



**THE INDEPENDENT COMMUNICATIONS
AUTHORITY OF SOUTH AFRICA – NOTICE
1532 OF 2009**

**NOTICE IN TERMS OF SECTIONS 2, 4, 13 (3,
4, 5) and 65 (7) OF THE ELECTRONIC
COMMUNICATIONS ACT 36 OF 2005**

Ownership and Control Discussion Paper

Submission

19 February 2010



Section 1: Introduction and background

The Media Development and Diversity Agency (MDDA) welcomes the Ownership and Control discussion paper as published by the Authority on the 17th November 2009. Further, MDDA (the Agency) appreciates the democratic and participatory nature of policy making in our country. This paper is published a few months after the Agency published a “Trends of ownership and control of media in South Africa”, 15 June 2009, which provides some helpful context in respect of broadcasting for this discussion paper.

The Constitution Act No. 108 of 1996 of South Africa provides for the freedom of expression and access to information, in its Section 16 and 32. The MDDA was established by an act of Parliament (the MDDA Act No 13 of 2002) to create an enabling environment for the development of media development and diversity in South Africa (including radio, television, newspapers, magazines and new media). According to the MDDA Act, the MDDA is mandated, amongst other things, to:

- *Create an enabling environment for media development and diversity that is conducive to public discourse and which reflects the needs and aspirations of all South Africans.*
- *Redress exclusion and marginalisation of disadvantaged communities and persons from access to the media and the media industry.*
- *Promote media development and diversity by providing support primarily to community and small commercial media projects*

(Preamble MDDA Act)

The objective of the Agency is to promote development and diversity in the South African media throughout the country, consistent with the right to freedom of expression as entrenched in section 16 (1) of the Constitution, in particular –



- (a) freedom of the press and other media; and
- (b) freedom to receive and impart information or ideas.

For this purpose, the Agency is established to:

- Encourage ownership and control of, and access to, media by HDC as well as by historically diminished indigenous language and cultural groups,
- Encourage the development of human resources and training, and capacity building, within the media industry, especially amongst HDGs,
- Encourage the channelling of resources to the community media and small commercial media sectors,
- Raise public awareness with regard to media development and diversity issues,
- Support initiatives which promote literacy and a culture of reading,
- Encourage research regarding media development and diversity, and
- Liaise with other statutory bodies, such as ICASA and USAASA.

Accordingly, the Agency in addition to it participating in the processes for promoting media development and diversity through a number of capacity building programmes, research, etc has supported and worked closely with the community broadcasting sector including both radio stations and television initiatives (often in liaison with and/or together with ICASA) in pursuit of the objects of both the MDDA Act and ECAAct.

The vision of the MDDA is that “Each and every South African Citizen should have access to a choice of a diverse range of media”. The MDDA “is a development agency that will assist in building an environment where a diverse, vibrant and creative media flourishes and reflects the needs of all South Africans.”

The Agency provides both financial and other support (including capacity building, mentoring, exchange programmes, etc.) to media projects across South Africa. In terms of the MDDA Act, the then Minister in the Presidency, published regulations outlining the criteria that the MDDA



will consider when deciding on applications. Many of these are similar to those considered by ICASA; however a license does not guarantee support from the Agency. The Agency has in addition developed guidelines outlining what we will and won't support, in consideration of research into needs of both small commercial and community media projects and the resources available to us. In terms of these, the MDDA will:

- Only provide support to licensed radio and TV stations
- Focus on mentoring to increase institutional capacity of projects
- Complement rather than duplicate support provided by other entities (including the Department of Communications, the Open Society Foundation of S.A., etc.)
- Provide ongoing support for up to three years for non-profit organisations
- Provide support for once off projects aimed at increasing sustainability of media projects.

The MDDA has achieved some major milestones, ever since its first grant decisions in January 2004. As at the 15th February 2010, the Board has approved more than 278 different projects, with approximately more than R102m in grants accumulatively.

However, the sector has grown fast, further facilitated by the environment created by the ECA. By way of illustration, the Agency has received more than R150m worth of applications for funding support.

The MDDA commits –

- to ensure diversity of media in each and every municipal district of our country.
- to ensure increased media in different indigenous languages, reflecting unity in diversity,
- to ensure rural communities are empowered, jobs are created, poverty is alleviated and we have an informed society.

