
GOVERNMENT NOTICE

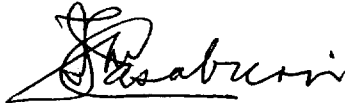
DEPARTMENT OF COMMUNICATIONS

No. R. 105

16 January 2003

TELECOMMUNICATIONS ACT, 1996 (ACT 103 OF 1996):**REGULATIONS IN RESPECT OF THE LIMITATION OF OWNERSHIP
AND CONTROL OF TELECOMMUNICATION SERVICES
IN TERMS OF SECTION 52**

Under section 96(6) of the Telecommunications Act, 1996 (Act No. 103 of 1996), I, Ivy Matsepe-Casaburri, Minister of Communications, hereby approve and publish the regulations in the Schedule attached hereto made by the Independent Communications Authority of South Africa under section 96(5) read with section 52 of the said Act.



Dr. Ivy Matsepe-Casaburri
Minister of Communications

SCHEDULE**Definitions and Interpretation**

1 (1) In these regulations any word or expression to which a meaning has been assigned in terms of the Act shall have the meaning so assigned unless the context otherwise indicates—

"affiliate" means-

- (a) in relation to a juristic person -
 - (i) any person who has a direct or indirect ownership interest or control interest in the juristic person;
 - (ii) any person in whom the juristic person has a direct or indirect ownership interest or control interest; or
 - (iii) any person in whom a person contemplated in subparagraph (i) has a direct or indirect ownership interest or control interest; and

- (b) in relation to a natural person, a parent, spouse or child of the relevant natural person;

"concentrated market" means any telecommunication service category in which:

- (a) there are fewer than five licensees; or
- (b) the Authority determines that the market is not concentrated after taking into consideration the intensity of competition among the operators in any particular market by counting sub-categories of telecommunication services that may be authorised within different categories of telecommunication service licenses, such as national long distance telecommunication services, data or other services authorised within a public switched telecommunication service license, or cross-categories of licenses such as global mobile personal communication by satellite service licenses and mobile cellular telecommunication service licenses.

"control interest" means that 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;

"historically disadvantaged persons" means in the case of—

- (a) natural persons, who before the Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993) came into operation, were disadvantaged by unfair discrimination on the basis of race, gender, disability, sexual orientation or religion;
- (b) an association, a majority of whose members are natural persons referred to in regulation (a) above;
- (c) a juristic person other than an association, and natural persons referred to in regulations (a) and (b) above own and control more than twenty-five percent of such juristic person's issued share capital (directly or indirectly) or members' interests and are able to control a majority of the juristic person's votes;
- (d) a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b) or (c) above own and control more than twenty-five percent of such juristic person's or association's issued share capital or member's interest and are able to control a majority of its votes;
- (e) a juristic person whereby natural persons, associations and/or juristic persons referred to in regulations (a), (b), (c) or (d) above possess the power to direct or cause the direction of the management and policies thereof whether through the direct or indirect ownership of issued share capital, by contract or otherwise;

"issued share capital" means with respect to any person all shares, interests, participations or rights or other equivalents (however designated, whether voting or nonvoting, ordinary or preferred) in the equity or capital of such person, now or hereafter issued;

"juristic person" means any company, closed corporation, voluntary association, partnership, joint venture, trust, or other enterprise or unincorporated organisation; or government (or any agency, instrumentality or political subdivision thereof).

"licensee" means any person who holds a telecommunication service licence under the Act;

"ownership interest" means any direct or indirect ownership of issued share capital of more than five per cent in a licensee;

"person"

- (a) means both juristic persons and natural persons;
- (b) provided that when two or more persons act in concert as a partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of the issued share capital of a licensee, such partnership, syndicate or group shall be deemed a single "person" for the purpose of these regulations;

"telecommunication service category" means a telecommunication service authorised by one of the following telecommunication service licence categories -

