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GENERAL NOTICES • ALGEMENE KENNISGEWINGS

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA
NOTICE 274 OF 2017****DISCUSSION DOCUMENT: EQUITY OWNERSHIP BY HISTORICALLY
DISADVANTAGED GROUPS AND THE APPLICATION OF THE ICT SECTOR
CODE IN THE ICT SECTOR IN TERMS OF S4B OF THE ICASA ACT 2000, AS
AMENDED**

1. The Independent Communications Authority of South Africa (“the Authority”) hereby gives notice of its intention to conduct an inquiry in terms of section 4B of the Independent Communications Authority of South Africa Act, 2000 (‘ICASA Act’) (Act no. 13 of 2000), as amended.
2. The purpose of the inquiry is to determine;
 - 2.1 how the Authority should approach the implementation the ICT Sector Code in light of the existing Historically Disadvantaged Groups/Individuals (‘HDG/I’) ownership requirements; and
 - 2.2 how the Authority can promote Broad-Based Economic Empowerment (‘BBBEE’), and equity ownership of HDG’s as required in terms of sections 9 and 13 of the Electronic Communications Act, 2005 (‘ECA’) (Act No.36 of 2005), as amended.
3. The Authority is empowered in terms of sections 4(3) (j) and (k) of the ICASA Act and section 2 (h) of the ECA “*to promote Broad-Based Black Economic Empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities;*” and make Regulations in this regard.
4. The Authority invites written submissions on the Discussion Document from interested parties. The closing date for submissions is 8 June 2017 at 16h00 at the Authority’s Head Office at Block D, Pinmill Farm, 164 Katherine Street Sandton. Submissions may be made by post, hand delivery, facsimile transmission or email. Submissions received after the submission deadline may be disregarded.

5. All written submissions, and related correspondence on the Discussion Document, must be directed to:

The Independent Communications Authority of South Africa (ICASA)

FOR ATTENTION:

Project Manager: Ms Refiloe Motsoeneng

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Sandton, 2146

6. The Authority will publish all written submissions received on its website. In instances where an interested party applies for confidentiality, this must be done in terms of Section 4D of the ICASA Act.
7. The party requesting confidentiality must provide the Authority with a public version of its submission in addition to the confidential version.
8. The Authority may hold public hearings as part of its public consultative process. Should an interested party wish to participate in public hearings, if held, such interested party must express such intention in its written submission. Submission

of written comments are a requirement to be eligible to participate in a public hearing.

9. General Enquiries

Contact Ms Refiloe Motsoeneng on 011 566 3213 or e-mail on transformation@icasa.org.za for general enquiries in respect of this notice.

10. Media Queries

Contact Mr Paseka Maleka on 011 566 3455 or e-mail at pmaleka@icasa.org.za in respect of media queries.



RUBBEN MOHLALOGA
ACTING CHAIRPERSON
ICASA

1. INTRODUCTION

- 1.1 The Authority is enjoined by the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000)¹ and the Electronic Communications Act, 2005 (Act No 36 of 2005)² to promote the economic empowerment of Black people in general, and women, youth and the disabled through ownership and control as well as the development of human resources, training and capacity building of Historically Disadvantaged Individuals³.
- 1.2 The Broad-Based Black Economic Empowerment (BBBEE) legislative framework provides for a broader approach to empowerment and as a result of amendments to the BBBEE Act (Act No. 53 of 2003)⁴, enjoins every organ of state and public entity to apply any relevant Code of Good Practice in the qualification criteria for licensing and concessions and the grant thereof.
- 1.3 The Authority noted an alarming trend over the recent past in licence transfer of ownership, and transfer of control applications submitted to it that sought to diminish levels of Historically Disadvantaged Groups (HDGs)⁵ equity ownership.
- 1.4 On 10 October 2014, the Authority published a Notice (Government Gazette No. 38087) which indicated that the Authority will no longer approve licence transfer applications which do not have 30% equity ownership held by HDGs.
- 1.5 Notwithstanding the above, the Authority notes with concern that 53% of Individual Electronic Communications Service (I-ECS) and Individual Electronic Communications Network Service (I-ECNS) licensees have less than the legislated 30% HDG equity ownership.

