would mean that an entity that has successfully completed an empowerment deal should continue to be regarded as empowered when its empowerment partners want to sell their investment. Such a flexible approach would in effect address the unfortunate reality that BEE can at times "punish" the very same investors whom it is meant to empower by ultimately forcing them to sell to other black shareholders at a discount.

**7.5 Current status of BEE ownership and control in your company.**

Although extremely difficult to individually identify all natural persons benefitting from BEE ownership, the interviewees advised as follows:

**Effective Ownership and Control (based on latest available statistics)**

Company	Effective BEE Ownership Actual	Effective BEE Ownership Target	Effective BEE Control

KG MEDIA	47.8%	n/a	33 % (3) of the Board members are black, i.e. Deputy Chairman, CEO & a female non exec Director.
Multichoice (NASPERS)	33.33%	n/a	Multichoice has an 11 member management team with (45%) 5 blacks - CEO, COO & 3 GM's.
TELKOM	62.00% (SA Govt-39.8%; PIC-15.6%; Elephant Consortium-6.6%)	Currently working on a BBBEE ownership strategy	50% of Board Directors are black. 66% of top management is black.
MTN (at Group level)	Was 13.06% before unwinding scheme in 2008 – now working on a 6% scheme	Currently working on the 6% scheme & other BBBEE ownership schemes planned for the future	At MTN Group level, black Chairman, CEO & COO in an 11 member Board with a total of (36%) 4 black Directors. At MTN SA, there are no black Executive Directors.
AME	2.16%	30%	50% of directors are black, with black female directors at 17%. There are no black people in the Executive Management of AME.
ALTECH	??	??	??

**Note: ?? = Information not supplied, and Black = African**

From the above table, it is evident that companies generally do not have readily available, up-to-date and complete information on their respective BEE ownership. All of them could not or were reluctant to drill down to the actual individual natural persons owning the BEE equity.

Only one company, at best, managed to give a breakdown of BEE ownership in terms of numbers of males, females, trusts and juristic persons.

There appears to be some measure of BEE control, given that 30% + of Board members are black. However, executive management in some companies lacks the 'transformation' complexion.

**7.6 How can ICASA best ensure that BEE equity shareholding and control is not diluted in applicable JSE listed companies?**

The majority of respondents were unanimous that the answer lies in the licensing requirements, regularly monitoring those requirements and, taking effective remedial action where need be:

*"Current ICASA criteria specify percentages of BEE ownership and control in licences. This appears to be a sufficient mechanism to deal with this issue".*

*"Percentages are prescribed in license conditions, and get monitored via stations' annual reports to ICASA and also during license renewal application processes. Companies need to have their own mechanisms in place to ensure that dilution does not take place, whilst ICASA should monitor....."*

To achieve the above, the regulations should be simple to implement and, monitor. As far as it is practical, the regulations or targets should be the same for each sub – sector.

One respondent summed it up as follows:

*"Stipulate the % BEE shareholding; lock in the resultant BEE shareholders for 5 to 10 years, with a proviso to only sell to other blacks; and strictly enforce compliance thereof."*

It was also noted that ICASA should actively engage the JSE to make the Exchange truly accessible to all South Africans, especially blacks, as part of the empowerment drive:

*"Minority shareholding, as per JSE rules, should be reserved for blacks through lobbying the JSE. Furthermore, most blacks do not understand how the JSE works and are not aware of its immense potential to create wealth for them. There is therefore a need for ICASA, as part of the annual educational drives that they undertake to educate South Africans in this regard."*

Two respondents were, however, of the view that if ICASA delves into controlling shareholding in listed entities, this might have the unintended consequences of adversely impacting on the tradability of shares and the possibility of a reduction in the share price. The focus, in their view, should be on the broader balanced scorecard and not just BEE ownership.