- (a) a public switched telecommunication service licence;
- (b) a mobile cellular telecommunication service licence;
- (c) a national long distance telecommunication service licence;
- (d) an international telecommunication service licence;
- (e) multimedia service licence;
- (f) international telecommunication gateway service licence enabling the licensee to operate as a carrier of carriers;
- (g) local access telecommunication service licence;
- (h) public-pay telephone service licence;
- (i) under-serviced area licence;
- (j) value added network service licence;
- (k) private telecommunication network licence;
- (l) global mobile personal communication by satellite service licence;
- (m) national mobile data telecommunication service licence;
- (n) national wireless data telecommunication service licence; and
- (o) any other telecommunication service license categorised by the Authority in terms of sections 33 (1)(b) or 34(2)(a)(vi) of the Act;

"telecommunication service licence" means a licence issued or deemed to have been issued in terms of the Act; and

"the Act" means the Telecommunications Act, 1996 (Act No. 103 of 1996);

"transfer" means sell, convey, assign dispose of, settle, alienate, or otherwise transfer, in whole or in part, whether or not for value, any interest in a licence or licensee from one person to a different person;

"transfer of a control interest" shall have the same meaning as "transfer" except that such transfer of a control interest shall occur when a control interest in a licensee is transferred from one person to a different person;

1(2) For purposes of these regulations an "indirect" ownership interest in a licensee shall be calculated by use of a multiplier whereby the ownership interest held at each level in the ownership chain is multiplied by the preceding percentage attributed to the indirect interest holder.

See Annexure A illustration of the above-mentioned calculation.

Limitation of ownership and control of telecommunication services

2 (1) No person who holds an ownership interest or control interest in a licensee in any telecommunication service category in a concentrated market, or an affiliate of such person, shall hold an ownership interest or control interest in another licensee in the same telecommunication service category.

2 (2) Sub-regulation 2(1) shall not apply to—

(a) the Government of the Republic of South Africa (or any agency, instrumentality or political subdivision thereof) acting in its capacity as a shareholder holding an ownership interest in the issued share capital of a licensee. For avoidance of doubt, licensees regardless of the amount of ownership interest held by the Government of the Republic of South Africa in such licensees, are subject to the limitation on ownership prescribed by sub-regulation 2(1).

(b) passive institutional investments where such investments are held by a person referred to in section 144 of the Companies Act, 1973 (Act No. 61 of 1973) or an affiliate thereof: Provided that such person or affiliate, as the case may be, does not participate in the management of the licensee.

2(3) For purposes of this regulation, when determining a licensee's compliance with regulation 2(1), the Authority will only consider the primary licence categorisation and not any sub-category of services that may also be authorised within the licence, such as a public switched telecommunication service licence that also authorises the holder to provide national long distance telecommunication services, data or other services (in such case the Authority will only consider the licence to be a public switched telecommunication service licence).

Maintenance and submission of ownership and control interest records

- 3(1) A licensee must maintain accurate and detailed records indicating the –
- (a) owner of record holding any ownership interest, including the name(s), address, telephone numbers, e-mail address and any other contact details;
 - (b) ownership interest held as of the date the records were last updated;
 - (c) title and class of ownership interests held;
 - (d) number of shares or other ownership interests owned of record in the issued share capital by each holder of an ownership interest;
 - (e) identity of the person or persons entitled to vote such issued share capital; and
 - (f) the percent of the relevant class of issued share capital.
- 3(2) The records contemplated in 3 (1) above must reflect the following:
- (a) ownership interests and control interests held by historically disadvantaged persons during the first two years of the initial grant of the licence, except that licensees may exclude such information for ownership interests trading on the JSE Securities Exchange South Africa, or any other internationally recognised securities exchanges; or
 - (b) the total number of issued share capital trading on the JSE Securities Exchange South Africa or any other internationally recognised securities exchanges.
- 3(3) A licensee must annually file with the Authority, no later than 31 January of each year, an ownership report for the preceding calendar year containing the information referred to in sub-regulation 3 (1) above. The Authority may, at the request of a licensee, waive such licensee's obligation with respect to some of the information required to be kept as part of the record keeping prescribed in sub-regulation 3 (1) where such licensee's issued share capital is listed on the JSE Securities Exchange South Africa or any other internationally recognised securities exchange and the information is not kept in the ordinary course with respect to such listed issued share capital and not otherwise required by such exchanges.

