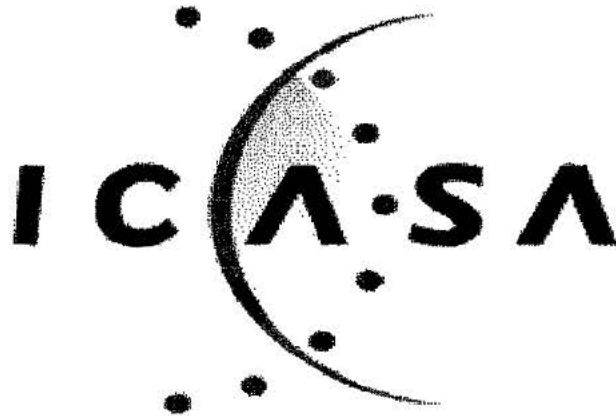


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## GENERAL NOTICE

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NOTICE 624 OF 2011



FINDINGS DOCUMENT

ON

**THE REVIEW OF OWNERSHIP AND CONTROL OF COMMERCIAL SERVICES AND  
LIMITATIONS ON BROADCASTING, ELECTRONIC COMMUNICATIONS SERVICES  
AND ELECTRONIC COMMUNICATIONS NETWORK SERVICES**

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**I. Introduction**

1. On 17 November 2009 the Authority published a discussion document on Ownership and Control published in Government Gazette No 32719, inviting stakeholders and the general public to submit written comments. Thereafter public hearings took place on the 05<sup>th</sup> to the 07<sup>th</sup> May 2010.
2. The latter discussion document raised a number of ownership and control issues as a way to locate a review of the recommendations tabled in the 2004 document and the regulations promulgated under the repealed Telecommunications Act, 106 of 1996 within a broader context, taking into account the implications of section 13 and chapter 9 of the Electronic Communications Act, 36 of 2005 (ECA).
3. The submissions have been considered and a Findings Document has been developed. The primary purpose of the Findings Document is to highlight key issues raised by stakeholders following an inquiry held by the Authority on ownership and control and articulate the Authority's position.

**II. Legislative Background**

4. The Authority initially published its Discussion Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences in Notice 1825 published in Government Gazette 23873 dated 30 September 2002 ("the Discussion Paper"). 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, 153 of 1993. Interested parties made written and oral representations on the Discussion Paper to the Authority.
5. Subsequent to the Authority having duly considered both the written and oral representations by interested parties, the Authority published The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper ("the Position Paper") on 13 January 2004.

6. Subsequent to the 2004 position paper, the Authority sent a letter, on 07 May 2004, to the Minister of Communications detailing a set of recommendations that had to be tabled before the National Assembly.
7. Key elements of the Authority's letter to the Minister, as originally written, included the view that technological developments had the potential to change the landscape of the broadcasting industry in the country thereby providing new opportunities for broadcasters. It was recommended that greater investment in the broadcasting industry must be encouraged, empowerment at all levels must be promoted and attempts must be made to ensure that commercial broadcasters operate in a climate of certainty and stability.
8. The Authority mailed the latter recommendations to the Ministry of Communications, whilst a legislative review was underway which led to a promulgation of the Electronic Communications Act, No 36 of 2005. 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), 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.
9. Prior to the publication of the above-mentioned Position Paper, the Ministry of Communications published in Government Gazette 24288 dated 16 January 2003, the regulations in respect of the limitations of ownership and control of telecommunication services in terms of section 52 of the Telecommunications Act, 103 of 1996.
10. In response to the legislative changes introduced in the ECA, the Authority embarked on a process of reviewing the regulations published in respect of the limitation of ownership and control of telecommunications services prescribed in terms of the section 52 of the Telecommunications Act, 1996 (Act No.103 of 1996) and developing regulations on ownership and control in respect of all the new

categories of licences, namely the Broadcasting Service (BS) licensees, Electronic Communications Service (ECS) licensees and Electronic Communications Network Service (ECNS) licensees. This process was undertaken under the ECA read with the Independent Communications Authority of South Africa Act, 13 of 2000 (ICASA Act) and related legislations.

11. In order to conduct a comprehensive review of the current recommendations and regulations on Ownership and Control and to fulfil the provisions of sections 2, 13, 64, 65 and 66 of the ECA, the Authority published a Discussion Document on 17<sup>th</sup> November 2009 inviting inputs from interested stakeholders and the general public. The document specifically mentioned that the Authority is guided by sections 2, 4, 13 (3), (4) and (5) and 65(7) of the ECA and section 4(3) (k) of the ICASA Act.
12. The closing date for the receipt of representations was 19 February 2010. The Authority received Twenty eight (28) submissions, nineteen (19) of which expressed their interest to make oral presentations. Submissions were received from the following stakeholders:
  - African Media Entertainment (AME) MultiChoice
  - Avusa Media Limited
  - Kagiso Media
  - MDDA
  - NAB
  - Cell C
  - MTN
  - Neotel
  - Telkom SA
  - E-tv
  - Media Monitoring Africa
  - SOS
  - SABC
  - Caxton
  - MWeb
  - ISPA

- Smile
- WNC IT Services
- Altech
- Super 5 Media
- South African Communications Forum (SACF)
- Vodacom
- BT
- Collateral Trading
- Maxitec Internet Services
- AT & T South Africa
- LARI

Public hearings on the Discussion Document were held on the 05<sup>th</sup> to the 07<sup>th</sup> May 2010. The hearings provided interested parties with opportunities to make submissions in respect of issues raised in the Discussion Document and the Notice for Public Hearings.