¹ As amended by Act No. 2 of 2014

² As amended by Act No. 1 of 2014

³ Historically Disadvantaged Individuals (HDGs) also refers to Historically Disadvantaged Groups (HDGs) in this Discussions Document

⁴ As amended by Act No. 46 of 2013

⁵ Also referred to as Historically Disadvantaged Persons

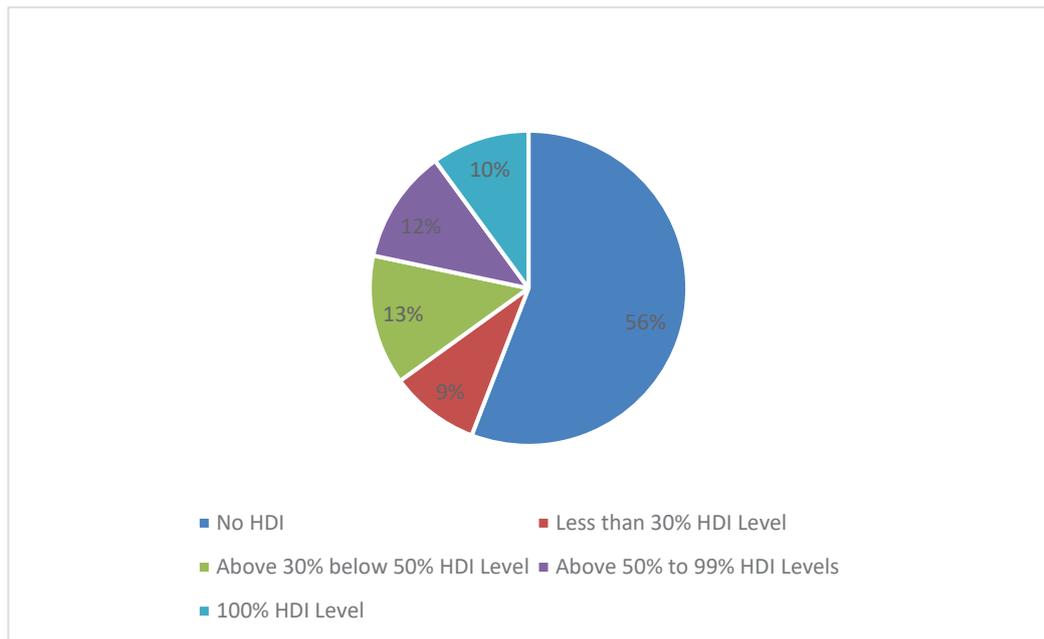
- 1.6 The picture is considerably different in respect of Individual Broadcasting Service (I-BS) licensees, whereas eight (8)% of Individual licensees are non-compliant with the legislated targets. This may in part be attributed to the fact that the majority of I-Broadcasting Service licences were issued post promulgation of the ECA.

2. Current Landscape

- 2.1 Under the Broadcasting Act, repealed Telecommunications Act, 1996 (Act No. 103 of 1996) and Independent Broadcasting Authority Act, 1993 (Act No. 153 of 1993), there were no mandatory applicable targets for equity ownership by HDGs which resulted in various levels of equity being held by licensees or none at all. Chapter 15 (“the Transitional Provisions”) of the Electronic Communications Authority Act (ECA), more specifically section 93 (1), provided for the conversion of licences on no less favourable terms than what the licensee held pre-licence conversion.

- 2.1.1 In the 2013/14 financial year, the Authority conducted an audit on the HDG levels for all operational licensees in line with the specifications of the Compliance Procedure Manual Regulations Government Gazette No. 34863 as published on 15 December 2011. One hundred and twenty (120) licensees responded which provided a snapshot of the HDGs levels of the licensees. The findings of the Audit were as follows:

- 2.1.2 56% of licensees (that responded) held no equity ownership by HDGs.



