

WILL DRAFT POLICY DIRECTION PUBLISHED FOR ICASA TO INVESTIGATE BLACK OWNERSHIP REQUIREMENTS FOR SOUTH AFRICAN BROADBAND LICENCES BE EASY?

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A draft Policy Direction was published yesterday for the Independent Communications Authority of South Africa (“ICASA”) to investigate changing black ownership requirements for South African broadband licences.

The Minister of Communications and Digital Technologies released the draft Policy Direction for comment. It seeks to allow ownership of broadband licences in South Africa, without the requirement

that black people, the youth, disabled people and women have equity ownership in the licence holder. The 30% black ownership requirement is an issue that may have discouraged businesses such as Starlink from starting up in South Africa.

If the draft Policy Direction is promulgated, ICASA will have to consider changing South Africa's current broadband licensing laws to allow for licences without the 30% black ownership, also known as the historically disadvantaged group ("HDI") equity ownership, requirement.

The draft Policy Direction is not a surprise. The Minister has been talking about equity equivalent programmes for months now. [He argues](#) that such programmes allow multinational companies alternative ways, without giving equity ownership, to make a positive impact on South Africa's economic development.

Publishing a draft Policy Direction is the first step he needs to take, under the Electronic Communications Act ("ECA"), to remove the black ownership requirement.

At first glance, it may seem like it will be plain sailing because, for policy directions, the ECA requires that the Minister must only:

- ☑ consult [ICASA](#);
- ☑ obtain the views of interested persons; and then
- ☑ publish a final version of the policy direction in the Government Gazette.

Except, ICASA is independent and has been known to push back against the Minister's draft Policy Direction, which is what it could do, given its current stance on black ownership. What is even more important is that the ECA compels ICASA to *consider* a policy direction. "*Consider*" is the key word here. [South Africa's courts](#) have said that while ICASA must consider the Minister's policy directions, the Minister's "*substantive ideas in such a policy plainly do not bind ICASA, who owes them no deference.*"

Similarly, in another piece of legislation – the ICASA Act – which sets out how inquiries are to occur, it provides that ICASA "*may conduct an inquiry into any matter...*". Again, on this aspect, our courts have said: "*In such instances too, ICASA is not bound to act on the direction but must merely consider it. It seems to [the court] that the effect of these provisions is simply to compel each party to be open to the ideas of the other.*"

Given the many issues that will need to be resolved regarding black ownership and broadband licences, there is a good chance that this issue may need to be fully, and finally resolved by South Africa's courts.