### **III. Analysis of written and oral submissions**

13. The Discussion Document was divided into two distinct parts. The first part, Part A, dealt with Individual Broadcasting Services. The second part, Part B, dealt with Individual ECS and ECNS.
14. In Part A and Part B several questions derived from the research undertaken are raised as a way to guide discussions with stakeholders and the general public. For the purposes of consistency, the submissions are analysed in terms of the questions as they appear in the Discussion Document. Below is the analysis of the submissions.

**14.1. 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 e.g. BBBEE 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?**

MDDA, e-tv, M-Net and MultiChoice reject the suggestion that the ownership and control restrictions in South Africa should be guided by market shares of licensees. They add that compliance with BBBEE should be mandatory for all individual licensees.

MDDA further argues that market share cannot be used as an effective instrument to diversify views and opinions and that strong regulation and licensing, supported by monitoring and compliance, provide an effective instrument to ensure diversity of views and opinions. MDDA states that diversity of views and opinions can be enhanced by diverse ownership and control, multiple languages, various formats and broad ranging news and programming, different sources of news and information. MDDA also argues that regulation of rural and secondary markets can only be supported by a developmental-orientated-approach which is premised on constitutional transformation imperatives.

SABC is of the view that the current market share is likely to create an illusion that the public broadcaster dominates the radio market, whereas in reality there is no correlation between radio audience drawn to SABC and revenue collected by it. SABC argues that despite the 17 radio stations it has, together with their respective audiences, the revenue

returns are not positive. In support of its claim it argues that SABC Radio and non- radio advertising volumes share the market on an equal basis of 50/50. The revenue that is generated is spent on compliance with legislative mandate requirements like extensive public interest contributions through high levels of local content, provision of programming in all official languages and the provision of full spectrum services catering for diverse audience needs.

Similarly to MDDA, the SABC believes that the licensing process and license conditions can be used to facilitate content diversification, hence there is no need for ICASA to introduce regulation of market shares as an additional tool. The public broadcaster is also of the view that the Competition Act provides sufficient tools for the management of competition, and proposes that if the Authority believes that the Competition Act does not cover the concerned issues satisfactorily, it can approach the Competition Commission with a view to amend this Act. It argues that a new set of rules and regulations will burden the regulator with excessive administrative duties, adjudication and recruitment costs.

The Authority, in considering all submissions, and accepting that the use of market share may be effective in some developed countries, is of the view that any decision seeking to diversify content through market share in South Africa at this stage might not necessarily ensure a diversity of views and opinions in the broadcasting sector, and a closer examination of the broadcasting market after the digital migration process may yield better answers. However, the Authority notes that Section 13 of the ECA does lend itself to an interpretation that control and ownership restrictions should apply to individual licences, that is, those with larger market share.

**14.2. 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?**

The South African Communications Forum (SACF) submits that the reasons for the imposition of restrictions on foreign ownership are valid and legitimate and especially important in this era when South Africa is still knitting together a national culture and transcending the legacy of apartheid. SACF is of the view that the provisioning of funds for socio-economic projects does not change these reasons, nor justify an exemption.

SACF maintains that restrictions on control do not adequately offset relaxation of foreign ownership limitations. With increased restriction on control, foreign companies that own controlling shares in a broadcasting licensee may, by example, be forced to hire South African CEO's or CFO's, but ultimately who pays the piper calls the tune. Job reservation does not directly equate to a restriction on foreign influence. Even under increased restrictions of control, the South African CFO and CEO will be assessed and hired by the controlling foreign shareholder; their remuneration, including bonuses, will be approved by the controlling foreign shareholder; and their powers and authority will be regulated by the controlling foreign shareholder. Job reservation or other restrictions on control will not guarantee a diversity of perspectives as ultimately the owners of the business will be able to influence those South African nationals who will act as their proxies. Otherwise, the foreign company would probably not make the investment decision to pay for a controlling interest. Most companies would not make a substantial investment in a company without being able to achieve control of the company, directly or indirectly.

The SABC shares a similar view with SACF in arguing that foreign investment does not guarantee diversity of opinions. The SACF further states that limitations on foreign control should only be raised to the extent that the resulting benefits become tangible in the industry.

The MDDA in contrast, supports the 2004 Position Paper which promoted a slight relaxation in respect of limitations of foreign ownership in view of a need to increase foreign investment but being limited in order to ensure that the broadcasting sector complies with the objectives of the Act and is controlled by South Africans.

