GENERAL NOTICES • ALGEMENE KENNISGEWINGS

DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

NOTICE 3692 OF 2025

MINISTRY
COMMUNICATIONS AND DIGITAL TECHNOLOGIES
REPUBLIC OF SOUTH AFRICA

DEPARTMENT OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES

ELECTRONIC COMMUNICATIONS ACT, 2005 (ACT NO. 36 OF 2005)

POLICY DIRECTION TO THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ON BROAD-BASED BLACK ECONOMIC EMPOWERMENT

I, Mr Solly Malatsi, Minister of Telecommunications and Digital Technologies, hereby issue the Policy Direction in the Schedule to the Independent Communications Authority of South Africa in terms of section 3(2) of the Electronic Communications Act, 2005 (Act No. 36 of 2005).

Mr Solly Malatsi, MP
Minister of Communications and Digital Technologies
DATE: 11 December 2025

EXPLANATORY NOTE AND FINAL POLICY DIRECTION ON THE APPLICATION OF THE ICT SECTOR CODE

1. Background

1.1. There is a large body of national and sectoral policies relating to infrastructure development and specifically to deploying broadband networks and ensuring access to accessible, available and affordable high-speed internet services by all of South Africa's citizens. A list of some of these policies is attached to this Schedule.

1.2. The Minister of Communications and Digital Technologies ("the Minister") is concerned that there are impediments to both national and international investments in the sector that have been occasioned by, among other reasons, inconsistent requirements applicable to the ownership persons who hold radio frequency spectrum and service licences under the Act. It is accepted by Government that it cannot, on its own, achieve national goals for connectivity and that participation by the private sector is vital.

1.3. To this end, the Minister has consulted widely with a view to enabling investments in the sector by companies that have given undertakings that are acceptable to the Department of Trade, Industry and Competition ("the DTIC") in terms of its Equity Equivalent Investment Programme ("EEIP").

1.4. The draft policy directive was published in the Government Gazette on 23 May 2025 for public comment. Following the consideration of the public submissions, the Minister has decided to issue this policy direction.

2. The ICT Sector Code

2.1. The DTIC approved the ICT Sector Code in 2016[1] ("the Code"). The Code was approved in terms of the Broad-Based Black Economic Empowerment Act, 2003 ("BBBEE Act") as a way of measuring the contribution of a Measured Entity to the goals of the BBBEE Act. A Measured Entity in the ICT Sector may only, as a matter of law, be measured for

[1] Broad-Based Black Economic Empowerment Act (53/2003) as amended by B-BBEE Act (46/2013) » Codes of good practice on broad based black economic empowerment (bbbeecommission.co.za) and South Africa Government Gazette dated 2015-05-06 number 38766 - Law Library

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compliance with the requirement of broad-based black economic empowerment in accordance with the Code.[2]

2.2. The fundamental principle for measuring B-BBEE compliance is that substance takes precedence over legal form. In interpreting the provisions of the Codes any reasonable interpretation consistent with the objectives of the B-BBEE Act as amended and the B-BBEE Strategy must take precedence.

2.3. The introduction to the Code provides that *"…we, the ICT Sector stakeholders, resolve and commit to:*

- *The objectives of the B-BBEE Act as amended*
- *Promote the effective implementation of B-BBEE in the ICT sector;*
- *Bridge the "digital divide" by actively promoting access to ICTs;*
- *Stimulate and support growth in the ICT sector;*
- *Advance economic and social transformation in the ICT sector;*
- *Contribute towards the reduction of unemployment and poverty alleviation;*
- *Support skills development and training initiatives;*
- *Foster equity and address the legitimate economic aspiration of all South Africans;*
- *Provide an enabling environment conducive to transparency, fairness, and consistency when adjudicating on matters related to B-BBEE in the ICT sector; and*
- *Comply with the requirements of the ICT Sector Code as defined hereunder and where possible meet and exceed targets across the sector.*"

2.4. ICASA, the sector regulatory authority, and other sector stakeholders participated in the development of the Code which process took several years to complete.

2.5. Numerous sector codes issued under the B-BBEE Act recognise ownership through deeming provisions (subject to specific requirements), including equity equivalent investment programmes.

[2] B-BBEE Act (46/2013), section 10(3).