Accordingly in its plan, the Agency has set itself the following indicators for the years ahead, in



terms of its mandate in the promotion and strengthening small commercial print and community media:

- ✚ At least 1 community radio per district municipality funded
- ✚ At least 1 community newspaper per district municipality funded
- ✚ At least 1 community television per province funded
- ✚ 1 media co-operative per district funded guided by the feasibility study on the viability of co-operatives
- ✚ at least 1 hub per province (print & radio) funded
- ✚ number & range of student media funded
- ✚ number & range of atypical media funded
- ✚ number & range of new media funded
- ✚ number & range of content development initiatives
- ✚ Number and spread of small commercial newspapers, magazines, online newspapers or magazines funded

We therefore welcome this discussion, as it add value to all our legislative mandates as organs of state but also generally guiding the growth, promotion of investment and innovation in the communications sector.

Section 2: Nature and Scope of the Submission

A lot of changes have taken place in the broadcasting system, including with regard to diversity of ownership and control. In the financial year 2008/9, the MDDA commissioned Z-Coms to conduct research on the trends in ownership and control of media in South Africa. This was intended to assist the Agency in its pursuit of the mandate enshrined in Section 3 (b) (i) of the MDDA Act which requires that the MDDA in giving meaning and effect to Section 16 (1) of the Constitution Act No. 108 of 1996, encourages the ownership and control and access to media by historically disadvantaged communities as well as by the historically diminished indigenous language and cultural groups. This research report is a useful baseline data in understanding who owns and controls what in the media sector.



1. BACKGROUND IN RESPECT OF BROADCASTING SERVICES

- 1.1. The Independent Communications of South Africa (ICASA) 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”). Interested parties made written and oral representations on the Discussion Paper to ICASA.
- 1.2. Subsequent to ICASA having duly considered both the written and oral representations by interested parties, ICASA issued The Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences Position Paper (“the Position Paper”) on 13 January 2004.
- 1.3. On 13 January 2004 the Authority launched the Position Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Sound Broadcasting Licences.
- 1.4. On the same day as the publication of the Position Paper, the Authority published for written comment proposed amendments to the Independent Broadcasting Authority Act, even though the Authority was not required by statute to publish these proposed amendments for comment, the Authority had decided to allow the public and stakeholders the opportunity to help shape legislative proposals to the Minister and Parliament. The closing date for written comment was 13 February 2004.
- 1.5. The Authority received about ten written submissions from a broad range of stakeholders, which contained helpful suggestions and raised some complexities which the Authority needed more time to resolve. The Authority took into account the submissions received in order that the proposed amendments submitted to the Minister were comprehensive and took into consideration all the issues raised.
- 1.6. On the 06th May 2004, the Authority made recommendations to the Minister of Communications on proposed amendments to sections 48, 49, 50 and 52 and Schedule 1 of the Independent Broadcasting Authority Act, No. 153 of 1993 (“the IBA Act”) having



regard to the fact that the Position Paper envisaged new policy that had the potential to change the landscape of broadcasting in the country thereby creating new opportunities for broadcasters.

2. BACKGROUND IN RESPECT OF “TELECOMMUNICATIONS” SERVICES

- 2.1 The Agency notes the background outlined in Section B of the Discussion Paper, which reflects the ownership and control regulations prescribed by the Authority / Minister in terms of the repealed Telecommunications Act No. 102 of 1996.
- 2.2 The Agency assumes thereof that the Authority in publishing this Discussion Paper is also acting in terms of Section 95 of the ECA which provides for the Authority to consider (*if necessary*) repeal, amend regulations made under the repealed laws.

3. ROUNDTABLE ON OWNERSHIP AND CONTROL

- 3.1 On the 17 November 2009, ICASA published the “Ownership and Control Discussion Paper” in terms of Notice No. 1532 published in the Government Gazette No 32719, and written comments were invited to be submitted by the 19th of February 2010.
- 3.2 The MDDA welcomes this effort by the Authority, reviewing the previous regulatory framework, recommendations to the Minister in terms of the 2004 Position Paper to amend the provisions of the IBA Act, aligning the existing regulations to the ECA and towards a comprehensive regulatory guide for ownership and control of communication services in South Africa.
- 3.3 In this regard, the Agency convened a roundtable discussion on the 15th February 2010 with all stakeholders at Wits University, with a view to deliberate and assist in the finalisation of the Agency’s submission to ICASA. The roundtable was held in partnership with Wits University. It was a successful event attended by almost all stakeholders from the regulator (ICASA), the DTI, DoC, GCIS, broadcasting service licensees, electronic communication service licensees, electronic communication network service licensees, trade unions, academics, civil society and the media. The participants were very



appreciative of the opportunity provided by the Agency on this matter as the session prepared them for making submissions to ICASA well-informed by the current debates in this regard and challenges.