Caxton is of the view that the Authority has not mentioned that at the time that Australia "abolished" foreign media ownership restrictions in 2006, ACMA (the Australian Communications and Media Authority) was given wider (and weightier) responsibilities to ensure diversity in ownership of media and to prevent "unacceptable media diversity situations", or concentrations. Thus Caxton is of the view that any relaxation in the current ownership and control provisions of the ECA will perpetuate the lack of diversity in the local media industry.

In sharp contrast M-Net and MultiChoice argue that countries which had imposed limitations on foreign ownership and control provisions have reviewed them or are in the process of doing so with an aim to ease their negative impact. They also submit that the effects of globalization and convergence in the international arena are compelling reasons for reviewing and increasing the current 20% on the foreign control of commercial broadcasting services in the country. They add that relaxations of foreign limitations need not be at the expense of other policy objectives.

M-Net and MultiChoice furthermore argue that the most effective way to deal with issues of foreign limitation is through voting rights, as opposed to the financial interest or paid up capital a person may have in a licensee. They insist that this proposal must be incorporated if any changes are to be made to section 64 of the ECA. They propose that the definition of a Foreigner must be included in the ECA and that of Foreign Interest must be deleted.

The Authority maintains the promotion of diversity of South African cultures, languages and viewpoints, needs to be balanced with the objects of the Act and Government Policy which includes the encouragement of investment within the sector. The Authority does not wish to abolish limitations on foreign ownership nor increase the threshold arbitrarily. The limited employment of foreign professionals may advance the objectives of the BBBEE Act, but there is no certainty that the employment of South African nationals or

even HDI's will automatically result in increased diversity of views and opinions. Similarly relaxation of foreign ownership may not necessarily increase diversity of views.

The Authority recognises that the consultation preceding the 2004 recommendations argued for increase in foreign ownership in the sector, however, the number of players in the sector has increased in parallel with foreign investment (See On Digital Media, Walking on Water and Super 5 Media). The Authority's position is that diversity of views can also be promoted through increased competition and by default increased collective foreign investment in the sector, there is no need for the authority to dilute the foreign ownership threshold in individual licensees beyond those proposed in the 2004 recommendations or WTO agreement stipulations.

The Authority concurs that an exemption on foreign ownership restrictions will not necessarily address concerns on diversity of content.

#### **14.3. What constitutes control of an individual licence?**

Telkom is of the view that the instances that are generally considered to confer control in a company like owning more than 50% of the issued share capital, possessing an actual voting right that controls the majority of directors and top management of the company, the ability to exercise material influence, etc. should be viewed as constituting control of an individual licence. But this should not necessarily be taken to be exhaustive but merely as indicative of the most common forms of control.

Avusa proposes that the issue of "control" be dealt with in the licensing conditions when a commercial sound broadcasting licence is issued. Avusa believes that it will enable the Authority to address the issue of control on a case-by-case basis founded on guidelines issued by it, alternatively in terms of the established guidelines adopted by the Competition Tribunal, established in terms of the Competition Act 89 of 1998.

The MDDA also supports the proposed amendments to the 2004 recommendations in order to define and simplify control, deemed control, financial interest and securities.

The SABC observes that since the ECA does not provide a useful definition for Control, the Authority should examine other legislation such as the Companies Act, for guidance. The Public Broadcaster explains that while the Company's Act does not necessarily define Control, it gives a detailed account of what is meant by a company and a subsidiary of another company and this is predicated on Control.

Super 5 Media posits that an interpretation of control derived from Section 2 of the Companies Act of 2008, which reads thus, "control is present when a person or juristic person; has majority votes in general meetings; and / or can appoint or veto the appointment of directors who control the majority of votes; and / or has the ability to materially influence the policy of the firm" would suffice for the purpose of the ECA. They further state that the presence or absence of control should be ascertained from agreements between the shareholders of the licensee. Where no additional agreements have been concluded by the shareholders, a memorandum and articles of association of the licensee could provide further insight.

Caxton asserts that the definition in section 12 of the Competition Act offers a sensible and comprehensive approach to determining control of a licensee. Thus a broad definition of control such as that described would ensure that any machinations attempted by shareholders and others could nonetheless constitute control for purposes of the ECA. Caxton mentions that control can be effected through economic interests. Although the Competition Act suggests 50+1% could constitute control, Caxton recommends the adoption of a lesser threshold, close to that applied by the Securities Commission, which is 35%. Caxton is of the view that that the threshold must be raised gradually from the current 25% - 35% in order to ensure that control in the context of concentrations and cross media ownership is limited.

The Authority believes that control is a critical issue in view of the objects of Act that South Africans need to control South African licenses. Control may be on various levels and is summarized as follows by Cilliers and Benade:

"A distinction is often made between four categories of control which differ in degree of security and effectiveness. They are: (a) complete control, which entitles the holder thereof to exercise all the voting rights at company meetings; (b) majority control which entitles him to exercise more than 50% of the voting rights; (c) minority control, which

means that the controller exercises sufficient voting rights, though less than the majority, to place him in de facto control of the company; (d) management control or control of the proxy voting machinery, which is usually coupled to minority control, enabling the controller to control the company by soliciting proxy votes, particularly where the shares of the company are widely held." [Cilliers & Benade *Corporate Law* (2000) 460]

The Authority's position is that control should be viewed from a multidimensional perspective as advocated by Cilliers and Benade (2000), not simply on the basis of financial interest. Whilst, the Authority has studied the competition commission's definition and the definition contained in the Company's Act, it is of the view that control should comprise 25% shareholding or the right or the ability to direct or otherwise control the majority of the votes attached to the shareholders' issued shares, or the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the board of directors, or the right to control the management of the enterprise.

