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GENERAL NOTICE

NOTICE 40 OF 2004

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NOTICE IN TERMS OF SECTION 28 OF THE INDEPENDENT BROADCASTING AUTHORITY ACT, NO.153 OF 1993, INVITING WRITTEN REPRESENTATIONS ON PROPOSED LEGISLATIVE AMENDMENTS SET OUT IN PART D OF THE POSITION PAPER TITLED 'THE REVIEW OF OWNERSHIP AND CONTROL OF BROADCASTING SERVICES AND EXISTING COMMERCIAL SOUND BROADCASTING SERVICES'

The Independent Communications Authority of South Africa ("the Authority") has in terms of section 28 of the Independent Broadcasting Authority Act, No.153 of 1993 ("the IBA Act"), conducted an inquiry on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Services.

The Authority published a Discussion Paper titled "The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Services" on 27 September 2002. The Authority invited stakeholders and the public to respond to the questions and issues raised in the Discussion Paper and to make an input on any issues related to the ownership and control of broadcasting services.

The Authority received nineteen (19) submissions. Eighteen (18) of these indicated their wish to make oral presentations. Oral hearings were held at the Authority's offices from 10 to 18 February 2003.

On 13 January 2003 the Authority published its Position Paper on "The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Services". The Position Paper sets out the Authority's plans for the licensing of additional commercial radio services, and proposed legislative amendments to be submitted to the Minister of Communications for tabling in the National Assembly. The Position Paper is available at the Authority's library and on its website www.icasa.org.za

In the interests of further public input and in terms of section 28 of the IBA Act, the Authority has decided to publish the contents of Part D of the Position Paper for further public comment.

Part D deals with Proposed Amendments and sets out the Authority's proposed legislative amendments to Schedule 2 and sections 48, 49 and 50 of the IBA Act. After

these further comments have been taken into account, the Authority will submit the proposed amendments to the Minister, as required by the IBA Act.

Interested parties will have until close of business on 13 February 2004 to make submissions on the proposed amendments set out in Part D. However, the Authority will not reopen comment on the policy issues that have now been settled in the Position Paper and will only consider comments on the proposed legislative amendments. The Authority intends to conclude this process and present final proposed amendments to the Minister by the end of February 2004.

Submissions will be public documents and should be provided to the Authority in both electronic and hard copy formats. Electronic copies will facilitate the posting of submissions on the Authority's website (www.icasa.org.za). The Authority will post all submissions on its website, except where the submitter has requested that inputs remain confidential.

Written comments (and electronic copies thereof) should be addressed to:

Mr Pfanani Lishivha
Manager: Projects
Policy Development and Research Department
ICASA
e-mail: plishivha@icasa.org.za
Fax: (011) 448 2414

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

On the same day as the publication of this Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences, the Authority shall publish for written comment proposed amendments to the IBA Act, set out hereunder. Although the Authority is not required by the statute to publish these proposed amendments for comment, the Authority has decided to allow the public and stakeholders the opportunity to help shape legislative proposals to the Minister and Parliament.

The Authority has proposed two sets of legislative amendments for public comment under the headings 'Option One' and 'Option Two'.

The Authority is seeking comment on the two options and on the substantive amendments themselves. Further proposals on the proposed amendments are also welcome. The Authority will only consider proposals on the amendments as set out in Part D of the Position Paper. No representations on the policy as set out in Part C shall be considered.

OPTION ONE: PRESCRIBING REGULATIONS THAT LIMIT FOREIGN OWNERSHIP, COMMERCIAL SOUND AND TELEVISION BROADCASTING OWNERSHIP AND CROSS-MEDIA OWNERSHIP, AND THAT DEFINE CONTROL

The Authority proposes the deletion of sections 48, 49 and 50 and Schedule 1 to the IBA Act and their replacement by provisions that would enable the Authority to prescribe regulations on the same subject matter. The legislation could set out the factors the Authority should take into account when prescribing such regulations.

Section 48: Limitations on Foreign Control of Commercial Broadcasting Services

The Authority proposes that section 48 of the IBA Act be deleted and be substituted with the following new section:

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

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48. Taking into account the objects of the Act as set out in section 2, the Authority shall prescribe the limitations on the control of broadcasting services by foreign persons.

Section 49: Limitations on Control of Commercial Broadcasting Services

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

49. Taking into account the objects of the Act as set out in section 2, the Authority shall prescribe limitations on the control of commercial television and sound broadcasting services, including:
- (a) definitions of control and historically disadvantaged persons;
 - (b) instances of control of commercial broadcasting licensees, newspapers and other companies;
 - (c) limitations with respect to overlapping broadcasting licence areas;
 - (d) any other matter relevant or ancillary to the promotion of diversity of ownership in the broadcasting industry.

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

The Authority proposes that section 50 of the IBA Act be deleted and be substituted with the following new section:

50. Taking into account the objects as set out in section of the Act, the Authority shall prescribe limitations on cross-media control of commercial broadcasting services.