- 3(4) A licensee must file with the Authority, whenever required to do so by the Authority, any records or other information or extracts there from required to be maintained in sub-regulation 3(1).
- 3(5)(a) A licensee is responsible for updating the records required to be maintained pursuant to sub-regulation 3 (1) within 30 days of any transfer of an ownership interest.
- (b) Within 10 days of updating such records, the licensee shall file an updated ownership report with the Authority.
- (c) Where such transfer requires prior approval by the Authority under sub-regulation 4 (1), the licensee shall include with its report the date of such approval and a copy of the authorisation approving the transfer.

Transfers of ownership interests and control interests

- 4 (1) A licensee shall obtain prior written approval from the Authority in accordance with the procedure prescribed by regulation 5 in any case where the transfer results in-
- (a) the transfer of a control interest in the licensee;
- (b) a decrease in the ownership interests held by historically disadvantaged persons in a licensee within the first two years of initial grant of the licence where the licensee proposed such ownership interests to be held by historically disadvantaged persons in its application for a licence in response to an invitation to tender issued by the Minister under section 34 of the Act.
- 4 (2) Sub-regulation 4 (1) shall not apply to-
- (a) the issued share capital of a licensee that is trading on the JSE Securities Exchange South Africa or other internationally recognised securities exchange where the trading of such issued share capital would not result in the transfer of a control interest in the licensee;
- (b) the transfer of any ownership interest or control interest in a licensee where the market is not a concentrated market;
- (c) the transfer of any ownership interest held by the Government of the Republic of South Africa (or any agency, instrumentality or political subdivision thereof) acting in its capacity as a shareholder holding an ownership interest in the issued share capital of a

licensee (regardless of whether such transfer results in a transfer of a control interest in the licensee), but would apply to such licensee in cases where such licensee holds ownership interests in another licensee; or

- (d) transfer of ownership interests where such transfer does not result in a transfer of a control interest.

Procedures for transfers of ownership interests or control interest

5(1) A licensee who must obtain approval under sub-regulation 4(1) must in the application to the Authority -

- (a) indicate that the application is submitted in terms of these regulations;
- (b) explain in detail, the transfer that is the subject of the application;
- (c) set out in detail all of the ownership interests and the control interests held by the licensee on the date of the applications, as required by sub-regulation 3 (1);
- (d) set out in detail after completion of the proposed transfer the ownership interests and the control interests as required by sub-regulation 3 (1);
- (e) undertake that if the transfer is approved by the Authority, the licensee will continue to satisfy its obligations under the licence, the Act and regulations;

5(2) The applications must be signed by –

- (a) the licensee;
- (b) transferor of the controlling interest that forms the subject matter of the application; and
- (c) proposed transferee.

5(3) The application must be accompanied by an application fee as may be prescribed by the Authority pursuant to Section 88 of the Act.

Confidentiality of applications

6 (1) The Authority may at the request of a licensee or an interested person who submitted representations, determine that any document or

information relating to the financial capacity or business plan of any person or to any matter reasonably justifying confidentiality, shall not be open to public inspection, if such document can be separated from the application, representations or other documents in question.

- 6 (2) If the Authority refuses a request contemplated in sub-regulation 6 (1), the applicant or person concerned may withdraw the document or information in question, in which event, the Authority shall not consider the document or information so withdrawn.

Application Review

- 7 (1) If an application is made under sub-regulation 5 (1) the Authority may--
- (a) publish a notice of the application in the *Government Gazette* and invite written representations with regard thereto, to be submitted within the period specified in the notice or within such additional period as the Authority may determine; and
 - (b) hold hearings in respect of the application at such time and place as the Authority may determine after the period for submitting representations under paragraph (a), if applicable, has passed.
- 7 (2) A hearing contemplated in sub-regulation 7 (1) (b) may be open to the public. Where such hearing is open to the public, before considering any document or information which the Authority has determined shall not be open for public inspection in terms of sub-regulations 6(1) and 6(2), the Authority may direct that the public or any member or category thereof shall not be present at the hearing: Provided that before making such a direction the Authority shall notify those present of its intention to do so, allow persons to object to such direction and give due consideration to any objection made.
- 7 (3) The Authority may require a licensee or an interested party who has made written representations under sub-regulation 7(1) to furnish the Authority, within the period specified by it, with such further information as the Authority may request in order to consider the application.
- 7 (4) The criteria the Authority will use in evaluating an application for—
- (a) the transfer of a control interest in a licensee will be whether the licensee will be able to satisfy its obligations under the licence and comply with the Act and regulations promulgated there under after the transaction(s) proposed in the transfer application have been finalised;