**14.4. Should exemptions that apply to compliance with BBBEE be incorporated in new regulations of ownership and control, if so in which instances? And should compliance with BBBEE be mandatory for all individual broadcast licensees?**

The SACF is of the view that on good cause shown, the Authority should have the ability, without departing from the objects and principles of the IBA Act, to provide an exemption from compliance with BBBEE requirements with regard to ownership and control. Such exemption should be granted:

- In furtherance of BBBEE, for example, upon application of a current BBBEE shareholder who wishes to unencumber his/her shares but by doing so will reduce his/her percentage shareholding
- When a commercial broadcaster needs to be rescued and it can be reasonably shown that alternative financing cannot be sourced.

SACF strongly agrees that all individual broadcast licensees should comply with BBBEE requirements.

e-tv submits that great strides have already been made in advancing BBBEE in the broadcasting sector. They are of the view that since its inception, the Authority has taken an uncompromising approach to the advancement of BBBEE in its licensing of broadcasters.

MDDA, like the SACF, feels that exemptions should be considered on good cause shown but within the framework of the objectives of the ECA.

The SABC believes that the Authority should advance empowerment goals, and exemption provisions should be aligned with the BBBEE Act.

The Authority will continue to encourage compliance with ECA legislation in licensing processes until such time amendments are effected to align the ECA with BBBEE legislation.

**14.5. What factors should the regulator consider when promoting diversity of views and opinions through regulation?**

The SACF is of the view that the Authority should have sight of all contracts and agreements among the owners of the licensee that relate to issues of ownership and control. Although on paper a South African company can be seen as the controlling shareholder, their controlling power and influence can be eroded by management and other contracts that effectively deliver *de facto* control to a minority shareholder. All such contracts, agreements and arrangements should be reviewed by the Authority on an on-going basis to ensure that the objects and principles of the regulations are not eroded.

The SABC believes that the primary intention of the ECA is to ensure diverse views and opinions and not manage foreign investment. Whilst encouraging investment and innovation in the communications sector as per section 2(d) of the ECA, the Authority must strive to maintain the balance between public broadcasting and commercial interests as it embarks on this inquiry and its related tasks. For instance, it would not be in the public interest for South African assets to be controlled by a foreign company. The South African control of local assets provides for such assets to reflect local cultures and aspirations. Thus, the Authority is urged to consider an assessment of the impact of

regulations on the South African Broadcasting Industry following the licensing of the Greenfields and Introduction of Competition.

Caxton stresses that the Authority should continue to retain the objectives and provisions of the ECA, which in short, are to protect and promote the interests of the public and protect and promote diversity of views. However, Caxton similarly warns that the inconsistencies in the wording in section 2 subsections (d), (f), (h), (k), (s), (w) and (y) may perpetuate the lack of diversity in the South African media industry.

The NAB is of the view that it is not necessary to make regulations in terms of section 13(4) as the Authority already promotes a diversity of views and opinions in the licensing process and thereby ensures that broadcasting services collectively promote a diversity of views and opinions in South Africa.

M-Net and MultiChoice strongly support the principle of plurality of views and opinions. They recommend that the Authority focuses on other aspects of diversity other than news, these include, promotion of local content, regional, national and international matters, the needs of children, youth and women and actuality programmes. However M-Net and MultiChoice indicate that the reality today is that content, including views and opinions, may be sourced and distributed by an unprecedented number of sources. As a consequence, many jurisdictions are liberalising limitations on horizontal and cross-media control.

In relation to the factors to be considered when promoting diversity of views and opinions, the Authority will monitor compliance with licence conditions and content regulations and establish whether competition in the sector is enhancing or discouraging diversity of views.

**14.6. 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?**

The NAB is of the view that it is not necessary to address vertical integration in view of the fact that the ECA does not provide the Authority with jurisdiction to do so.

MDDA posits that regulations will have to be specific on broadcasting services given the mandate broadcasting services have in terms of the objects of the ECA. For example, public service programming, development of local content, promotion of South African cultures, religions, and languages among others.

The SABC feels that the principle behind cross media limitations is sound as it serves to ensure diversity of news and views in the media. It argues that it is nevertheless still important to promote diversity of content to ensure a plurality of ownership. Critics of deregulation have pointed out that relaxation in ownership rules can lead to the spread of bland, low cost, high return stations as seen in the USA radio market which is dominated by large corporations.

The Authority maintains that "political and cultural diversity of media types and content is central to media pluralism." As a result, the Authority has decided to regularly evaluate the effectiveness of existing measures to promote pluralism and/or anti-concentration mechanisms and examine the possible need to revise them in the light of economic and technological developments in the media field.