- 3.4 The Department of Trade and Industry indicated at the roundtable that in respect of international binding protocols, broadcasting sector does not have any such limits committing South Africa. But with respect to “telecommunications”, the country committed itself to allowing up to 30% foreign ownership as part of its foreign direct investment strategy.
- 3.5 The roundtable felt strongly that ICASA needs to ensure that this process is used to harmonise the policy and legislative framework governing this sector in order to ensure regulatory certainty. In so doing, the Authority and the relevant Departments need to look into potential conflict between legislative framework prescribed through the ECA, ICASA Act, BBBEE Act, International commitments, etc. and to the extent reasonable, provide for a harmonised approach. This will ensure consistency and is in line with the integrated development approach adopted by South Africa.
- 3.6 Lastly, the roundtable felt strongly that the Authority needs to have regard to the 2004 Position Paper and its 06th May 2004 recommendations to the Minister, as a starting point in respect of Section A of the Discussion Paper.
- 3.7 The Agency believes that the proposed amendments, read together with the Position Paper, were encouraging greater investment in the industry, promoting empowerment at all levels and ensuring that commercial broadcasters operate in climate of certainty and stability. Therefore the Authority needs to consider these, amend them given that it’s been six years since 2004 and more so with the promulgation of the ECA, the developments in respect of digital broadcasting, etc.

Section 3: DISCUSSION PAPER

Section 3 (b) (i) of the MDDA Act requires that the MDDA, in giving meaning and effect to Section 16 (1) of the Constitution Act No. 108 of 1996, encourages the ownership and control and access to media by historically disadvantaged communities as well as by the historically



diminished indigenous language and cultural groups. The thrust thereof of this submission will be promoting empowerment, transformation and that South Africans are central in the ownership and control of communication services. The broad intentions and vision of the broadcasting system in South Africa provides that:

- broadcasting services are owned and controlled by South Africans;
- the broadcasting system must reflect the identity and diverse nature of South Africa, that is controlled and managed by persons or groups of persons from a diverse range of communities, including persons from previously disadvantaged groups, and
- must reflect the multilingual and diverse nature of South Africa by promoting the entire spectrum of cultural backgrounds, religious backgrounds and official languages in the Republic.

3.8 Accordingly, the Discussion Paper in respect of the broadcasting system should be in line and in accordance with the objects of the ECA. We understand that the objectives of the ECA are in nature developmental and progressive.

3.9 This discussion paper is divided into two sections namely: Section A and Section B, with Section A providing a discussion on ownership and control issues centred on individual broadcasting services. Section B provides for a discussion on ownership and control issues relevant to individual electronic communications services (ECS) and electronic communications network services (ECNS).

3.10 This submission will deal with each section separately, even though the central thrust in both sections is that of ensuring the regulation promotes transformational trajectory as prescribed by the Constitution Act of South Africa, “South African constitution recognises the injustices of our past... and commit to improving the quality of life of all citizens and free the potential of each person”. (*Preamble, Constitution Act No. 108 of 1996*) and the objects of the ECA to:



- the promotion of the development of broadcasting services responsive to the needs of the public (2f);
- ensuring that broadcasting services are effectively controlled by South Africans (2w);
- the promotion of the empowerment of historically disadvantaged persons (including black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities (2h);
- ensuring that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the republic (2k); and
- the promotion of investment and innovation in the communications sector (2d).

3.11 Finally, the regulation should be consistent with the objects of the Broad-based Black Economic Empowerment Act.

4. SECTION A – OWNERSHIP AND CONTROL ISSUES ON BROADCASTING SERVICES

Section 64 of the ECA limits (directly or indirectly) the exercise of control over commercial broadcasting licensees by foreigners, including that of financial interest or an interest either in voting shares or paid up capital and the directors should not exceed 20%. In 2004, the Authority recommended amendments whose effects would amend Section 64, 65 and 66 of the ECA.

