



POSITION PAPER

Government EEIP and Starlink Operating in South Africa: A Legal and Regulatory Analysis

Simangaliso Jachi

**Divisional Manager: Research and
Advisory**

Sjachi@empowerdexra.com

Tel: 081 576 7952

Anele Slater

**Research and Advisory
Consultant**

Aslater@empowerdexRA.com

M: 078 105 9644

30 May 2025

Executive summary

This Position Paper examines the legal and regulatory framework governing Equity Equivalent Investment Programmes (EEIPs) in South Africa, with specific focus on their application to Starlink's operations in the country. The paper analyses the complex interplay between the Broad-Based Black Economic Empowerment Act (B-BBEE Act), the Electronic Communications Act (ECA), and the Mineral Resources Development Act (MRDPA), highlighting the legal precedence established by the "Trumping provision" of the Amended B-BBEE Act of 2013.

The analysis demonstrates that Starlink's application for an EEIP is legally valid under South African law, despite arguments based solely on the ECA's transformation requirements. This conclusion is supported by a detailed examination of the relevant legislation, ministerial roles, and recent policy developments. The paper aims to provide clarity on this matter for policymakers, regulators, industry stakeholders, and the public.

Introduction and Background

Purpose and scope

1. This Position Paper addresses the ongoing debate regarding the application of Equity Equivalent Investment Programmes (EEIPs) to Starlink's operations in South Africa. It seeks to clarify the legal and regulatory framework governing transformation requirements in the ICT sector, with particular attention to the interplay between various pieces of legislation and the roles of different government departments and regulatory bodies.
2. The paper is structured to provide a comprehensive analysis of:
 - The historical development of relevant legislation and regulatory frameworks.
 - The legal standing of the ICT Charter and ICT Amended Code.
 - The "Trumping provision" of the Amended B- BBEE Act of 2013.
 - The respective roles of the Department of Trade, Industry and Competition (DTIC) and the Department of Communications and Digital Technologies.
 - The conflict between the B-BBEE Act, ECA, and MRDPA.
 - The implications for Starlink and similar multinational companies.

Historical Context of Transformation Legislation in South Africa

1. South Africa's post-apartheid economic transformation has been guided by several key pieces of legislation, each developed at different times and with varying approaches to addressing historical inequalities:

1.1 Mining Charter and Liquid Fuel Charter (1999-2000): The earliest sector-specific transformation charters emerged in the mining and liquid fuel sectors in 1999-2000. These charters used the language of "historically disadvantaged individuals" (HDIs), which included white women and white disabled people. The Mining Charter was incorporated into the Mineral Resources Development Act (MRDPA) of 2000.

1.2 Broad-Based Black Economic Empowerment Act (2003): The B-BBEE Act was enacted in 2003 and became effective in 2004. This Act introduced the concept of "black person" as the beneficiary of transformation, which specifically excluded white women and white disabled people. However, the detailed codes of good practice that would clarify implementation were only completed in 2007.

1.3 ICT Transformation Charter (2004): The ICT sector developed a transformation charter in 2004, which was not legally binding but served as a foundational document for the sector's approach to economic transformation.

1.4 Electronic Communications Act (2005): The ECA was passed as primary legislation in 2005, incorporating transformation requirements that mandated 30% HDI ownership. This created a definitional conflict with the B-BBEE Act's focus on "black people" rather than HDIs. The Section 9(1) states that – *"Any person may, upon invitation by the Authority, subject to the provisions of this Act, apply for an individual license in the prescribed manner. (2) The Authority must give notice of the application in the Gazette and – (a) invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice; (b) include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such higher percentage as may be prescribed"*.

1.5 ICT Sector Code (Post-2007): Following the completion of the B-BBEE codes of good practice, the ICT sector developed a formal sector code that was gazetted after 2007, providing more comprehensive guidance on transformation in the sector.

1.6 Amended B-BBEE Act (2013): The B-BBEE Act was amended in 2013 to address various implementation challenges, including conflicts with sector-specific

legislation. The amendment included the crucial "Trumping provision" that established the precedence of the B-BBEE Act over other legislation in matters of transformation.

1.7 Amended ICT Sector Code (2016): The ICT Sector Code was amended and gazetted on November 7, 2016 (Government Gazette No. 40407), aligning it more closely with the amended B-BBEE Act and codes.