The Authority is mandated in terms of chapter 10 of the ECA to look into the prevalence of anti- competition in the sector, and relevant regulation will emanate from such findings and consultation.

**14.7 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/or views of all, including the poor?**

The NAB is of the view that it would be inappropriate to use ownership and control as a regulatory instrument to set restrictions on new services. Firstly, under the technology-neutral licensing framework of the EC Act there are only individual and class broadcasting services offered within the ambit of three types of broadcasting set out in Chapter 9, namely Public, Commercial and Community Broadcasting. Consequently there is no need to subject new services to different rules of ownership and control. The



NAB is of the view that the appropriate regulatory tool to encourage diversity and views on new services is through licensing and local content regulation.

SACF submits that ultimately, ensuring that new services reflect diverse opinions and views of all, including the poor, requires at a minimum access by all to these services. If these services remain accessible by only a small elite then the views of the majority will not be reflected on them. Most of these new services require access to broadband. Currently only 2% of South Africans have access to broadband. Clearly new services will be geared to those who have access and who can afford them. The Authority needs to make even more concerted effort to ensure greater access to these services by the poor by means of promoting competition, tariffing interventions, and enhanced effectiveness of regulatory processes.

M-Net and MultiChoice suggest that the Authority deviates from one of the key principles of the ECA, namely that the legislation and regulatory framework be technologically neutral. To the extent that there are to be any limitations on ownership and control, those limitations may be imposed to varying degrees on different types of services (electronic communications services, electronic communications network services and broadcasting services). Furthermore, within, for example, broadcasting services, those limitations may vary according to the nature of the broadcasting services (for example, whether it is a free-to-air broadcasting service or a subscription broadcasting service). But the limitations should not be varied between services according to the technological means whereby those services are provided.

The Authority acknowledges that people in rural areas have very limited access to ICT-enabled communications. Nevertheless, opportunities for enhancing access, voice and participation of rural people have emerged as technological convergence of traditional and new media comes closer to reality and services become more accessible. In addition, the new media and networked communication environments have transformed the communicative space driven by the use of modern technology such as the Internet, wireless technologies and mobile telephony. Through these new technologies, users and communities, including the poor, are provided with an avenue for creating content. In the future, The Authority will examine the ownership structures of new services and

assess their impact on diversity of content before it makes further legislative proposals or regulations.

**14.8 What measures should be introduced to ensure that the BBBEE is not diluted when the shares are transferred? Can a lock - in period be used? If so, for how long?**

In their submission, Altech gave a historical background that one of the draft versions of the DTI Codes adopted the position that if black shareholders sold their shares in a company, that company would lose its BEE ownership points. Companies responded to this approach by contractually instituting lock-in clauses that prevented black shareholders from selling their shares to non-black people. The philosophy underpinning this approach was long-term black ownership of the economy and the avoidance of fronting transactions. The disadvantage of this approach was that black shareholders were offered limited liquidity, even after the lock-in period had expired because they were often restricted to selling shares to other black people only. Proponents of the opposing approach argued that the "*once empowered, always empowered principle*" should apply and that companies should be entitled to continue to count BEE ownership points of black shareholders who have sold their shares. This, it was argued, would allow black people to buy and sell their shares at their discretion, which would enable them to maximise and realise gains in terms of normal investment principles.

The DTI Codes, as argued by Altech, adopt a middle-ground approach to this debate, by allowing a company whose black shareholders have sold or lost their shares to count some of the sold or lost shareholding as black shareholding provided that certain criteria pertaining to, amongst other things, the level of transformation in the company, have been satisfied.

SOS supports lock-in periods but notes certain problems. Firstly, as soon as the "lock-in" period is over, smaller shareholders will probably sell their shares - the inevitable will just be delayed. Further, SOS noted that "lock-in" clauses generally create a two tier level of shares – those that can be traded and those that cannot. This makes certain shares more valuable than others.

Caxton submits that requiring a licensee to continue meeting the mandatory level even after a sale by an HDI shareholder to a non-HDI shareholder, would mean that one of two things must happen; either (i) the shareholders agreements (in an unlisted company) must prevent HDI shareholders from selling their shares, or it must require them to only sell to other HDI groups, or (ii) companies themselves will be required to monitor holdings of shares by HDI groups (in a listed environment) and ensure that shareholders are selected only if they are from the right race. Caxton argues that lock-ins may be a useful compromise, but they echo the example given at (i) above and are generally regarded as commercial arrangements, and not arrangements that should be prescribed. A compromise might be possible if changes in shareholding are permitted, subject to maintaining the prescribed levels of HDI ownership.

SACF proposes a minimum of a five- year lock in period. They argue that a lock-in period balances the expectations of the co-owners of the licensee that they have met the BEE requirements of the license with the desire by some BEE investors to realise the value of their shareholding or to unencumber their shareholding. Another mechanism besides a lock-in period is to ensure that when an HDG seeks to sell their interest in the licensee they do so on condition that they sell to another HDG.

The Authority has reviewed the submissions on lock-ins and believes that at present other safe-guards provided in the process and procedures regulations are sufficient. However, the ownership structure will be monitored over time to assess the impact of the latter provisions.