- (b) transfers involving a decrease in the ownership interests held by historically disadvantaged persons will be whether the transfer promotes sections 2(d), 2(k), 2(l), 2(n), 2(o), and 2(q) of the Act.
- 7 (5) The Authority shall, after having considered the application and the written representations, if any, and any other information considered relevant by the Authority and applying the relevant criteria set out in regulation 7(4), notify the licensee (and upon request, any interested party) of its decision together with the reasons therefore within sixty days of receipt of the application unless otherwise extended for good cause by the Authority, failing which the application shall be deemed to be granted by the Authority.
- 7 (6) The parties to an application lodged with the Authority under sub-regulation 7 (1) shall have 120 days from the date their application is granted under sub- regulation 7(5) within which to finalise the transfer or such grant shall lapse unless extended by the Authority in writing.
- 7 (7) The licensee shall notify the Authority in writing within thirty days after finalisation of any transfer granted under sub-regulation 7 (5).
- 7 (8) The Authority may combine related applications. When multiple transfers are contemplated as part of a single transaction, licensees may file a single application explaining each step of the transaction and include relevant charts showing the ownership structure prior to and post finalisation along with any other materials the licensee considers helpful in assisting the Authority in rendering its decision.
- 7 (9) The Authority may grant its approval in relation to one or more transfers of the issued share capital that forms the subject matter of an application.

Non-Compliance

- 8 Without limiting any other power of the Authority to enforce these regulations or other consequence of applicable law not being complied with-
- (a) Any transfers in violation of regulation 2(1) shall be void; and
- (b) Any transfer without written approval from the Authority shall be void.

REPEAL

9. The regulations under General Notice 300 of 2002 published on 27 February 2002 in Government Gazette No. 23190 are hereby repealed.

ANNEXURE A

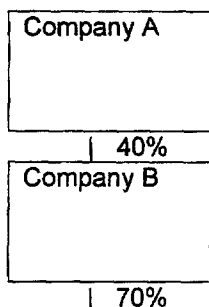
OWNERSHIP CALCULATIONS

The following examples illustrate the method of calculating ownership interests held indirectly in a licensee through one or more intermediate juristic persons as prescribed by regulation 1(2).

Example 1: If Company A (the indirect owner) were to own forty percent (40%) of the share capital of Company B (the intermediate company) and Company B were to own seventy percent (70%) of the share capital in a licensee, then, for purposes of this regulation, Company A would be deemed to hold twenty eight percent (28%) of the issued share capital in that licensee. Company A's interest in the licensee is calculated by multiplying Company A's interest in Company B by the percentage interest Company B holds in the licensee. ($40\% \times 70\% = 28\%$) Under the regulations, Company A would be deemed to hold a control interest in the licensee.

Example 2: Company A holds a forty percent (40%) interest in Company B and Company B holds a forty percent (40%) interest in Company C. Company C holds a seventy percent (70%) direct interest in the licensee. Company A's interest in the licensee would be eleven point two percent (11.2%). Company A's interest in the licensee is calculated by multiplying Company A's interest in Company B by the percentage Company B holds in Company C. The resulting percentage interest is then multiplied by the percentage interest Company C holds in the licensee. ($40\% \times 40\% = 16\%$; $16\% \times 70\% = 11.2\%$). Under the regulations Company A would be deemed to hold a ownership interest in the licensee but because such ownership interest falls below twenty five percent (25%), the indirect interest would be deemed non-controlling; provided, however, the indirect owner did not exercise control in fact over the licensee as prescribed in paragraph (g) of the definition of control interest.

EXAMPLE 1



$40\% \times 70\% = 28\%$
Company A would be deemed to hold a 28% ownership interest in the licensee

Licensee

EXAMPLE 2

Company A

| 40%

Company B

| 40%

Company C

| 70%

Licensee

$$40\% \times 40\% = 16\%$$

Company A would be deemed to hold a 16% ownership interest in Company C

$$16\% \times 70\% = 11.2\%$$

Company A would be deemed to hold a 11.2% ownership interest in Licensee