1.8 Recent Amendments (2021): Further amendments to regulations regarding Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code were published on March 31, 2021 (Government Gazette No. 44382).

2. This historical progression reveals a complex and sometimes contradictory development of transformation legislation in South Africa, setting the stage for the current debates regarding the application of EEIPs in the ICT sector.

ICASA/ICT Charter versus ICT Amended Code

The ICT Charter: Origins and Legal Standing

3. The ICT Transformation Charter was developed in 2004 as a "second working draft" by the ICT Empowerment Charter Working Group. This charter predated the signing of the Electronic Communications Act of 2005 and was used to inform the writing of the ECA. However, it is important to note that this charter was not legally binding and did not have the definition of black people as described in later documents.
4. The ICT Charter represented an early attempt to address transformation in the sector but lacked the legal force and comprehensive approach that would come with later developments. It was primarily a voluntary initiative that set aspirational goals for the sector.

The ICT Sector Code and Its Amendments

5. The first formal ICT Sector Code was gazetted on June 6, 2012, following the completion of the B-BBEE codes of good practice in 2007. This code provided a more structured and legally binding approach to transformation in the ICT sector.
6. The Amended ICT Sector Code was subsequently gazetted on November 7, 2016 (Government Gazette No. 40407). This amended code aligned the sector's transformation requirements more closely with the amended B-BBEE Act and codes, including provisions for alternative transformation mechanisms such as EEIPs. The most recent amendments to regulations regarding Historically Disadvantaged Groups (HDG) and the application of the ICT Sector Code were published on March 31, 2021 (Government Gazette No. 44382), further refining the regulatory framework.

Comparative Analysis and Legal Implications

7. The progression from the non-binding ICT Charter of 2004 to the legally binding Amended ICT Sector Code of 2016 represents a significant evolution in the regulatory approach to transformation in the sector. Key differences include:
 - 7.1 Legal status:** While the ICT Charter was voluntary and non-binding, the ICT Sector Code and its amendments are legally binding under the B-BBEE Act.
 - 7.2 Definitional clarity:** The Amended ICT Sector Code provides clearer definitions aligned with the B-BBEE Act, particularly regarding the definition of "black people" as beneficiaries of transformation.
 - 7.3 Comprehensive mechanisms:** The Amended ICT Sector Code includes provisions for alternative transformation mechanisms such as EEIPs, which were not fully developed in the original charter.
 - 7.4 Alignment with national legislation:** The Amended ICT Sector Code is explicitly aligned with the B-BBEE Act and its amendments, including the Trumping provision that establishes legal precedence.
8. This evolution has significant implications for the application of transformation requirements in the ICT sector, particularly for multinational companies like Starlink that may seek to utilise alternative mechanisms such as EEIPs.

The Trumping Provision of the Amended B-BBEE Act of 2013

Exact legal text of the Trumping Provision

9. The Amended B-BBEE Act of 2013 (Act 46 of 2013) included a critical addition to Section 3 of the principal Act, commonly referred to as the "Trumping provision." The exact legal text is as follows:
10. Section 3 of the principal Act is hereby amended— (a) by the substitution for paragraph (a) of the following paragraph: "(a) to give effect to its objectives and purposes; and"; and (b) by the addition of the following subsection, the current section becoming subsection (1): "(2) In the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act."

11. This provision was signed into law by former President Jacob Zuma and came into effect on October 27, 2015, after a 12-month transitional period following the commencement of the rest of the Amendment Act on October 23, 2014.