**14.9 Does an increase in ownership by historically disadvantaged groups lead to a proportional increase in diverse opinions and views? If yes explain, if no explain.**

SACF submits that there is no correlation between ownership held by historically disadvantaged groups (HDG's) and an increase in diverse opinions, but overall ownership does matter. SACF further states that ownership by HDG's can and, in many cases, does have an effect in increasing the diversity of views. As a majority or significant owner, a historically disadvantaged group has the platform to advocate and determine that different perspectives of language, culture and viewpoint are represented.

However, they might not choose to do so and instead they might focus on the same bottom line interests and values as their non-HDG co-owners.

In addition, SACF believes that if the HDG's were not owners, their voices would not be heard. Having HDG's as owners provides for a greater opportunity for a diversity of views and opinions to be represented. SACF stresses that it is important that this opportunity be preserved as South Africa is still overcoming the legacy of apartheid which amplified some voices more than others. They are of the view that the historically disadvantaged owners of a commercial broadcasting licensee should take greater responsibility in ensuring that the content of their services represents a diversity of opinions and views.

MDDA maintains that diverse ownership and control, where equity is unencumbered and there is no management contracts that limit participation of owners, does increase diverse views and opinions. They state that when accompanied by policy for editorial independence, diversity of views and opinions will increase. Moreover, such diversity of views would require further strong monitoring and compliance, which means a strong regulator will be needed. MDDA is of the view that the Licensing process at ICASA can be strengthened to ensure diversity in the market.

In contrast, M-Net and MultiChoice submit that it cannot be assumed that an increase in ownership of historically disadvantaged groups would necessarily result in proportional increase in the diversity of views and opinions. Technological development and market forces have dramatically increased the opportunity for diversity of views and opinions. Furthermore, there are other possibly more appropriate means whereby the Authority may encourage a further increase in diverse views and opinions.

The Authority accepts that HDI alone will not ensure diversity of views, but it believes that an absence of HDI considerations may yield less plurality of views.

**14.10 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?**

M-Net, MultiChoice and Telkom concur and submit that it would seem to be a reasonable approach on the part of the Authority to permit light touch regulation of class licensees. SACF also agrees that this can be viewed as a partial relaxation of control and ownership imposed on small players. Therefore these would mainly be the small players that cover a limited scope and may mostly be the SMMEs that are not under the control of foreigners. Therefore it would be inappropriate for the Authority to seek to impose any type of limitations on the ownership and control of Class Broadcasting Services.

In contrast, the MDDA states that the objectives of the ECA remain applicable to all licensees. According to the SABC, sections 65 and 66 of the ECA provide for limitations on control of commercial broadcasting licensees. The NAB supports the SABC that the ECA does not expressly provide for light touch regulation of all BS licensees.

The Authority is of the view that commercial broadcasters are all classified as individual licences, and that low power and community broadcasters are categorised as class licences. Further the ownership structure applicable to community broadcasters is prescribed in the ECA and aligned with community representation. The Authority will consequently accept that its interpretation is correct, and will accordingly not impose additional ownership restrictions on Class broadcasting licences.

**14.11. 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? What measures should the Authority place on companies listed on the JSE in relation to foreign control and ownership in order to promote diversity of views and opinions?**

SACF recommends that proposals with regard to listed individual broadcast licenses contained in the 2004 Position Paper be adopted. They further propose that the Authority place the same measures on companies listed on the JSE as those which are not listed.

The MDDA similarly supports the approach taken by the Authority in the 2004 Position Paper, namely, that no person may control more than 35% of the number of commercial sound broadcasting services that are licensed to broadcast.

The SABC asserts that there is no research, let alone analyses to prove that ownership and control restrictions on listed companies could positively influence the widening of diversity of opinions and views. Super 5 Media feels that the current 20% limit on foreign control of commercial broadcasting services, particularly for subscription broadcasting services limits the potential of attracting investment in the sector. Super 5 Media recommends that percentage be increased from the current 20 % to 49%. This, it motivates, would be in line with other jurisdictions of Tanzania, Mexico, Poland and Austria.

Caxton supports the control of ownership restrictions by the relevant management who are then able to supervise day to day operations of the licensee. The degree of diversity on any platform including digital platforms will be determined to a large degree if not solely, by the choices of the platform owner, and not the content providers. The diversity of channels carried on the platform is therefore determined by the owner of the platform, and it remains the functions of ICASA to regulate that person under the ECA.

M-Net and MultiChoice are of the opinion that listing is a financial decision and thus the notion that in the process of listing the diversity of views and opinions could be widened is totally misplaced and misleading. In any event, any attempt to introduce restrictions into the process of listing is likely to contravene JSE Listing requirements. Persons who invest in a company ought to be completely free to sell their shares to the most willing buyer in order to extract the maximum financial benefits from their investment.

The Authority has resolved that listed and non-listed companies cannot be treated differently, the objects of the Act will be upheld and applied to all licensees who wish to offer services in the sector.

**14.12. How should we advance BBBEE in the broadcasting sector?**

Telkom submits that the Authority should advance the BBBEE policy objectives and codes, and include the Charter where possible without necessarily having to reinvent the wheel.