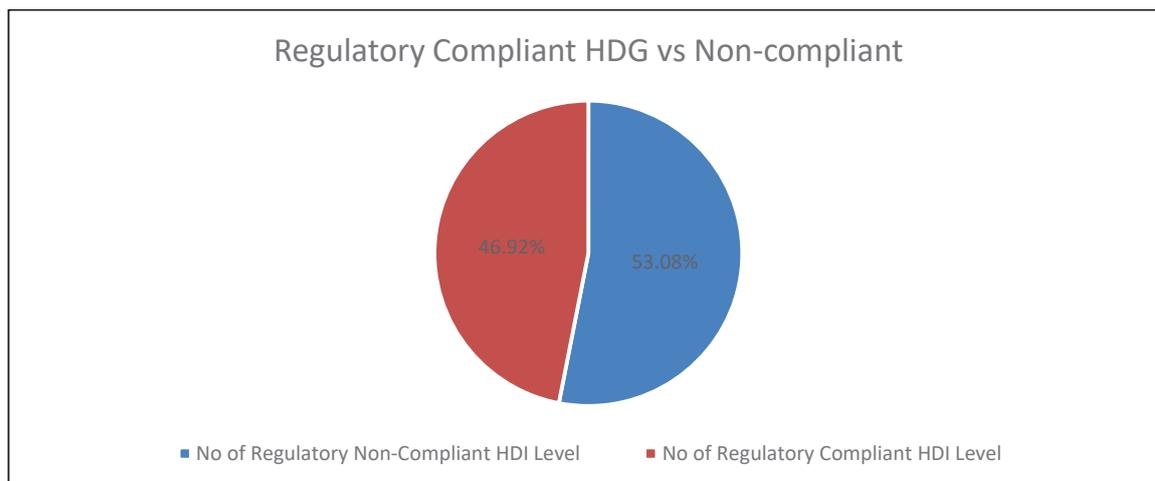
2.1.3 44% of licensees had some level of equity ownership held by HDGs.

2.1.4 22% of licensees from this sample exceeded the legislative target of 30% of equity ownership in individual licences to be held by HDGs.

2.1.5 12% of licensees were wholly owned by HDGs.

2.2 During the 2016/17 reporting period the Authority drew a sample of I-ECS, I-ECNS, and I-BS licensees and assessed the HDGs levels.

2.2.1 The sample size is 130 operational licensees for the 2017 review.



Source: ICASA Licensee Database

Figure 2: I-ECS and I-ECNS HDG Levels March 2017

2.2.2 The above illustration is a graphical representation of I-ECS and I-ECNS licensees in the sample. 53% of the licensees in the sample were found to be non-compliant.

2.2.3 38% of licensees in the sample have no HDG equity ownership.

2.2.4 7% of the sampled licensees have a HDG equity ownership level above 20% but below the prescribed level of 30%. A detailed breakdown of the percentages in respect to the above illustrated categories is provided in the table below.

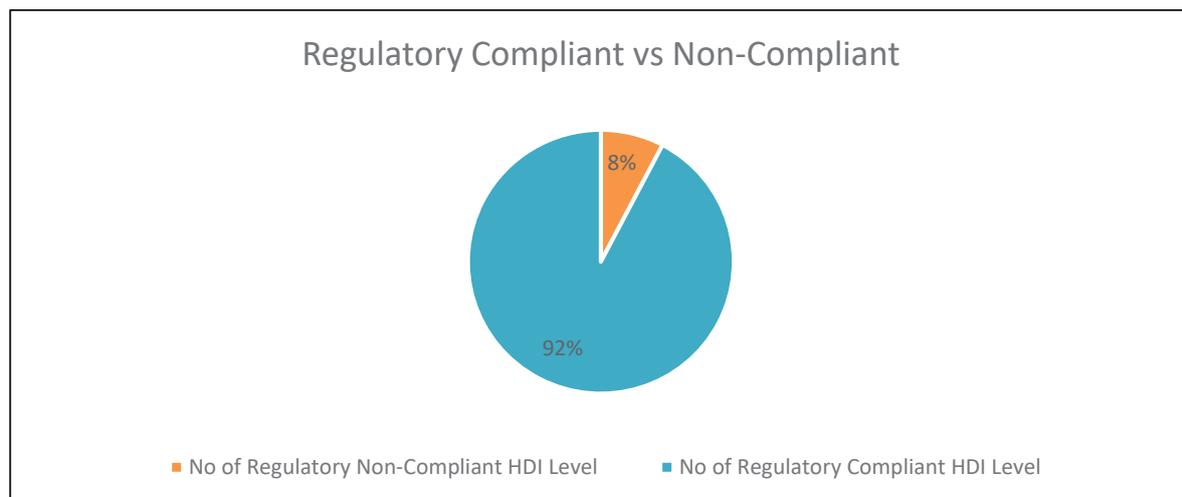
Level of HDG Ownership	Percentage by Licensees
No HDG	37.69%
HDG between 0 and 5%	0.77%
HDG between 5% and 10%	0.77%
HDG between 10% and 15%	2.31%
HDG between 15% and 20%	4.62%
HDG between 20% and 30%	6.92%
HDG equal to and above 30%	46.92%

Source: ICASA Licensee Database

Table 3: I-ECS and I-ECNS HDG Levels March 2017

2.3 Broadcasting Service Licences

- 2.3.1 A sample size of 26 operational broadcasting licensees are included in the sample with their corresponding HDG equity ownership level was provided.
- 2.3.2 Six licensees in the sample hold individual commercial subscription television licenses, one holds an individual commercial terrestrial licence and the remaining 19 licensees in the sample hold individual commercial sound broadcasting licences.
- 2.3.3 Licensees wherein the public broadcaster is a shareholder have been excluded from the analysis as a result of the government shareholding which negates the HDG equity ownership requirement.



