



Independent Communications Authority of South Africa

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FINAL RECOMMENDATIONS TO THE MINISTER TO AMEND CERTAIN PROVISIONS OF THE INDEPENDENT BROADCASTING AUTHORITY ACT (Act No. 153 of 1993)

A. Background

On 13 January 2004 the Authority published the Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences ("the Position Paper"). On the same day the Authority published for written comment proposed amendments to the Independent Broadcasting Authority Act, 1993. Although the Authority was not required by the statute to publish these proposed amendments for comment, the Authority decided to allow the public and stakeholders the opportunity to help shape legislative proposals to the Minister and Parliament.

By 13 February 2004 the Authority received ten written submissions on the proposed amendments. These submissions have contributed to the Authority's final recommendations on the proposed legislative amendments. The Authority has also ensured that these final recommendations are all in line with the policy set out in the Position Paper.

Before the Authority sets out its recommendations to the Minister, we wish to clarify our definition of 'historically disadvantaged persons' – a definition which attracted comment in the submissions.

B. Definition of 'historically disadvantaged persons'

For the purposes of analysing ownership and empowerment issues with respect to broadcasting services, 'historically disadvantaged persons' are defined as follows:

"historically disadvantaged persons" means -

- (a) South African citizens who are black people, women or people with disabilities and that black people are defined to include 'Africans, Indians and Coloureds';*

- (b) *an association, a majority of whose members are natural persons referred to in regulation (a) above;*
- (c) *a juristic person other than an association, whereby natural persons referred to in regulations (a) and (b) have, directly or indirectly, more than twenty-five percent of such juristic person's issued share capital or members' interests and are able to control a majority of the juristic person's votes;*
- (d) *a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b) or (c) have, directly or indirectly, more than twenty-five percent of such juristic person's or association's issued share capital or member's interest and are able to control a majority of its votes;*
- (e) *a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b), (c) or (d) above possess the power to direct or cause the direction of the management and policies thereof whether through the direct or indirect ownership of issued share capital, by contract or otherwise.*

The Authority will also be guided by any Code of Practice issued pursuant to section 9 of the Broad-Based Black Economic Empowerment Act.

C. Amendments to the Independent Broadcasting Authority Act, 1993¹

The Independent Communications Authority of South Africa (“the Authority”), in terms of section 13(1)(k) read with sections 49(7) and 50(4) and (5) of the Independent Broadcasting Authority Act (Act No.153 of 1993) (“the IBA Act”) hereby recommends to the Minister of Communications that sections 48, 49, 50, 52 and paragraphs 1 and 3 of Schedule 2 to the IBA Act should be amended.

Section 48: Limitations on Foreign Control of Commercial Broadcasting Services

1. The Authority recommends that section 48(1)(b) of the IBA Act should be amended as follows:

- (1) One foreign person shall not, whether directly or indirectly -

¹ **GENERAL EXPLANATORY NOTE.** [] Words in bold type in square brackets indicate deletions of existing words. .____ Underlined words indicate insertions

(b) have **[financial interest or interest in either]** issued share capital in a South African unlisted public or private company holding a [private] commercial broadcasting [licensee] licence equal to or exceeding [twenty] twenty-five percent of the issued share capital.

2. The Authority recommends that section 48(1)A is inserted as follows:

(A) Two or more foreign persons shall not, directly or indirectly, have issued share capital in a South African unlisted public or private company holding a commercial broadcasting licence equal to or exceeding thirty-five percent of the issued share capital.

3. The Authority recommends that section 48(1)B, should be inserted as follows:

(B) One foreign person shall not, directly or indirectly, have issued share capital in a South African listed public company holding a commercial broadcasting licence equal to or exceeding thirty-five percent of the issued share capital.

4. The Authority recommends the deletion of subsection (2) of section 48 and its replacement with the following:

(2) Foreign persons who are directors of a commercial broadcasting licensee shall not equal or exceed twenty-five percent of the total number of directors on the board.

5. The Authority recommends that subsection (4) of section 48 should be inserted as follows:

(4) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in section 2, exempt such person from adhering to any one of the limitations contemplated in the preceding subsections on grounds that include the following:

(a) the promotion and facilitation of Black Economic Empowerment;

(b) the promotion of foreign direct investment and job creation;

(c) undertakings by the foreign shareholder to sell shares back to South African citizens with a specified period; and

(d) undertakings to transfer expertise to South African citizens.