SACF submits that it is clear that ownership can be a platform for advancing BBBEE in the broadcasting sector; however it is not the only means, nor necessarily the most effective means to do so. SACF further submits that narrowly defining black economic empowerment by only counting the economic gain for the Black shareholders of a licensee limits the impact, effectiveness and intended result of the black economic empowerment requirements.

The SABC believes that the categories of companies to be empowered ought to be defined. The Public Broadcaster believes that such definitions, that set the criteria for different levels of empowerment, would assist both the Authority and operators during licensing processes. The SABC also agrees with the Department of Trade and Industry (the DTI) Codes of Practice as it sets out a clear and verifiable methodology for measuring BBBEE.

M-Net and MultiChoice make the following proposals;

- The Authority needs to consider whether to propose amendments which would bring the ECA in line with the BBBEE Act of 2003.
- The Authority has to note the HDI/G requirements contained in individual licenses conditions, especially for sound broadcasting licensees. Changing those conditions to suit black people only, may result in some licensees being in breach of their licensing conditions
- The Authority needs to set clear goals as to how it aims to measure BBBEE requirements. As it is, DTI's Codes of Good Practise already entails basic conditions. The Authority can require each individual licensee to provide a verified balanced score card in line with the DTI Codes of Good Practise.

- The Authority must assess BBBEE holistically in order to ensure that, a company that may have a high score in equity can also strive to include scores on other indicators to strike a reasonable balance.

The support for alignment of BBBEE legislation with the ECA is noted, however the Authority is of the view that alignment should not distract from equity, ownership and control considerations.

**14.13. 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.**

The SABC is of the view that issues of representation are dealt with through the licensing process during which the structure of the applicants is interrogated. The public broadcaster further argues that ICASA has regulations dealing with disability issues in place. In addition the SABC posits that it is also required to report on representation of gender and disability annually, and thus believes that the aforementioned regulatory tools are sufficient to ensure and assess representation, it is therefore not necessary to duplicate already existing measures.

SACF submits that collection and recording of this data would be beneficial to track the impact of the regulations in advancing the objects and principles of the Act, and the NAB is of the view that such information should be requested during the licensing process.

M-Net and MultiChoice do not believe that the Authority should set targets for such categories of ownership. They propose that the Authority should require all licensees to present their verified BBBEE score card annually. The scorecard already sets indicators for gender representation.

The Authority believes that specific requirements for regional representation may be appropriate where the Authority is inviting applications for regional licenses. The categories listed collectively constitute the diverse range of communities in the Republic



and the authority will require all licensees to submit data annually to ensure that the ICT sector is representative of the diverse communities resident in the Republic as per the objects of the ECA.

**14.14. What values or percentages should be allocated to gender, youth and regional representation to ensure that broadcasters diversify views and opinions?**

The MDDA posits that, historically, the Authority has always incorporated the promises of performance by applicants. In the context of the BBBEE and the ICT Charter, the Authority will be guided by the minimum score card provided.

The NAB indicates that there is no scientific evidence that demonstrates a relationship between percentages of shareholding and diversity of views on the broadcasting service. They propose that the Authority must further be cognizant of already existing instruments which deal with representation, such as the BBBEE Codes.

Like NAB, e-tv does not believe the imposition of requirements to report shareholding data and the allocation of "values or percentages" to special interest groups will have any significant impact on diversifying views and opinions on broadcasting services.

In addition e-tv does not agree that further "diversifying" is necessarily required. e-tv argues that the South African broadcasting sector is extremely vibrant and diverse and the various programming requirements contained in broadcasters' licences are more than sufficient to ensure diversity.

The Authority is not persuaded by the latter arguments and will accordingly align itself with the objects of the Act to ensure that gender, youth and regional representation is considered in the licences that have been issued by the Authority.

**14.15. See questions (i), (iii) and (xiv) on BBEEE on pages 36-38, are they relevant to the broadcasting sector?**

The NAB is of the view that the Authority must note that the concepts of BBEEE and historically disadvantaged individuals are imperatives, and ought to be complied with, even though they are not synonymous. They further state that If the Authority wishes to move to an understanding of empowerment that excludes white women and white people with disabilities it will have to recommend the amendment of the ECA to align it with the BBEEE Act. However, the NAB would recommend that the Authority should align its definition of BBEEE with the DTI Codes.

In addition the NAB notes that 'equity' is not defined in the ECA and proposes that the definition of equity in Regulation 100 issued by the BBEEE Act be adopted. The NAB is of the view that this BBEEE equity ownership limitation is already set out as a condition in the licences of individual broadcasting licensees. Failure to comply would therefore be a breach of licence conditions; therefore no additional mechanism is required.

The Authority accepts that the term equity has not been defined and will accordingly incorporate such definition in the regulations. The Authority will adhere to the term Historically Disadvantaged Groups (HDG) until such time as the Act dictates otherwise.

**14.16. Any other relevant issue you would like to suggest or comment upon?**

SACF submits that from the research presented in the position paper (2004) it can be concluded that the prior and present ownership and control requirements have had significant impact in opening the way for HDG to participate meaningfully in this sector. Therefore HDG ownership and control requirements are pillars of empowerment and must be strengthened and maintained.