The Agency is in support of the 2004 proposed amendments. These recommendations were motivated by extensive consideration by the Authority of the balancing act required, in order to ensure the imperatives of the Act as outlined in the objects are kept. Further the recommendations promoted “regulated consolidation” which is defined in elaboration in the Position Paper (2004).

The attention of the Authority is drawn to section 13 (5) of the ECA which provides that,

“Regulations contemplated in subsection (3) and (4) must be made —

(a) **with due regard to the objectives of this Act**, the related legislation and where applicable, any other relevant legislation;”.



This section therefore empowers the Authority to (amongst others) consider the objects of the Act in prescribing regulations.

Some opinion makers have narrowly read the expression of “.....to promote a diversity of views and opinions.” in section 13 (4). Our submission firstly is that promotion of diversity of views and opinions does not limit the Authority’s consideration to any one element of transformation. Diversity is a transformational imperative for promoting democracy in line with the Constitution Act of the country. Transformation is a redress requirement in all areas of any business, be it ownership and control, management representation, skills, equity, etc. Therefore, transformation in every level and the entire value chain of a broadcasting service will lead to the promotion of diversity of views and opinions.

It is our considered submission that the Authority should read section 13 (4) of the ECA with the Objects of the ECA, in particular 2(w) which requires that the Authority ensures that broadcasting services are **effectively controlled** by South Africans and therefore give effect to provisions of the B-BBEE Act in respect of transformation in the entire value chain of the broadcasting services including management control, skills development, preferential procurement, enterprise development, employment equity and socio-economic development. In this regard, the Authority (through its predecessor, the IBA) set precedence and has always enshrined these commitments in the license conditions of broadcasting service licensees.

The Agency therefore submits that this regulation should be consistent with the intentions and objects of the ICASA Act, ECA and B-BBEE Act. The objects of the ECA already provide principles and guide for the Authority to harmonise the intentions of these laws.

4.1 **RESPONSES TO QUESTIONS UNDER SECTION A OF THE DISCUSSION PAPER:**

- (i) ***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. BBE Act?

- Section 2 (h) of the ECA provides for the “promotion of the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities”. This is the guiding principle that should govern any regulations, therefore promoting empowerment at all levels.
- All licensees should be committed to the objects of the ECA, so that viewed collectively the broadcasting system should be responsive to the needs of all South Africans.
- Further, the broadcasting system is based on a three-tier system, which is the measure that will ensure that viewed collectively broadcasting services are effectively controlled by South Africans.
- The market share of licensees cannot be a measure to meeting the goals of the law.

(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?

- Market share cannot be used as an effective instrument to diversify views and opinions. Strong regulation and licensing is an instrument to ensure diversity of views and opinions. This coupled with a strong regulator that monitors compliance to the license terms and conditions.
- Diversity of views and opinions would be enhanced by diverse ownership and control, by diverse languages, diverse formats, diverse news and programming, diverse sources of news and information, etc.

(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?

- Regulation should be consistent, predictable and fair. Approach to rural and secondary market can only be supported by developmental oriented approach by the regulator having regard to the constitutional transformation imperatives.

(ii) 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.

- The Agency supports the 2004 Position Paper in this regard, which promoted a little relaxation in respect of limitations on foreign ownership having regard to the need to increase foreign investment but limited in order to ensure that the broadcasting system is in accordance with the objects of the Act, controlled by South Africans.

(iii) What constitute control of an individual licence?

- The Agency supports the proposed amendments in the 2004 Position Paper in order to define and simplify “control”, deemed control, financial interest and securities.

(iv) Should that exemptions apply to compliance with BBEEE be incorporated in new regulations of ownership and control, if so in which instance?

- Exemptions should only be entertained when there is such good cause shown that convinces the Authority but within the framework of the objects of the Act.

(v) What factors should the regulator consider when promoting diversity of views and opinions through ownership and control regulation?



- Refer to the answer in (a) above.

(vi) 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?

- Regulation will have to be specific on broadcasting services given the mandate broadcasting services have in terms of the objects of the Act, for example, public service programming, development of local content, promotion of South African culture, languages, etc.
- Refer sections 2 (s), (u) of the ECA.

(vii) What measures should be used to ensure that ownership or control restrictions on new services, for an example, mobile television services IPTV/ VOD services and Direct Audio Broadcasting reflect diverse opinions and views of all, including the poor?