Legal Implications of the Trumping Provision

12. The Trumping provision has several significant legal implications:

- 12.1 Precedence over prior legislation:** The provision explicitly establishes that the B-BBEE Act takes precedence over any other law in force prior to the commencement of the Amendment Act (January 27, 2014) if there is a conflict related to matters dealt with in the B-BBEE Act.
- 12.2 Impact on ECA of 2005:** This means that despite the Electronic Communications Act of 2005 having specific transformation requirements using HDI (Historically Disadvantaged Individual) terminology, the B-BBEE Act's definitions and requirements would prevail.
- 12.3 Impact on MRDPA of 2000:** Similarly, the Mineral Resources Development Act of 2000 and its associated Mining Charter would be subordinate to the B-BBEE Act in matters of transformation and economic empowerment.
- 12.4 Clarification of beneficiary definitions:** The trumping provision ensures that the B-BBEE Act's definition of "black people" (which excludes white women and white disabled people) takes precedence over the broader HDI definition used in other legislation.
- 12.5 Enforcement of B-BBEE Codes:** The provision legally binds organs of state like ICASA to apply the B-BBEE codes when evaluating transformation requirements, if sector-specific legislation has different requirements that are not aligned to the dtic BEE .
- 12.6 Validation of alternative ownership models:** The trumping provision confirms the legal validity of alternative ownership models provided for in the B-BBEE codes, such as Equity Equivalent Investment Programs (EEIPs), even when not explicitly mentioned in sector-specific legislation.

Application to the ICT Sector and ICASA

13. For the ICT sector specifically, the Trumping provision means that ICASA, as an organ of state, is legally bound to consider the full range of transformation mechanisms provided for in the B-BBEE Act and its codes, including EEIPs.

Section 10 of the Amended B-BBEE Act reinforces this obligation, stating:

14. "Every organ of state and public entity must 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 licenses, concessions or other authorisations in respect of economic activity in terms of any law."
15. This directly applies to ICASA's licensing processes, including for entities like Starlink seeking to operate in South Africa.

Roles of DTIC/Minister Parks Tau versus The ICT Minister Solly Malatsi

Department of Trade, Industry and Competition (DTIC) and Minister Parks Tau

Statutory Responsibilities

16. The DTIC, currently under Minister Parks Tau, has primary authority for B-BBEE implementation across all sectors:

Primary Authority for B-BBEE Implementation:

- 16.1** The DTIC is the custodian of the Broad-Based Black Economic Empowerment Act and its amendments.
- 16.2** Responsible for developing and implementing B-BBEE policy and regulations.
- 16.3** Oversees the B-BBEE Commission which monitors and enforces compliance.

EEIP Approval Authority:

- 16.4** The Minister of Trade, Industry and Competition has the statutory authority to approve Equity Equivalent Investment Programmes (EEIPs).
- 16.5** The EEIP approval process is controlled by the minister of trade and industry. However, the line ministry must be consulted and be represented in the Equity Equivalent Committee convened by the DTIC.
- 16.6** The Minister of Finance must also approve EEIPs, but the primary responsibility lies with the DTIC.

Sector Code Development:

- 16.7** The DTIC oversees the development and gazetting of all sector codes, including the ICT Sector Code.
- 16.8** Has authority to approve amendments to sector codes.

Communications and Digital Technologies Minister - Solly Malatsi

Statutory Responsibilities

17. The Minister of Communications and Digital Technologies has specific responsibilities related to the ICT sector:

ICT Sector Policy Direction:

- 17.1 Provides policy direction to ICASA on matters related to the ICT sector.
- 17.2 Recently published policy direction on Equity Equivalent Investment Programmes in the ICT sector (May 2025).
- 17.3 Can direct ICASA to align its regulations with national priorities and transformation objectives.

ICASA Oversight:

- 17.4 The ICT Minister has oversight responsibility for ICASA as the regulator falls under the Department of Communications and Digital Technologies.
- 17.5 Can issue policy directives that ICASA must consider in its regulatory decisions.

ICT Sector Transformation:

- 17.6 Responsible for promoting transformation within the ICT sector specifically.
- 17.7 Works within the broader B-BBEE framework established by the DTIC.

Overlapping Jurisdictions and Potential Conflicts

18. The dual ministerial roles create several areas of overlapping jurisdiction and potential conflict:

Policy Direction versus Statutory Authority:

- 18.1 While the ICT Minister can issue policy directions to ICASA regarding transformation, the DTIC Minister has the statutory authority to approve EEIPs.
- 18.2 This creates a situation where ICASA must follow both the ICT Minister's policy direction and the B-BBEE Act's requirements.

Transformation Targets:

- 18.3 The ICT Minister's policy directions must align with the B-BBEE Act and codes but may emphasize sector-specific priorities.
- 18.4 This can create tension if sector-specific priorities conflict with broader transformation goals.