6. The Authority recommends that subsection (5) of section 48 should be inserted as follows:

(5) An exemption in terms of subsection (4) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

Section 49: Limitations on Control of Commercial Broadcasting Services

7. The Authority recommends that subsections (1), (2), (3), (4) and (5) of section 49 should be deleted and substituted with the following:

(1) No person shall, directly or indirectly, exercise control over more than one commercial television broadcasting licence;

(2) No person shall, directly or indirectly, exercise control over more than thirty five percent of the total number of licensed commercial sound broadcasting services provided that:

(a) when the calculation of the number of licensed commercial sound broadcasting services that a person may be in control of does not result in an integer and that when that number is rounded to the closest integer, that integer results in a percentage that is higher than the thirty-five percent limitation set out in subsection (2); and/or

(b) when a person exceeds the thirty-five percentage limitation set out in subsection (2) only because one or more other licensees have had their licences suspended or revoked by the Authority, or one or more licensees have ceased broadcasting (temporarily or permanently), in which case the Authority shall consider an application by the relevant person for exemption from the limitations in terms of subsection (6)(a).

(3) Notwithstanding the provisions of subsection (2), no person shall, directly or indirectly, exercise control over more than two commercial sound broadcasting licences which have the same licence areas or substantially overlapping licence areas.

8. The Authority recommends the amendment of subsection (6)(a) as follows:

(6)(a) On application by any person the Authority may, on good cause shown and without departing from the objects and principles enunciated in section

2, exempt such person from adhering to any one of the limitation contemplated in the preceding subsections on grounds that include the following:

- (i) the promotion and facilitation of Black Economic Empowerment;
and
- (ii) ensuring the survival of a commercial broadcasting service.

Section 50: Limitations on Cross-Media Control of Commercial Broadcasting Services

9. The Authority recommends that section 50(2)(a) should be amended as follows:

(2)(a) No person who controls a newspaper or newspapers **[may acquire or retain]** shall exercise, direct or indirect, **[a financial]** control **[in]** of both a **[radio]** commercial sound broadcasting licence and **[TV]** a commercial television broadcasting licence”.

10. The Authority recommends that section 50(2)(b) should be amended as follows:

(2)(b) No person who is in a position to control a newspaper shall exercise, direct or indirect, **[may be in a position to]** control of a **[radio]** sound or a television broadcasting licence **[in an area]** where the newspaper or all the newspapers that it controls has **[an average]** a total weekly ABC circulation of **[20%]** twenty-five percent of the total weekly ABC **[newspaper readership]** circulation in [the area if the] that broadcast licence area. **[of the radio licence overlaps substantially with the said circulation area of the newspaper]**

11. The Authority recommends that subsections 50(2)(c) and (2)(d) should be deleted.

12. The Authority recommends that subsection 50(2)(e) should be amended as follows:

(2)(e) The shareholding and financial structures of commercial broadcasting licensees [will] shall form part of [the] their annual reports submitted to the **[a]**Authority.

13. The Authority recommends that subsection (3) of section 50 should be deleted and substituted with the following:

(3) On application by any person the Authority may, on good cause shown and without departing from the objects and principles as enunciated in

section 2, exempt such person from adhering to the limitations contemplated in the preceding subsections on grounds that include the following:

- (a) the promotion and facilitation of Black Economic Empowerment;
and
- (b) ensuring the survival of a commercial broadcasting service.

14. The Authority recommends that subsection (3)A should be inserted in section 50 as follows

(3)A An exemption in terms of subsection (3) may be made subject to terms and conditions as the Authority deems appropriate and equitable in the circumstances.

Section 52: Amendment of broadcasting licences

15. The Authority recommends the amendment of section 52 by the insertion of section 52A as follows:

(A) The Authority may prescribe regulations on the procedure to be followed by a licensee who is required to seek approval for the change in control of such licensee in circumstances where such approval does not involve the amendment or a transfer of a licence.

Schedule 2 of the IBA Act

16. The Authority recommends that the term 'private' should be replaced by the term 'commercial' wherever it appears in paragraph 1 of Schedule 2, including the heading of the schedule
17. The Authority recommends that paragraph 3 of Schedule 2 should be deleted and substituted with the following:
- 3. A person shall be regarded as being in control of a company if he or she holds, directly or indirectly, issued share capital equal to or exceeding twenty-five percent of the issued share capital in the company, irrespective of whether or not such issued share capital confers de facto control.
18. The Authority recommends that the definition of 'financial interest' in section 1 of the IBA Act should be deleted.