Source: ICASA Licensee Database

Figure 3:

- 2.3.4 The above illustration is a graphical representation of Broadcasting licensees in the sample that are found to be compliant with the Authority's 30% HDG equity ownership level requirement versus those that are non-compliant. Observable from the diagram is that approximately 8% of the licensees in the sample are non-compliant.

- 2.3.5 The above illustration is a graphical representation of broadcasting licensees in the sample broken-down by different categories based on HDG equity ownership levels.
- 2.3.6 Approximately 8% (2 licensees) of the sampled licensees have a HDG equity ownership level above 20% which is below the prescribed level of 30%; with the remainder of the licensees being compliant.
- 2.4 Section 10 of the BBBEE Act requires every organ of state and public entity to take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law.
- 2.5 As such the Authority is enjoined to consider the BBBEE Act and its Codes with BBBEE certificates being the mechanism used to determine compliance with the BBBEE Act and the Codes.
- 2.6 The Authority is enjoined by the ICASA Act, ECA and the BBBEE Act to promote BBBEE. The BBBEE Act and sector Codes are applicable to all entities operating across the economy, including the ICT and Broadcasting sectors. The essence of BBBEE compliance is voluntary and the prioritisation of compliance with the scorecard is discretionary.
- 2.7 The ECA on the other hand, adopts a prescriptive approach for Individual licensees, where equity held by HDGs is mandatory whilst it is silent with respect to Class licensees.
- 2.8 While BBBEE applies only to black people and is pervasive across the economy, HDGs or Historically Disadvantaged Persons is not defined in the ECA. It is however defined in the Processes and Procedures Regulations for

Individual Licences, 2010⁶, as ‘*South African citizens who are Black people, women or people with disabilities and that black people are defined to include Africans, Indians and Coloureds*’.

3. LEGAL FRAMEWORK

- 3.1. Section 4(3)(k) read with section 4(3)(j) of the ICASA Act and section 2(h) read with section 4(1) of the ECA empowers the Authority to make Regulations on the application and manner in which BBBEE will be applied in the ICT and Broadcasting sectors. Notwithstanding the aforementioned, the legal framework in respect of individual licences is explicit.

	Electronic Communications Act	Broad-Based Black Economic Empowerment Act
Scope	Equity Ownership	Balanced scorecard with five elements
Compliance	Mandatory for individual licences	Voluntary and discretionary on compliance level emphasis
Application	Historically Disadvantaged Persons or Groups	Black People

4. Triggers that invoke the HDG Equity Requirement in Individual licences

- 4.1 A minimum of 30% equity ownership by HDG's is a mandatory requirement for Individual licences for the following applications:

- 4.1.1 Application for a new licence;
4.1.2 Transfer of a Licence;

⁶ As amended by Government Gazette No. 39871 of 2016

4.1.3 Transfer of Control or Change of Ownership of a licence;

4.1.4 Renewal of a licence; and

4.1.5 Amendment to a licence.

The table below sets out the relevant legislative provisions in respect of the above for ease of reference.

Key Legislative References		
Legislation	Reference	Topic
ICASA Act	Section 4 (3) (k)	BBBEE
EC Act	Sections 2(h), 9(2) (b), 10(2), 11(3), and 13 (6)	HDG
Standard Terms and Conditions Regulations	Regulation 2(2)	HDG
BBBEE Act	Section 10	BBBEE

5. Application of HDG Equity Requirement

5.1 The ECA is explicit in its requirement for empowerment, and equity to be held in respect of individual licences. There is no similar explicit requirement for class licensees. However, the Authority is of the view that it should not exclude a broad sector of licensees from being part of the transformation agenda and through its regulation making powers, and in accordance with the objects of the ECA may impose HDG equity requirements on all licensees including class licences. It is also empowered to increase the requirement target beyond 30%.