EEIP Implementation Process:

- 18.5** Starlink must apply to the DTIC for EEIP approval, not to ICASA.
- 18.6** However, ICASA must consider approved EEIPs when issuing licenses.
- 18.7** This creates a two-step process where both ministries are involved.

Recent Developments in the Starlink Case:

- 19. Minister Malatsi has defended his policy directive on EEIPs, emphasizing it is legally grounded.
- 20. Some parliamentarians have accused him of "compromising on transformation goals".
- 21. Minister Tau has emphasized broader transformation efforts while Minister Malatsi has focused on attracting investment in the ICT sector.

Legal Hierarchy:

- 22. The trumping provision of the B-BBEE Act establishes that in cases of conflict, the B-BBEE Act prevails.
- 23. This means that regardless of ICT sector-specific regulations, the B-BBEE Act's provisions on EEIPs take precedence.
- 24. The ICT Minister's policy directions must operate within this legal framework.

Conflict between B-BBEE ACT, ECA, and MRDPA

Nature of the Legislative Conflict:

- 25. The conflict between these three pieces of legislation stems from their different approaches to transformation and economic empowerment:

Definitional conflicts:

- 25.1 Beneficiary definitions:** The B-BBEE Act defines "black people" as the beneficiaries of transformation, while the ECA and MRDPA use "historically disadvantaged individuals" (HDIs), which includes white women and white disabled people.
- 25.2 Ownership requirements:** The ECA specifies 30% HDI ownership, while the B-BBEE codes initially set different targets (25% and later 30% for the ICT sector).

25.3 Transformation mechanisms: The B-BBEE Act and its codes provide multiple mechanisms for achieving transformation (equity ownership, sale of assets, EEIPs, exclusion of foreign operations), while the ECA and MRDPA have more limited options.

Jurisdictional Conflicts:

25.4 Regulatory authority: The ECA empowers ICASA to regulate the ICT sector, including transformation requirements, while the B-BBEE Act gives the DTIC Minister authority over transformation across all sectors.

25.5 Approval processes: The ECA establishes ICASA's licensing process, while the B-BBEE Act establishes the DTIC Minister's authority to approve alternative transformation mechanisms like EEIPs.

Chronological Development:

26. The MRDPA (2000) preceded the B-BBEE Act (2003), which preceded the ECA (2005)

27. The B-BBEE codes were only completed in 2007, after all three Acts were in force

28. This created a situation where sector-specific legislation was operating without clear alignment to the broader transformation framework.

Resolution Through the Trumping Provision

29. The conflict was ultimately addressed through the "trumping provision" in the Amended B-BBEE Act of 2013, which established a clear legal hierarchy:

29.1 Hierarchy established: The trumping provision establishes that the B-BBEE Act takes precedence over both the ECA and MRDPA in matters of transformation.

29.2 Definition clarification: The B-BBEE Act's definition of "black people" (excluding white women and white disabled people) prevails over the broader HDI definition.

29.3 Alternative mechanisms validated: The B-BBEE Act's provision for alternative transformation mechanisms like EEIPs is legally valid even if not explicitly mentioned in the ECA.

29.4 Regulatory guidance: ICASA and other regulators must apply the B-BBEE codes when evaluating transformation requirements, even if their sector-specific legislation differs.

Implications for Starlink and Similar Cases

30. The resolution of this legislative conflict has direct implications for Starlink's operations in South Africa:

30.1 EEIP validity: Starlink's request for an EEIP is legally valid under the B-BBEE Act, regardless of the ECA's specific transformation requirements.

30.2 Application process: Starlink must apply to the DTIC through the ICT Sector Council for EEIP approval, not just to ICASA only.

31. **No special treatment:** Starlink is not receiving special treatment but is following the established legal framework. The Minister of the DTIC has not applied section 10(2)(a) of the Amended B-BBBB Act, which provides for exemption or deviation from the B-BBEE requirements by any organ of state.

32. **Policy direction impact:** The ICT Minister's policy direction on EEIPs provides clarity but does not change the legal requirements established by the trumping provision.

33. **Target maintenance:** While the mechanism (EEIP vs. direct equity) may change, the transformation targets (30% for ICT sector) remain in place.