#### **7.7 Any other comments on BEE equity shareholding and control within the sector?**

- *"The definition of black being used for BEE needs to be reviewed, especially in the context of employment equity at management and skilled levels. Some organisations are compliant as result of employing Coloureds and Indians with hardly any black Africans in meaningful positions."*
- *"There is still an untapped market for new radio licences. Although there are approximately 100 radio licences issued in the country, of which about 40 are in Gauteng, very few licensees are actually delivering on their promises and truly serving their targeted markets. Maybe only 10 or so radio licensees can be said to be viable on a sustainable basis."*
- *"Control is not synonymous with equity ownership as there could be other variables that can affect the former. A case in point is a situation where the BEE ownership could be as high as 35% but the effective control might be with shareholders owning the other 40%, assuming the remaining 25% is owned by the public at large."*
- *"The focus on equity ownership as opposed to the balanced scorecard is an unfortunate point of departure and ICASA needs to relook that."*
- *"Virtually all the large BEE deals involve the same elite –there should be new black participants, especially ordinary women, youths and people from the rural areas, if genuine black empowerment is to be achieved".*
- *"Government could further reduce its shareholding in state enterprises like Telkom, Transnet and Eskom by selling to BBBEE groups, thus empowering the historically disadvantaged in a more meaningful and inclusive way".*

The aforementioned suggests that more could be done to deepen and broaden BEE to make it truly broad based and transparent.

#### **7.8 Relating the Findings and Analysis to the Research Topic**

The empirical research has revealed the current state of BEE in licensed JSE listed companies through bringing out key issues and resultant themes from the interviews conducted. This current state was, in turn, analysed in the context of the prevailing regulatory

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regime for the ICT sector. What then came out is that the current regulatory regime does have some shortcomings, the majority of which could be resolved by streamlining and harmonizing the existing legislation, regulations and directives. Furthermore, new 'smart' regulations would need to be introduced to specifically address the research objectives. Thereafter, robust monitoring for compliance will have to be instituted and that way, ownership and control by HDG's would be preserved at the prescribed levels on a perpetual basis. The actual licence would be the primary instrument to enjoin the licensee to comply.

### 7.9 Outcome of the Research

From analysing and discussing the findings the salient issues are:

- The ICT sector is generally committed to BEE and great strides have been made in embracing it. However, a lot more still needs to be done to fully transform the sector, with the focus being on all elements of BBEE, including the subject matter of ownership and control.
- For the sector to realize its full BEE potential, regulations should be streamlined and harmonized. This would, in turn, create an effective, consistent, clear and coherent regulatory framework. With such a framework, coupled with a congruous (gazetted) ICT Charter and, a balanced scorecard approach, the full BEE potential can be realized.
- In terms of maximizing stakeholder value, BEE is not that critical per se though it definitely is a transformation imperative and a business necessity. What really creates value for the business is the licence granted by ICASA, making that licence the ideal instrument for effectively regulating the sector.
- There is no consensus on what the optimum BEE ownership % should be although a crude statistical mode suggests 30%. Responses ranged from one extreme of non stipulation of a % in preference of the balanced scorecard approach to another extreme of 50%, all with their plausible justifications. There is however a general agreement that BEE ownership should be accompanied by commensurate control at Board and executive management level.
- Actual BEE equity ownership in JSE listed companies is extremely difficult to establish, let alone monitor to ensure non-dilution. Advocators of monitoring suggest that the onus to prove BEE ownership and control should be on the licensees. Those against prefer the concept of "once empowered, always empowered". It will be necessary to ensure that this important debate on monitoring dilution does not end up being debased to a simple binary campaign for or against.
- BEE ownership details are sketchy – there was no drill down to the individual natural persons behind the respective BEE ownerships.

**8. APPENDIX B: ECS LICENSEES' PROFILE OF HISTORICALLY DISADVANTAGED GROUPS**

1	NAME OF LICENSEE & HDI SHAREHOLDING	LESS 30%	30% PLUS	50% PLUS	@ 100%	Wholly Owned by the State
2	Benwest Internet Service (Pty)Ltd		37.50%			
3	Black Star Networks				100%	
4	Bloomberg Value-added Network Service SA		30%			
5	Bowin Information Technology Services				100%	
6	Broadband Innovations (Pty) Ltd		31%			
7	BT Communcations SA (Pty) Ltd		30%			
8	BNR Consulting CC	28.75%				
9	Breedenet CC	22%				
10	Business Connexion (Pty) Ltd	20%				
11	Banzinet (Pty) Lts			65%		
12	Bytes Systems Integration (Pty) Ltd	27%				
13	Cell C (Pty)Ltd	25%				
14	CMC Networks (Pty) Ltd	26%				
15	Connect First Telecomms (Pty) Ltd	28%				
16	Cheap Calls CC				100%	
17	China Times CC				100%	
18	City of Johannesburg					100%
19	City of Tshwane					100%
20	Comit Technologies		30%			
21	Connection Telecom (Pty) LTD			51%		
22	Crazyweb Tech CC		30%			