5.1.2 Should class licensees have HDG equity requirements similar to those of Individual licensees? Explain the rationale for the position proposed. In your opinion, how should the equity requirement be imposed on class licensees?

5.1.3 Should the Authority consider income levels and size of the entity as criteria for differentiation in the imposition of the HDG requirement?

5.1.4 Should the minimum legislated requirement remain at 30% should it be increased? If so, what targets do you propose and why?

5.1.5 Should the Authority require licensees to seek prior approval in instances where:

5.1.5.1 a change in shareholding results in reduction of of equity ownership by HDG's below 30%; and

5.1.5.2 where the licensee does not meet the 30% minimum requirement, and change in shareholding that affects the percentage of equity ownership by HDG's

5.2 How should the HDG equity ownership requirement be applied to publicly traded entities, without discouraging HDG's from participating in share schemes?

6. How Should Compliance With The HDG Requirement Be Verified?

6.1 Recognising the difference between HDGs⁷ and Black people⁸, the Authority has consistently faced challenges in respect of the evidence of HDG equity ownership that applicants are required to submit in support of applications before it. Applicants typically submit BBBEE verification certificates as proof of claimed levels of equity held by Black people. This presents the following challenges:

6.2 BBBEE provides for continuing consequences, and as a result recognises for a period, equity held by Black people who have already exited. The ECA does not adopt a similar approach. It only recognises equity currently held.

⁷ HDP (HDG/HDG) according to Department of Trade and Industry (DTI) goes beyond BEE standards/requirements since by definition it includes black people, white women and disabled people.

⁸ Black people means blacks, coloureds, Indians and Chinese people.

6.3 BBEE certificates are valid for a period of one year, and do not indicate the equity held on the date of application. The ECA requires that an applicant must hold 30% equity at the point of submission of an application. The Authority accordingly assesses the HDG requirement based on the most appropriate information it is able to obtain in each instance.

6.4 The difference in terminology between HDG and Black people poses a challenge despite the fact the Black people are a subset of HDGs. This is the case as applicants of various processes submit BBEE certificates as proof of ownership. These certificates reflect the status in terms of Black People and not HDG which creates a gap in the provision of proof of equity ownership.

6.4.1 What proof should the Authority consider appropriate to confirm compliance with the HDG requirements?

6.4.2 What proof would in your view be appropriate to confirm the compliance of publicly traded entities provide with the HDG equity/ownership requirement?

7. What Constitutes Ownership And What Constitutes Control?

7.1. The term "Ownership" has not been defined in the ECA and the lack of such definition has created uncertainty. The Webster Dictionary defines ownership as follows:

Ownership is the state of owning something giving one legal title and exclusive rights to possess and control. It gives one full and complete right of dominion over property giving one power to enjoy and dispose of a thing absolutely, to the exclusion of all other persons.

7.2. The term "Control" has only been defined in relation to broadcasting services. Section 66 (5) of the ECA provides that "a 20% shareholding in a commercial broadcasting service licence, in either the television broadcasting service, or sound broadcasting service, is considered as constituting control."

- 7.3. The Regulations in respect of the Limitation of Ownership and Control of Telecommunication Services, 2003 (Gazette no: 24288, page 4) define a "control interest" as follows:

“a person has a control interest if, in the absence of proof to the contrary, that person directly or indirectly:

- (a) beneficially owns more than twenty-five percent of the issued share capital of the licensee;*
- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the licensee or has the ability to control, either directly, indirectly or through an affiliate the casting of a majority of those votes of the licensee;*
- (c) is able to appoint or veto the appointment of a majority of the directors of the licensee;*
- (d) is a holding company and the licensee is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);*
- (e) in the case where the licensee is a trust, has the ability to control a majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;*
- (f) in the case where the licensee is a close corporation, owns more than twenty-five percent of the members' interest, or controls or has the right to control the member's votes in the close corporation; or*
- (g) has the ability to direct or cause the direction of the management or policies of the licensee in a manner similar to any of paragraphs (a) to (f), whether through the direct or indirect ownership of issued share capital, by contract, by other securities, or otherwise.”*

- 7.4. Both transfer of control and transfer of ownership applications are subject to the 30% threshold set in the ECA of equity ownership held by HDG's.
- 7.5. There is a need for clarity on what constitutes transfer of ownership and what constitutes a transfer of control;