Analysis and Implications

Legal Analysis of Starlink's Position

34. Based on the comprehensive analysis of the relevant legislation, regulations, and ministerial roles, Starlink's position regarding the use of EEIPs is legally sound:

34.1 Legal foundation: The B-BBEE Act and its codes explicitly provide EEIPs as an alternative to direct equity ownership for multinational companies whose global practices preclude them from entering into direct ownership arrangements.

34.2 Trumping provision application: The trumping provision of the Amended B-BBEE Act ensures that these provisions take precedence over any conflicting requirements in the ECA or other sector-specific legislation.

34.3 Procedural compliance: The correct procedure for Starlink is to apply to the DTIC through the ICT Sector Council for EEIP approval, which would then be recognised by ICASA in its licensing process.

34.4 Ministerial alignment: Both the DTIC Minister and the ICT Minister have indicated support for the use of EEIPs as a valid transformation mechanism, with the ICT Minister recently issuing a policy direction to provide clarity on this matter.

Policy Implications and Recommendations

35. The Starlink case highlights several important policy considerations:

- 35.1 Balancing transformation and investment:** South Africa's transformation goals must be balanced with the need to attract foreign investment, particularly in critical infrastructure sectors like telecommunications.
- 35.2 Regulatory clarity:** There is a need for greater clarity and alignment between sector-specific regulations and the broader B-BBEE framework to avoid confusion and disputes.
- 35.3 Ministerial co-ordination:** Enhanced coordination between the DTIC and sector-specific ministries would help ensure consistent application of transformation requirements.
- 35.4 Public communication:** Better public communication about the legal framework governing transformation, including the role of EEIPs, would help address misconceptions and misinformation.

Broader Implications for Foreign Investment

36. The resolution of the Starlink case has broader implications for foreign investment in South Africa:

- 36.1 Precedent setting:** The clarification of EEIP applicability in the ICT sector sets an important precedent for other multinational companies considering investment in South Africa.
- 36.2 Investment certainty:** Legal certainty regarding transformation requirements is crucial for attracting foreign investment, particularly in capital-intensive sectors.
- 36.3 Transformation impact:** Properly structured EEIPs can potentially have a broader transformative impact than direct equity ownership, particularly if they focus on skills development, enterprise development, and infrastructure investment in underserved areas.
- 36.4 Global competitiveness:** Allowing for alternative transformation mechanisms like EEIPs helps ensure that South Africa remains competitive in attracting global technology companies while still advancing its transformation agenda.

Conclusion

37. This Position Paper has demonstrated that the legal framework governing transformation in South Africa, particularly the trumping provision of the Amended B-BBEE Act of 2013, provides clear support for the use of Equity Equivalent Investment Programmes (EEIPs) by multinational companies like Starlink.

38. The analysis has shown that:

38.1 The B-BBEE Act and its codes explicitly provide for EEIPs as an alternative transformation mechanism.

38.2 The trumping provision ensures that these provisions take precedence over any conflicting requirements in sector-specific legislation like the ECA.

38.3 Both the DTIC Minister and the ICT Minister have roles in the process, with the DTIC Minister having primary authority to approve EEIPs.

38.4 Recent policy directions from the ICT Minister align with and clarify this legal framework rather than changing it.

38.5 Starlink's application for an EEIP is following the established legal process and does not represent special treatment or exemption from transformation requirements.

39. This clarification is important for ensuring that South Africa can attract critical foreign investment while still advancing its transformation agenda. It also highlights the need for continued coordination between different government departments and regulatory bodies to ensure consistent application of transformation policies across all sectors of the economy.

References

1. Broad-Based Black Economic Empowerment Act, 2003 (Act 53 of 2003).
2. Broad-Based Black Economic Empowerment Amendment Act, 2013 (Act 46 of 2013).
3. Electronic Communications Act, 2005 (Act 36 of 2005).
4. Mineral Resources Development Act, 2000 (Act 28 of 2000).
5. ICT Sector Code, Government Gazette No. 40407, November 7, 2016.
6. Amendments to regulations regarding HDG and the ICT Sector Code, Government Gazette No. 44382, March 31, 2021.
7. Minister Solly Malatsi's Policy Direction on Equity Equivalent Investment Programmes in the ICT Sector, May 2025.
8. ICT Empowerment Charter Working Group, "The ICT Charter," Second Working Draft, March 2004.
9. Trade and Industry announcement on commencement of Trumping Provision, October 27, 2015.