

Draft regulations on ownership and control in the communications sector

Following the release of its position paper in February 2019, the Independent Communications Authority of South Africa (Icasa) published its long-awaited draft regulations on ownership and control in the telecommunications and broadcasting sectors, for public comment, on Friday, 14 February 2020. The deadline for submissions on the draft regulations is 3 April 2020.

By [Livia Dyer](#) 20 Feb 2020



Image source: Getty Images

The draft regulations propose to set new broad-based black economic empowerment (BBBEE) ownership requirements over and above the targets that apply under the ICT Sector Code published in terms of the Broad-Based Black Economic Empowerment Act, 2003.

The draft regulations propose that licence applicants and licensees applying for approval to transfer, amend or renew an individual licence must be 30% owned by persons from historically disadvantaged groups (HDPs), which category includes but is not limited to Black people. Licence applicants must then also maintain 30% ownership by Black people and achieve level 4 BBBEE status. It appears that this requirement may apply to both applicants for individual licences and registrants for class licences, although this is an area that requires clarification.

Currently under the Electronic Communications Act, 2005 (ECA), and following the High Court's decision in *Telkom SA SOC Limited v Mncube NO* in 2016, HDP ownership requirements only apply to individual licence applicants (not class licence registrants), and where an individual licence is transferred, subject to "transfer of control", amended or renewed; there is no ongoing obligation to maintain a particular level of ownership by HDPs.

As contemplated in Icasa's position paper, the draft regulations now propose to impose a minimum ownership requirement that will apply for the whole licence term. The two separate proposed requirements relation to ownership by HDPs, on the one hand, and ownership by Black people on the other hand overlap

significantly, given that Black people are HDPs. The draft regulations also do not clearly address the application of the principles in the ICT Sector Code when a licensee determines its percentage Black ownership for the purposes of the regulations. The draft regulations provide for a 24-month transitional period to comply with the new requirements with 50% compliance needing be achieved in the first year.



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The regulations will also have significant implications for corporate activity in the communications sector. As currently drafted, a bright-line rule for the establishment of control will be set at 20% shareholding (in aggregate) at which a regulatory prior approval requirement will be triggered. Currently the requirement under the ECA is only that individual licensees must get Icasa's prior consent to transfer control of an individual licence, where control is not defined.

Given that the ECA does not stipulate the shareholding level at which control exists, control has until now been understood in its ordinary sense and typically in line with how control is understood for competition/ anti-trust purposes. By contrast, under the draft regulations the 20% bright-line rule will apply irrespective of whether the person acquiring the 20% interest has any ability to influence the operations of the licensee or not. If adopted, and because of the lower control threshold, the draft regulations could mean that Icasa's approval would be required even in situations where no approval was required for competition/ anti-trust purposes. As the approval process can be lengthy, this could result in significant delays in completing transactions in the communications sector.

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