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3. Ownership under the ECA and the ICASA Act

3.1. Section 4(1)(a) of the Independent Communications Authority of South Africa Act, 2000 ("ICASA Act") provides that ICASA must exercise the powers and perform the duties conferred and imposed upon it by this Act, the underlying statutes and other applicable law. The BBBEE Act is such a law. Specifically:

(a) section 10(1) of the BBBEE Act states that "[e]*very of state and public entity must apply any relevant code of good practice issued in terms of this Act in… (a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law…*; and

(a) section 10(3) of the BBBEE Act states that "*subject to section 9(6)* [of the BBBEE Act]*, an enterprise in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code.*"

3.2. Section 9(2)(b) of the Electronic Communications Act, 2005 ("ECA") provides that in relation to an application for a new licence (and in terms of later sections, the amendment, renewal and transfer of a licence)[3], ICASA "*must…include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, **or** such other conditions **or** higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act*". "Prescribed" is defined in the ECA as "prescribed by regulation made by the Authority in terms of this Act or the related legislation" (and "related legislation" includes the ICASA Act). Effectively the section has 3 parts:

3.2.1. include, as a condition of a licence, that an applicant must have equity that is not less than 30% in the hands of HDI; ***or***

3.2.2. apply other conditions under section 4(3)(k) of the ICASA Act; ***or***

3.2.3. increase or change the percentage of equity from 30%.

3.3. The underlined portion was inserted by amendments made to the ECA in 2014. In the explanatory memorandum that accompanied the ECA Amendment Bill in 2013 (which led to the amendments in 2014), it is expressly stated that:

[3] Sections 10, 11 and 13 of the Electronic Communications Act, 2005.

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"*The focus of the Act has been changed from the empowerment of 'historically disadvantaged individuals' to broad-based black economic empowerment. Therefore the required equity ownership by historically disadvantaged groups in section 9(2)(b) has been retained for the time being provided that broad-based black economic empowerment requirements prescribed by ICASA under section 4(3)(k) of the ICASA Act may replace it in due course*"

3.4. Section 4(3)(k) of the ICASA Act provides that ICASA "may make regulations on empowerment requirements to promote broad-based economic empowerment". "Broad-based economic empowerment" is defined in the ECA as "having the meaning ascribed to it in the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)".

3.5. ICASA consulted on the treatment of ownership and control of individual licences for over a decade and sought the views of stakeholders in several consultation processes, replicating those views in their findings documents[4]. Numerous stakeholders recommended aligning the position with the ICT Sector Code in terms of national legislation.

4. ICASA's Regulations

4.1. On 14 February 2020, ICASA exercised its discretion in terms of section 9(2)(b) of the ECA to prescribe draft "Regulations on the Limitation of Control and Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT Sector Code" in *Gazette* 43021, for public comment. The introduction to these draft Regulations stated under the heading "Purpose of the Regulations":

[4] The consultations were as follows:
1. Discussion Document on Ownership and Control November 2009. *Gazette* 32719 of 17 November 2009.
2. Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communication Network Services. *Gazette* 34601 of September 2011.
3. Discussion Document: Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code in the ICT sector in terms of Section 4B of the ICASA Act 2000, as amended. *Gazette* 40759 of 31 March 2017.
4. Findings Document and Position Paper on: Inquiry into Equity Ownership by Historically Disadvantaged Groups and the application of the ICT Sector Code in the ICT Sector, January 2019. *Gazette* 42234, 15 February 2019.

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"*The purpose of these Regulations is to promote equity ownership by HDGs and to promote B-BBEE. In achieving this, these regulations will –*

a. *Facilitate diversity and transformation in the ICT sector by prescribing the implementation of the Revised ICT Sector Code;*
b. *Prescribe the application of the HDG equity requirement; and*
c. *Provide the manner in which to verify compliance with HDGs and B-BBEE requirements".*

4.2. On 31 March 2021, ICASA again exercised its discretion in terms of section 9(2)(b) of the ECA to prescribe the final "Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the Application of the ICT Sector Code" ("the Ownership Regulations").