- Specifications of different formats, genres of programming, languages, etc. will need to be imposed on licensees / channels.

(viii) Does increase in ownership by historically disadvantaged groups lead to proportional increase in diverse opinions and views? If yes explain, if no explain?

- Refer to (a) above.
- Yes, diverse ownership and control, when equity is unencumbered and there is no management contracts that limit participation of owners, does increase diverse views and opinions.
- Also, when accompanied by policy that provide for editorial independence, diversity of views and opinions will increase.
- Also, any such would further require strong monitoring and compliance, which means a strong regulator is needed.



- (ix) ***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?***
- The objects of the ECA remain applicable to all licensees.
- (x) ***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?***
- The Agency is again in support of the approach taken by the Authority in the 2004 Position Paper in this regard.
- (xi) ***How should we advance BBEEE in the broadcasting sector?***
- Through the regulation and license conditions.
- (xii) ***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 license of every licensee should include such shareholding details and amendments therefore of licenses require the Authority's approval. This is in line with section 9 (2) (b) of the ECA and conventional practise by the Authority.
- (xiii) ***What values or percentages should be allocated to gender, youth and regional representation to ensure that broadcasters diversify views and opinions?***
- Historically, the Authority has always taken the promises of performance by applicants. In the context of the BBBEE and the ICT Charter, the Authority



will be guided by the minimum scorecard provided, but license those applicants that are committed to the objects of the Act.

(xiv) See questions (i), (ii) and (xiv) on BBEEE, are they relevant to the broadcasting sector

- Yes, they are, they are consistent with the objects of the Act.

(xv) Any other relevant issue you would like to suggest or comment upon?

- Comments provided in the introduction section of this submission.
- Also, in order to limit the extent of commoditisation of broadcasting, which after all is not just any business but a key cultural institution where pluralism and diversity needs to be pro-actively retained, the Authority may wish to consider a version of Canadian regulatory practice. In that jurisdiction, sales of shares above a certain level incur a levy, which in turn is dedicated towards training or other capacity building. The MDDA could administer such a levy for the particular purposes for which the Authority would want it intended.
- (See for Canada: <http://www.crtc.gc.ca/archive/ENG/Notices/1992/PB92-42.htm>; <http://www.crtc.gc.ca/archive/eng/Decisions/2000/DB2000-747.HTM>)

(xvi) What is your view of the approach adopted by the Authority

- Refer to section 1 of this submission.



5. SECTION B – OWNERSHIP AND CONTROL ISSUES ON TELECOMMUNICATIONS

Section 13 (3) of the ECA provides that, “The Authority may by regulation, set a limit on, or restrict, the ownership or control of an individual licence, in order to —

- (a) promote the ownership and control of electronic communications services by historically disadvantaged groups; or
- (b) promote competition in the ICT sector.”

The Agency notes drafting omission of electronic communications network services in this section. It is worth noting that no where in the Act (in particular in the objects of the Act) is such exclusion explicitly mentioned. Therefore, the intention of the legislature is clearly not to exclude ECNS. Again, we draw the Authority’s attention to section 13 (5) of the ECA which provides that,

“Regulations contemplated in subsection (3) and (4) must be made —

- (a) **with due regard to the objectives of this Act**, the related legislation and where applicable, any other relevant legislation;”

This section empowers the Authority to (amongst others) consider the objects of the Act in prescribing regulations. The relevant objectives of the ECA (referred to in other sections of this submission) that promotes empowerment do not exclude individual electronic communications network services.

6.1 RESPONSES TO QUESTIONS UNDER SECTION B OF THE DISCUSSION PAPER

When formulating ownership and control regulations under the ECA the Authority needs to address the following issues:

6.1.1 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 amount to the transfer of a control interest?

- Such transfers should be subject to the Authority's approval, in order to at all times ensure licensees are in line with the objects of the Act.
- In order to limit the extent of commoditisation of broadcasting, which after all is not just any business but a key cultural institution where pluralism and diversity needs to be pro-actively retained, the Authority may wish to consider a version of Canadian regulatory practice. In that jurisdiction, sales of shares above a certain level incur a levy, which in turn is dedicated towards training or other capacity building. The MDDA could administer such a levy for the particular purposes for which the Authority would want it intended.
- (See for Canada: <http://www.crtc.gc.ca/archive/ENG/Notices/1992/PB92-42.htm>; <http://www.crtc.gc.ca/archive/eng/Decisions/2000/DB2000-747.HTM>)

6.1.2 How do we strike a balance between section 2 (d), (f) and (y) on the one hand and 2 (h) and (p) on the other hand on the ECA? Can we reconcile these two policy objectives so that the need to empower HDI's and the need to ensure that regulatory measures developed by the Authority do not serve as a barrier to entry?