Insertion of Section 52A

The Authority proposes that section 52A be inserted in the IBA Act to deal with the approval for the change in control of a licensee that does not amount to an amendment or transfer of a licence. The Authority proposes that section 52A should read as follows:

"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 a licence and such approval does not involve an amendment or a transfer of a licence".

Deletion of Schedule 2 to the IBA Act

The Authority proposes that Schedule 2 to the IBA Act be deleted.

OPTION TWO: AMENDING SCHEDULE 2 AND SECTIONS 48, 49 AND 50 OF THE IBA ACT AND RETAINING THE SUBSTANTIVE PROVISIONS IN THE IBA ACT

Option Two involves the amendment of the relevant sections and the retention of these ownership limits in the IBA Act. Should Option One be preferred, then the proposed amendments set out under option two would form the basis of regulations.

Section 48: Limitations on Foreign Control of Commercial Broadcasting Services

1. The Authority proposes that section 48(1)(b) of the IBA Act be amended to read as follows:
 - (1) One foreign person shall not, whether directly or indirectly –
 - (b) have [financial interest or interest in either] securities [in voting shares or paid-up 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.
2. The Authority proposes that section 48A(1) be inserted to read as follows:
 - (1) One or more foreign persons shall not, whether directly or indirectly –
 - (a) have securities in a South African unlisted public or private company holding a commercial broadcasting licence equal to or exceeding thirty-five percent.
3. The Authority proposes that section 48A(2) be inserted to read as follows:
 - (2) One foreign person shall not, whether directly or indirectly –
 - (a) have securities in a South African listed public company holding a commercial broadcasting licence equal to or exceeding thirty-five percent.
4. The Authority proposes that subsections 4(a) and 4(b) be added to section 48 of the IBA Act. Section 48(4)(a) should read as follows:

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.
5. The Authority proposes that section 48(4)(b) should read as follows:

An exemption in terms of paragraph (a) 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

6. The Authority proposes that subsections (1), (2), (3), (4) and (5) of section 49 be deleted and substituted with the following:
- (1) No person shall be in a position to directly or indirectly exercise control over more than one commercial television broadcasting licence;
 - (2) No person shall be in a position to exercise control over more than thirty five percent of the number of licensed commercial sound broadcasting services except:
 - (a) when the calculation of the percentage does not result in an integer and that when the number of licences is rounded to the closest integer, that integer is higher than the percentage limit; and/or
 - (b) when a person exceeds the percentage limit only because one or more other licensees have had their licences suspended or revoked by the Authority, 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) No person shall be in a position to exercise control over more than two commercial sound broadcasting licences which have the same licence areas or substantially overlapping areas.

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

10. The Authority proposes that section 50(2)(a) be amended to read as follows:
"No person who controls a newspaper may acquire or retain **[a financial]** control in both a **[radio]** commercial sound and **[TV]** a commercial television broadcasting licence".
11. The Authority proposes that section 50(2)(b) be amended to read as follows:
"No person who is in a position to control a newspaper may be in a position to control a **[radio]** sound or a television broadcasting licence in an area where the newspaper has an average weekly ABC circulation of **[20%]** 25% of the total newspaper **[readership]** circulation in the area if the licence area of the **[radio]** sound or television broadcasting licence overlaps substantially with the said circulation area of the newspaper
12. The Authority proposes that section 50(2)(bA) be inserted as follows:

Where the relevant broadcast coverage area is controlled in a single city, the newspaper circulation figures shall be calculated relative to that city.

13. The Authority proposes that section 50(2)(bB) be inserted as follows:

Where the broadcast coverage area covers a number of cities or towns, the newspaper circulation figures shall be calculated relative to the three largest cities or towns within the relevant broadcast coverage area.

14. The Authority proposes that section 50(2)(bC) be inserted as follows:

Where the broadcast coverage area is national, the national newspaper circulation figures shall be used.

15. The Authority proposes that section 50(2)(d) be deleted.

Insertion of Section 52A

16. The Authority proposes that section 52A be inserted in the IBA Act to deal with the approval for the change in control of a licensee that does not amount to an amendment or transfer of a licence. The Authority proposes that section 52A should read as follows:

"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 a licence and such approval does not involve the amendment or a transfer of a licence".

Schedule 2 of the IBA Act

17. The Authority proposes that paragraph 3 of Schedule 2 to the IBA Act be amended to read as follows:

"Without derogating from the provisions of any law or from the common law, and in the absence of proof to the contrary, a person shall be regarded as being in control of, or being in a position to exercise control over, a company if he or she has equity shareholding in the company exceeding twenty-five percent or has other securities [financial interests therein equal to at least] exceeding twenty five percent of its nett assets, irrespective of whether such holding or holdings confers de facto control.

18. The Authority proposes that paragraph 3(a) be inserted into Schedule 2 to the IBA Act as follows:

'Security' means any share in the capital of a company and includes stock and debentures convertible into shares and any rights or interests in a company or in respect of any such shares, stock or debentures and includes any financial instrument as defined in the Financial Markets Control Act, 1989 (Act No. 55 of 1989)

17. The Authority proposes that the definition of **'financial interest'** in section 1 of the IBA Act be deleted.

MANDLA LANGA
CHAIRPERSON
ICASA