4.3. By taking the step to prescribe the Ownership Regulations under the ICASA Act, ICASA chose to apply the second part of section 9(2)(b), namely "***or*** *such other conditions"* since it stepped away from applying 30% HDI equity only (as set out in the first part of the section), and it did not increase the percentage ownership, being the third part of that section (see paragraph 3.2 above).

4.4. On 14 April 2022, ICASA published amendments to the Ownership Regulations[5] to remove reference to different forms of ownership that are recognised by the Code by explicitly referring to only certain Code Statements as being recognised:
*"**B-BBEE Contributor Status Level**" - means a B-BBEE status as referred to in paragraph 5.2 of Statement AICT000 of Code Series AICT 000 of the ICT Sector Code, as determined in terms of Statement AICT000 of Code Series AICT000, Statement AICT004, of Code Series AICT000, or Statement AICT600 of Code Series AICT600 of the ICT Sector Code, and as confirmed by a valid B-BBEE Verification Certificate, a sworn affidavit or a CIPC issued certificate, as may be applicable".*

4.5. In so doing, ICASA deliberately moved away from the DTIC's approved ICT Sector Code, deleting the following recognised statements in the Codes:

[5] *Gazette* 46245 of 14 April 2022.

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Statement number	Code series	Statement title
AICT100	Code series AICT100	The general principles for measuring ownership
AICT102	Code series AICT100	Recognition of the sale of assets
AICT103	Code series AICT200	Recognition of equity equivalents for multinationals
AICT200	Code series AICT200	The general principles for measuring management control
AICT300	Code series AICT300	The general principles for measuring skills development
AICT400	Code series AICT400	The general principles for measuring enterprise and supplier development
AICT500	Code series AICT500	The general principles for measuring socio-economic development
AICT601	Code series AICT601	Ownership for qualifying small enterprises
AICT602	Code series AICT602	Management control for qualifying small enterprises
AICT603	Code series AICT603	Skills development for qualifying small enterprises
AICT604	Code series AICT104	Enterprise and supplier development for qualifying small enterprises
AICT605	Code series AICT605	Socio-economic development for qualifying small enterprises

4.6. Deviation from the ICT Sector Code is not permissible in law, nor is it desirable as a matter of fact. This is because it excludes the possibility of an international entity investing in the South African economy only because its global business policies do not allow ownership by third parties even where the DTIC has recognized that the entity may qualify, on application, for approval of an EEIP.

4.7. Contributions using EEIPs are measured using the general principle set out in Code Series AICT400 and AICT500 against any of the following targets:

4.7.1. 30% of the value of the South African operations of the Applicant, determined using a Standard Valuation Method; or

4.7.2. 4% of Total Revenue from its South African operations annually over the period of continued measurement.[6]

4.8. The Ownership Regulations do not provide for the recognition of such a programme, nor do they recognise or permit the recognition of a number of other forms of broad-based black economic empowerment contemplated in the ICT Sector Code, such as procurement initiatives, participation in management, or skills development. The

[6] Statement AICT103: The recognition of equity equivalents for applicants.

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Ownership Regulations do not recognise other forms of ownership including the deeming provisions contained in Statement AICT100 including Statement AICT103 as explained above.

4.9. As a result, the Ownership Regulations are out of step with national law, the ICT Sector Code and national policy goals, and this misalignment must be addressed.

4.10. ICASA has, in other secondary instruments (regulating individual, class and radio frequency spectrum licences, among others), stated its intention to apply the Ownership Regulations despite their non-conformity, and without approval by the DTIC, alternatively to apply section 9(2)(b) of the ECA without regard for the possibility of imposing "other conditions".

5. The outcome of the consultation

5.1. The Department of Communications and Digital Technologies received in excess of 19,000 submissions. On review, this number included approximately 4,000 duplicates or blank submissions, bringing the total number of actual substantive submissions at 15,000.

5.2. An overwhelming 90% of the submissions are in favour of the policy direction. For ease of reference, the submissions are grouped into 2 categories, those in favour and those opposed.

5.3. Common themes in submissions in favour of the policy direction highlight the following benefits:

5.3.1. Acceleration of universal access to high-speed internet, particularly in rural and underserved communities;

5.3.2. Economic empowerment through enhanced digital participation and new business opportunities;

5.3.3. Reinforcement of South Africa's competitiveness in the global digital economy;

5.3.4. Alignment with the goals of inclusivity, education, and innovation; and

5.3.5. Recognizing its role in bridging the digital divide, advancing socio-economic development, and positioning South Africa as a digital leader on the African continent.