- These are reconcilable; the Authority in its decision making has always balanced the imperative of transformation without undue interference in commercial activities.
- This regulation is by no means a barrier to entry, transformation and participation of HDI in the economy is a national priority.

(i) The BBEE makes reference to "black people", whilst the ECA relates to "historical disadvantaged persons or groups" [See section 2 (h) which articulates the primary objects of the Act and 9 (2) (b) Of the ECA.] Are these two concepts reconcilable?

- To the extent of understanding the context and the objects of the Act, and read with relevant legislation as the Authority is empowered in terms of section 13 (5) of ECA. For ease of implementation, the Authority may seek amendments to the Act to clarify the same.

(ii) Section 9 (2) (b) allows the Authority to include the minimum percentage of equity ownership to be held by persons from historically disadvantaged groups who are applying for an individual licence. Should the envisaged ownership regulations adopt the same threshold?



- The regulation has to be in line with the Act. It is worth noting that the Act refers to a minimum of 30%. Therefore the regulation should allow the Authority to issue licenses to applicants with higher ownership by persons from HDG.

(iii) Whilst the term equity is not defined in the ECA, Section 10 (a) of the Broad-Based Black Economic Empowerment Act 53 of 2003 (“the BBBEE Act”) provides that “Every organ of state and public entity must take, account and, as far as is reasonable 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 authorizations in terms of any law”. He codes are issued in terms of section 9 of the BBBEE Act. In terms thereof, clause 3.8 in Code 100 defines equity as follows:

“Equity, in relation to any form of enterprise, means the capital invested in that enterprise in respect of which the members have a claim against the enterprise or against the other members of that enterprise by reason of holding an equity interest. Analogous terms and concepts include, but are not limited to:

- *Issued share capital in a company limited by shareholding or share capital in a co-operative society;*
- *The total of members ‘ interests in a close corporation; and*
- *The total interest of all the partners in a partnership”.*

(l) Is this definition helpful in the context of the ownership and control framework? If not, can you provide an alternative?

- The definition is helpful.

(ll) How could the Authority better promote the ownership and control of electronic communications services by historically disadvantaged groups in listed companies

- Reference is made to the approach taken in the broadcasting process of 2004.

(lll) Are the issues regulated in the limitation of ownership and control of telecommunications services in terms of section 52, 16 January 2003 (Notice R105, Government Gazette 24288 of 2003) still relevant under the Electronic Communications Act, 2005 (Act 36 of 2005) (The Act)? What improvements, if any can be made to the 2003 ownership and control regulation?



- The regulation should ensure alignment and consistency with the relevant sections of the ECA, BBBEE, etc.
- The issues are still relevant to today hence this submission is reliant on the ECA as well as sections of the BBBEE.

(IV) *How could the Authority strike the balance between the need to promote the empowerment of historically disadvantaged persons on the one hand and the need to promote competition and encourage investment on the other hand? Are the two necessarily mutually exclusive?*

- Transformation and participation of HDI in the economy is a national priority and imperative. It is in the best interest of any business.
- There is inherently no contradiction between the need to promote entry of historically disadvantage persons into any market on the one hand and the need to enhance competition with a view to attracting investment on the other. The entry by historically disadvantaged persons could (should) increase competition and investment.

(V) *Do the provisions of the Act empower the Authority to prescribe regulations on foreign limitations in individual ECS and ECNS licences?*

- Yes, the Authority should take guidance from the primary objects of the Act.
- Further, the Authority needs to align its regulation with the country obligations in terms of international protocols.

(VI) *Should the Authority regulate foreign ownership for electronic communications? if so to what extent?*

- Yes, the Authority needs to align its regulation with the country obligations in terms of international protocols.
- Much of the mandate of the Authority needs to address these kinds of matters which include the regulation of foreign ownership.

(VII) *In regulating ownership and control for electronic communications what percentage should be allocated towards black people, black women, black youth and black disabled people? Should a score card be used?*

- The Act provides for a minimum of 30%.