- 7.5.1 in instances where one hundred percent (“100%”) of a licensee’s share capital is transferred; and
- 7.5.2 in instances where less than 100% of a licensee’s share capital is transferred.
- 7.6. This document does not attempt to define “black ownership” as contemplated by the BBBEE Act wherein the Code of Practice for Broad Based Black Economic Empowerment provides general principles for measuring black ownership under the BBBEE Act. It seeks to define ownership as a general concept particularly as it pertains to the ECA.
- 7.7. In light of the foregoing, and taking into account the Companies Act, 2008 (Act No. 71 of 2008) and the Competition Act of 1998 (Act No. 89 of 1998);
- 7.7.1. Is the definition of a *control interest* as set out in 7.3 above still valid?
- 7.7.2. In your view, what constitutes control and how should the Authority define it. Set out the basis for your argument.
- 7.7.3. Are you of the view that the Authority should define ownership?
- 7.7.4. In your view, what constitutes Ownership and how should the Authority define it. Set out the basis for your argument.
- 7.7.5. Are you of the view that the transfer of 100% share capital in a licensee amounts to transfer of control or transfer of ownership?

8. Application of the ICT Sector Codes

- 8.1. The ECA requires the Authority to promote BBBEE and the BBBEE Act compels all organs of state and public entities to apply the applicable sector Codes.

How should the Authority go about doing this? Explain the rationale that underpins your view.

- 8.2. Should the Authority apply the Codes to all applications i.e. including service, spectrum, type-approval and number applications?
- 8.3. Should the Authority require BBBEE certificates to be submitted as part of licensees' annual compliance requirements?

9. General

- 9.1. Stakeholders are invited to submit any other commentary deemed to be useful or necessary to assist the Authority in the Inquiry and Findings.
- 9.2. With the exclusion of applications regarding individual licences, the Authority proposes to apply either HDG ownership requirements or the Codes, to all applications and processes.
- 9.3. Please provide your view whether this is the correct approach, or whether both HDG ownership and the Codes should apply to all applications and processes that do not involve individual licences?
 - 9.3.1. What should be the minimum level of BBBEE certification?
 - 9.3.2. Should HDG requirements or the application of the Codes be made mandatory and not be triggered only by an application of some other regulatory process?
 - 9.3.3. The Authority proposes that with individual licence applications, both HDG ownership requirements as well as the Codes should be applied. Please provide your view whether this proposed approach should apply? Provide reasons for your position.
 - 9.3.4. What should be the minimum level of BBBEE certification?

- 9.3.5. Should HDG requirements or the application of the Codes be made mandatory or should it be triggered by an application of some other regulatory process?
- 9.3.6. Two decades into the South African democratic dispensation, we are yet to see ownership and operations of licensees fully and meaningfully transformed. Consequently, there are growing calls which grows louder for transformation. In response to growing public and government sentiments in this regard, should the Authority impose timeframes for compliance by all of its licensees for requirements for empowerment?
- 9.3.7. What in your view would be an appropriate timeframe? Provide the rationale informing the period required to ensure compliance.

10. Process

- 10.1. In September 2011, the Authority published a Findings Document on the Review of Ownership and Control of Commercial Services and Limitations on Broadcasting, Electronic Communications Services and Electronic Communications Network Services (the Findings Document)⁹.
- 10.2. The 2011 Findings document noted policy contradictions that led to the view that the regulatory process needed to be suspended at the time.
- 10.3. In May 2014, the ECA was amended. The amended ECA, to a certain extent, rectified the policy contradictions between the Department of Trade and Industry and the Department of Communications. It is on this note that the Authority is again able to commence with this consultative process.
- 10.4. This Discussion Document is the commencement of the Section 4B Inquiry process as contemplated by the ICASA Act. Interested parties have at least 45 days to submit written comments. The process will culminate in the publication of a findings document.

⁹ Government Gazette No.34601

10.5. Comments submitted out of time will not be considered in the interests of a fair process.

Milestone	Timeframe	Requirements of Stakeholders
Publication of Discussion Document (Written comments)	45 days	Interested stakeholders to submit written comments on the Discussion Document ¹⁰
Public consultations (Oral supplementary comments, if necessary)	2 days ¹¹	Interested stakeholders who submitted written comments may make oral presentations.
Findings Document	2017/18	The consultative process will culminate in a Findings Document which the Authority will publish at the conclusion of the process.

¹⁰ Submission of written comments is the basis to make an oral submission at Public hearings

¹¹ The days scheduled for the public hearings will be determined by the number of submissions received. Two days is an estimate based on receipt of 12 submissions.

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