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5.4. Opposing viewpoints provided feedback on implementation risks and equity considerations that can inform policy refinement, highlighting the following:

5.4.1. Concerns about possible dominance by large or foreign telecommunications operators.

Response: The Competition Commission is the competition regulator for all sectors in the Republic, and ICASA has power to investigate competition in the electronic communications sector. Furthermore, any foreign operator will be a new entrant to the sector and have no market share or subscriber base for a number of years.

5.4.2. Fear of undermining local empowerment and transformation objectives (in particular, B-BBEE compliance).

Response: The sole purpose of the policy direction is to promote and support empowerment and transformation initiatives already in place in terms of the ICT Sector Code under the Broad-Based Black Economic Empowerment Act, 2003 which ICASA has not adopted in its Ownership Regulations.

5.4.3. Concerns that EEIPs have no impact at all and are just being used by multinationals to evade BBBEE compliance requirements.

Response: There is little evidence to support this claim. As the ICT Sector Code itself recognises EEIPs as contributing to BBBEE, this is not a legally sound argument.

5.4.4. The need for tighter safeguards to prevent regulatory loopholes or unfair competition.

Response: ICASA is the sector regulator. Its duty is to keep the market and sector participants' behaviour under review at all times. As indicated above, both ICASA and the Competition Commission have a duty to regulate competition in the ICT sector and in South Africa, respectively, thus there are already provisions in place to address any loopholes or unfair competition.

5.4.5. The perception that the policy direction is intended to benefit Starlink at the expense of transformation.

Response: As has been stated publicly numerous times, the policy direction will, if implemented by ICASA, apply to all licensees in the same way when the Ownership Regulations are amended as required.

5.4.6. Worries about data sovereignty and national security implications.

Response: South Africa's Protection of Personal Information Act, 2013, has been in force for many years and the Information Regulator is empowered to take action in relation any data sovereignty concerns, as data sovereignty is addressed in this Act. National security is protected by numerous laws and law enforcement authorities. These will all be brought to bear on any issue that may affect national security.

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5.4.7. The perception of a lack of consultation or transparency during policy development.

Response: The policy direction was published for public comment as is provided for in the Electronic Communications Act, 2005. The period for public comment was intended to accommodate as many stakeholders as possible who wanted to participate in the process. The consultation process is the same process adopted for all policy directions.

5.5. Those who support the policy direction suggested the application of the following conditions:

5.5.1. Transparency around the formulation and approvals of EEIPs.

Response: The Minister and the Department of Communications and Digital Technologies will liaise with the Minister and the Department of Trade, Industry and Competition to review the process of making application for and approving EEIPs, as well as monitoring and reporting on approved applications.

5.5.2. The need for a clear monitoring and reporting frameworks.

Response: See above.

5.5.3. The need for regulatory parity, meaning that regulatory compliance should nonetheless be required of all licensees.

Response: If ICASA amends its Ownership Regulations in terms of the policy direction, then they will apply as they currently do, to all licensees referenced in those Regulations and compliance with the Regulations will be mandatory as it is now.

6. Policy direction

Having regard to the need to promote numerous policy goals for the sector in relation to the availability, accessibility and affordability of communications services; taking account of the contribution to investment and competition that can be made by international entities; and considering the overriding provisions of the BBBEE Act, ICASA is directed in terms of section 3(2) of the Electronic Communications Act, 2005 (Act No. 36 of 2005) to–

6.1. urgently consider alignment of the Regulations in respect of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups (HDG) and the Application of the ICT Sector Code, with the Amended Broad-Based Black Economic Empowerment (B-BBEE) ICT Sector Code; and

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6.2. take account of government's national economic inclusion policy goals and the scope of its own powers and duties under the ECA and ICASA Act in giving effect to these policy goals and, insofar as is possible:

6.2.1. ensure parity among licensees; and

6.2.2. promote the roll out of broadband to bridge the digital divide; and

6.2.3. ensure the preservation of South Africa's digital sovereignty by encouraging adherence to South Africa's data protection and data security policies.

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