- The Authority should prioritise applicants with higher percentages in its licensing decisions.
- Foreign investors do appreciate countries priorities as long as they are clearly articulated, consistent with the country's commitments at World Trade Organisation (WTO), etc. and there is regulatory certainty.

(VIII) Are restrictions and limitations on cross licence ownership relevant for electronic communications? If yes, to what extent and what measures should be put into place to ensure that convergence is encouraged in the process?

- The Authority should refer to the approach taken in the broadcasting sector, in its January 2004 Position Paper. Some similarities exist in respect of content providers in the converged space.

(IX) To what extent should the Authority restrict the transfer of ownership and control interest in a licence?

- Transfers should be subject to the Authority's notice and approval, to avoid reverse of transformational gains achieved during licensing.
- The regulator could consider an approval regime that includes a levy system to ensure that where ownership consolidation is an effect, that a levy is required to support diversity elsewhere.

(X) What factors should be considered in prescribing a limitation on ownership and control of an individual licence by foreign investors?

- The Authority needs to align its regulation with the country's obligations in terms of international protocols.

(XI) What is the effect of ownership limitation and restrictions on foreign investment? Can lessons be learnt from the broadcasting sector and should we be guided by limitations imposed in other countries?

- Limitations and restrictions on foreign ownership is a global phenomenon.
- South Africa also has commitments internationally.



- Broadcasting lessons are different given the cultural imperative of broadcasting and therefore sovereignty protections and considerations, over and above the local participation in the economy.
- For example, as discussed above, in order to limit the extent of commoditisation of broadcasting, which after all is not just any business but a key cultural institution where pluralism and diversity needs to be pro-actively retained, the Authority may wish to consider a version of Canadian regulatory practice. In that jurisdiction, sales of shares above a certain level incur a levy, which in turn is dedicated towards training or other capacity building. The MDDA could administer such a levy for the particular purposes for which the Authority would want it intended.
- (See for Canada: <http://www.crtc.gc.ca/archive/ENG/Notices/1992/PB92-42.htm>; <http://www.crtc.gc.ca/archive/eng/Decisions/2000/DB2000-747.HTM>)

(XII) What mechanism can be brought in place to ensure that existing licensees comply with the suggested limitation of equity ownership? What measures should be introduced to ensure that BBBEE is not diluted? In other sectors a lock – in period is used, how long should the lock-in period be, if any?

- Strong monitoring is needed from the Authority's side, thereby requiring a strong regulator to ensure compliance thereof.
- Transfer of shares should be subject to the Authority's approval as discussed above.
- Equity ownership structure should be included in the licensee's license, so that changes are approved by the Authority to prevent dilution of ownership by HDI's and locals.

(XIII) What are the limitations to ensure that electronic communication services and networks are controlled by South Africans?

- Finances and commitment by investors to supporting local participation in the economy.

(XIV) Is it practical and desirable for the regulations or targets to be identical across each sub – sector (ECS vs. BS)?



- Not necessarily given the other imperatives and considerations in respect of broadcasting.

Section 4: Conclusion

The Agency is established in partnership with the major print and broadcast media industry to create, support, promote and encourage an enabling environment for media development and diversity that is conducive to public discourse and which reflects the needs and aspirations of all South Africans.

The Agency commends the Authority for this initiative and hopes that the process will lead to enhancement of the goals and vision of a communications sector serving the people of South Africa.

Further, we would recommend that the Authority consider the MDDA Research Report on Trends of ownership and control of media, June 2009; as a reference document. It is our hope that this process should lead to recommendations made by the Authority to the Minister for clearer Policy Directive in this regard intended to harmonise the policy and legislative framework guiding this imperative including international obligations. Such discussions should involve all relevant Government Departments like DTI and DAC.

The MDDA commits –

- to ensure diversity of media in each and every municipal district of our country.
- to ensure increased media in different indigenous languages, reflecting unity in diversity,
- to ensure rural communities are empowered, jobs are created, poverty is alleviated and we have an informed society.



In conclusion, the MDDA would like to participate in any further processes aimed at achieving the purpose of this discussion paper. This submission should be seen as working contributions of the MDDA to this public discourse.

Submitted for and on behalf of:

MDDA

Lumko Mtimde

Chief Executive Officer

19 February 2010