MMA believes that diverse content can be promoted through the enhancing of public service obligations and conditions for foreign ownership. They propose that the Authority should conduct a market review on license conditions.

MDDA posits that in order to limit commoditisation of broadcasting, the Authority may wish to consider Canadian regulatory practice which allows for, sales of shares above a certain level to incur a levy, which in turn is dedicated towards training or other capacity building initiatives. In the case of SA, MDDA could administer such a levy for the particular purposes for which the Authority would want it intended.

With specific reference to broadcasting, Caxton rejects ICASA's tackling of the HDI/HDGs under sections 64 – 66 of the ECA. Caxton notes that the Authority cannot attempt to vary the provisions of sections 64 – 66 through regulations because this would be *ultra vires*.

In addition Caxton warns that, retaining empowerment levels at a particular threshold may frustrate shareholders seeking to realize value from their investment and may retard their willingness to invest in the sector again if their next investment is going to be subject to restrictions. Thus, they propose that it would be best to require a threshold to be met over the short to medium term following a purchase by a foreign investor. Once diversity is more visible in the sector, there is a high possibility that the current prescribed HDG and BBBEE levels will occur commercially. Caxton also recommends that applicable restrictions and limitations on all types of commercial broadcasters continue, albeit with the provision that there are no exemptions.

Kagiso Media supports ICASA in ensuring that HDG's are recognised, on condition foreign investments are discouraged in the process.

AVUSA asserts that ICASA must allow cross media ownership because this will assist in leveraging marketing, promoting platforms, utilizing the scarce and specialized sales knowledge, enhancing cross media advertising sales opportunities, and the sharing of resources. It argues that cross media leads to diversity of opinions and ideas where different media platforms can efficiently utilize their valuable financial and human resources effectively. AVUSA further alleges that, the current definition of cross media ownership fails to appreciate the developments in the broadcasting sector. AVUSA asserts that the reality is media companies in the print and publishing space resist collaborations/coalitions unless such intentions have the potential to expand their horizons, including providing possibilities of international growth.

**14.17. What is your view of the approach adopted by the Authority?**

Telkom is supportive of an intensive engagement on important issues and encourages an approach where broad views are first sought before drafting regulations. On the other hand AME believes that the Recommendations are the only basis on which ICASA can make changes to the current regime governing the ownership and control of broadcasting services.

15. Part B raised seventeen (17) questions as a way to guide discussions with stakeholders and the general public. Below is the analysis of the submissions.

**15.1. When formulating ownership and control regulations under the ECA**

- (a) 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 amounts to the transfer of a control interest?

Vodacom is of the view that any regulation granting ICASA powers to approve transfers of ownership and/or control should be derived from the provisions of either the ECA or ICASA Act. Vodacom's understanding of section 13 of the ECA is that it contains what seems to be a general discretion on the part of the Authority to prescribe regulations of general application on ownership limitations whereas section 9(2)(b) obliges the Authority to include the percentage equity ownership to be held by persons from historically disadvantaged groups which percentage must not be less than 30%. Therefore Vodacom submits that the Authority cannot impose such a requirement through subordinate legislation. They believe that the Authority's powers are restricted to imposing limits on ownership and/or control of an individual licence or the transfer of such licence in its entirety.

Vodacom is of the view that in proposing to restrict the transfer of licences, ICASA should provide clarity about which aspect of the licence is substantive. They posit that the plethora of companies that have been licensed by ICASA to provide ECS and ECNS

is evidence that there is no restriction per se on the number or nature of companies who are authorised to provide communications services. They further submit that there is no strong case for limiting transfers of licences which are not inherently limited.

Vodacom believes that ICASA should require a simple notification for transfers with an assurance that the change does not affect the ultimate control of the licensee or the licensee's compliance with any equity requirements relating to HDI/BEE. Such notification would also be consistent with the operating licence requirement to notify the regulator of the owners of the licensee.

Cell C proposes that the Authority only regulates the transfer of shares if:

- (a) It affects the percentage ownership by HDG's for the first two years of being compliant to a 25% equity shareholding;
- (b) If at any point prior to the company reaching the 25% threshold, it reduces the percentage HDG shareholding; or
- (c) If it results in any shareholder increasing its shareholding by more than 25%; or
- (d) If it results in a transfer of shareholding of more than 25% to an entirely new shareholder.

Cell C further proposed that the Authority should take the various pieces of legislation regulating the operators into account when making a decision regarding the transfer of interest. They argue that it will be in the best interest of the consultative process for the Authority to discuss its approach with the Competition Commission and the Takeover Regulations Panel (Companies Act 71 of 2008).

Telkom is of the view that any instance of transfer of control interest, particularly one that affects the BBBEE status or structure of a licensed operator in the sector, should be undertaken through a notification process. Accordingly, the Authority's approval should be required.

The authority is of the view that general sentiment of licensees suggests that transfers cannot proceed without checks and balances. The extent of the checks and balances differs from one submission to the next and consequently the Authority will continue to