23	CSE (Pty) Ltd			50%		
24	Cyberdine Secure Internet				100%	
25	CyberSmart (Pty) Ltd		30%			
26	Data Mobility Technology Solutions (Pty)Ltd				100%	
27	Datapro (Pty) Ltd		47.16%			
28	Dial Telecoms CC		41.17%			
29	Digital Broadband International Holdings		30%			
30	Dira Ka Thata Computers (Pty) Ltd	25%				
31	Digital Dynamix CC			50%		
32	Dream Cellular Company (Pty) Ltd	12.82				
33	East Coast Access (Pty) Ltd				100%	
34	Easycoms Communications		30%			
35	Erum Import & Export CC				100%	
36	ECN Telecommunications (Pty) Ltd		37.08%			
37	EL Online CC			60%		
38	Emid (Pty) Ltd			70%		
39	Enyuka Internet Access CC		31%			
40	eTube Data and TV Transmission (Pty) Ltd		30%			
41	eNetworks CC	15%				
42	Ensync Network Solutions (Pty) Ltd	20%				
43	FFG Connection CC			50%		
44	First Technology (Pty) Ltd			53.23%		
45	Fixtrade 1641 CC		41%			
46	Fleetcall (Pty) Ltd				100%	
47	Fone (Pty) Ltd		42%			

48	Framework Plus (Pty) Ltd		35%			
49	Free Space Optics International (Pty) Ltd				100%	
50	Frogfoot Networks (Pty) Ltd		30%			
51	Fujitsu Services (Pty) Ltd		30%			
52	Finant 24 (Pty) Ltd	24%				
53	Gamsol (Pty) Ltd		30%			
54	Gateway Communications (Pty) Ltd		31%			
55	GijimaAst Holdings (Pty) Ltd			45%		
56	Goal Technology Solutions (Pty) Ltd		37.40%			
57	Green Flash Trading 72 (Pty) Ltd		30%			
58	GS Telecom (Pty) Ltd		31%	50%		
59	GVSA Communications (Pty) Ltd					
60	High Speed Africa			90%		
61	Hux IT Consortium (Pty) Ltd				100%	
62	Ibanza Internet Solutions (Pty) Ltd		30%			
63	ICT Globe Management (Pty) Ltd			52%		
64	ICT Works (Pty) Ltd			96%		
65	Infosat (Pty) Ltd					100%
66	Infovan Proprietary (Pty) Ltd		30%			
67	iSpace (Pty) Ltd			95%		
68	Integrat (Pty) Ltd	24%				
69	Internet Solutions (Pty) Ltd	25.01%				
70	Interexcel World Connection	20%				
71	JC Broadband Services				100%	
72	Julia Hope				100%	
73	Kaltrade 470 (Pty) Ltd		30%			

74	Kingsley Technologies (Pty) Ltd				100%	
75	Lakeshore Trading 224 (Pty) Ltd			50%		
76	Lasernet (Pty) Ltd	22%				
77	LPD Consulting CC			66%		
78	Logali Investments CC				100%	
79	Liveweb (Pty) Ltd				100%	
80	Limpopo Information Technologies CC				100%	
81	Maberekise IT CC				100%	
82	Macrolan CC		35%			
83	Majuba Technologies (Pty) Ltd				100%	
84	Makeshift 1146 (Pty) Ltd		30%			
85	Maruping Wirelss Communications (Pty) Ltd				100%	
86	Mbhuri Investment (Pty) Ltd				100%	
87	Masakhe Technologies (Pty) Ltd	26.50%				
88	Max Internet Technolgies CC	15%				
89	Mexcop (Pty) Ltd	24%				
90	Micelangelo Technology (Pty) Ltd			51%		
91	Micropick Solutions CC				100%	
92	Mindspring Computing CC				100%	
93	Moody Blue Trade and Investfment 86		30%			
94	Moya Multimedia CC			90%		
95	Moya Telecom		36%			
96	MRX 56 Investment Holdings (Pty) Ltd				100%	
97	Mthinte Communications (Pty) Ltd				100%	
98	Multisource Telecoms (Pty) Ltd		39.60%			
99	Mzansi Lisetta Media and Printing				100%	

100	MYNEXT Mail				100%	
101	Neatcom Technologies CC				100%	
102	Neelana Communications				100%	
103	Neology (Pty) Ltd		38.30%			
104	Netsat Communications				100%	
105	Neotel (Pty) Ltd	19%				
106	New Age Holdings (Pty) Ltd				100%	
107	Nerox 147 CC		31%			
108	Next Generation Network Telecommunications			67%		
109	Nnako Project CC				100%	
110	Netvoip CC	15%				
111	Nyala Communications (Pty) Ltd	3.23%				
112	Offtake (Pty) Ltd			66%		
113	Openvoice Service Provider (Pty) Ltd		30%			
114	Orion Cellular (Pty) Ltd			61.75%		
115	Platformity CC				100%	
116	Platoon Trade and Inves 44 (Pty) Ltd			60%		
117	Pnetshop CC				100%	
118	Posix Systems CC		30%			
119	Pro Talk (Pty) Ltd				100%	
120	Pacset Telecoms (Pty) Ltd				100%	
121	Pan African Web Solutions			51%		
122	Pygma Investmnets CC	20%				
123	Quickstep 691		30%			
124	Radiospoor Welkom (Pty) Ltd		40%			
125	Rapid Link (Pty) Ltd		30%			
126	Skyrove (Pty) Ltd	18.15%				

127	Smile Telecoms SA (Pty) Ltd	21%				
128	Spescom Special Resources (Pty) Ltd	23.30%				
129	Standard Bank Group Limited	10%				
130	SA Digital		40%			
131	Sagateway Internet Service Provider			56%		
132	Sainet Internet CC			51%		
133	Salestalk 570 (Pty) Ltd				100%	
134	SBS Telecom JHB (Pty) Ltd			51%		
135	Screamer Telecommunications (Pty) Ltd			66%		
136	Shaida Gani				100%	
137	Shurprops 1012 CC				100%	
138	Sikhonathi Trading (Pty) Ltd				100%	
139	State Information Technology Agency					100%
140	Skygistics (Pty) Ltd			72%		
141	Smartel Communications				100%	
142	Smart village (Pty) Ltd		33%			
143	SMMT Online (Pty) Ltd				100%	
144	Spice Phone (Pty) Ltd		30%			
145	Storm Telecom (Pty) Ltd		47.16%			
146	Talknet Africa (Pty) Ltd			90%		
147	TalkWith Us (Pty) Ltd				100%	
148	Techno Fature 305 CC		35%			
149	Telkom SA Ltd	19%				
150	Tel-Net-Com Consulting (Pty) Ltd		32.50%			
151	Telestream Communications (Pty) Ltd			50%		

152	TelFree Communications (Pty) Ltd		40%			
153	Tertiary Education and Research				100%	
154	Trusc Technologies (Pty) Ltd			50%		
155	Twin Peak Technologies CC				100%	
156	Umzansi African Telecoms (Pty) Ltd		30%			
157	UniNet Communications (Pty) Ltd			77%		
158	Value City SA (Pty) Ltd				100%	
159	Verizon SA (Pty) Ltd		30.01%			
160	Vodacom (Pty) Ltd	6.25%				
161	WIFIZA Communications (Pty) Ltd			50%		
162	Wireless Business Solutions (Pty) Ltd			60%		
163	Wireless Dimension (Pty) Ltd		36%			
164	WNC IT Services				100%	
165	X-DSL Networking Solutions (Pty) Ltd	29.60%				
166	Advanced Online Systems (Pty) Ltd		30%			
167	Afro Call Satellite (Pty) Ltd			50%		
168	Airpark Beaufort West (Pty) Ltd			50%		
169	AL Cell				100%	
170	Alazon Connexion			60%		
171	Amobia Communications (Pty) Ltd			50%		
172	Annette de Beer				100%	
173	Arivia.kom (Pty) Ltd					100%
174	AT & T South Africa (Pty) Ltd		30%			
175	Xtranct Internet Services CC			50%		

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176	ZA Telecommunications Xtranet Internet Services CC				100%	
177	Zazu Internet Xtranet Internet Services CC		35%			
178	Zensho Telecoms Zazu Internet Xtranet Internet Services CC		32.50%			
179	Wave South Telecoms CC		49%			
180	Vox Telecom Limited		47.17%			

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