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## GOVERNMENT NOTICE

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### DEPARTMENT OF TRADE AND INDUSTRY

No. 541

3 May 2002

#### MEMORANDUM OF AGREEMENT

Entered into between

#### THE COMPETITION COMMISSION

(Hereinafter referred to as "the Commission")

a juristic person established in terms of the provisions of section 19 of the Competition Act, 1998 (Act No. 89 of 1998), as amended, herein duly represented by Advocate Menzi Simelane, in his capacity as the Commissioner of the Competition Commission

and

#### THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

(Hereinafter referred to as "the Authority")

a juristic person established in terms of section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), herein duly represented by Mr Mandla Langa in his capacity as the Chairperson of the Independent Communications Authority of South Africa.

**WHEREAS-**

The Independent Communications Authority of South Africa is established in terms of section 3 of the Independent Communications Authority Act No. 13 of 2000 ("the ICASA Act") in order to regulate the telecommunications and broadcasting sectors in the public interest.

**WHEREAS-**

The Competition Commission is established in terms of the provisions of section 19 of the Competition Act No. 89 of 1998 ("the Competition Act") in order to, *inter alia*, investigate, control, and evaluate restrictive practices, abuse of dominant position, exemptions and mergers.

**AND WHEREAS-**

The Commission, in terms of the provisions of section 21(h) read with sections 3(1A)(b) and 82(1), (2) and (3) of the Competition Act, has a responsibility to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act.

**THEREFORE**, the parties now agree to conclude this Agreement as follows:

**1. BASIS OF THIS AGREEMENT**

- 1.1 This Agreement is entered into in order to establish the manner in which the parties will interact with each other in respect of the investigation, evaluation and analysis of mergers and acquisition transactions and complaints involving telecommunication and broadcasting matters.
- 1.2 This Agreement is entered into on the basis of mutual respect, in a spirit of goodwill and does not affect the independence of the two regulatory bodies hereto.

## **2. APPLICATION FOR APPROVAL IN RESPECT OF MERGER TRANSACTIONS**

- 2.1 Where a transaction requires the approval of both regulators, the public shall submit separate and concurrent applications to the Commission (in accordance with Competition Act) and to the Authority (in accordance with statutes supervised or administered by the Authority) for their respective consideration.
- 2.2 The Commission and the Authority shall thereafter make independent determinations on the basis of the criteria and mandates of their respective legislation. In arriving at these determinations the Commission and Authority may consult with each other.
- 2.3 In the event of the Commission and the Authority arriving at different determinations, the following process shall apply:
  - 2.3.1 The Commission and the Authority may discuss the matter in order to identify the reason(s) for the difference in determinations and whether such differences, if they pertain substantially to similar criteria used by both regulators on issues (e.g. definition of the market), could be resolved prior to the determinations being made public, by the imposition of certain conditions;
  - 2.3.2 If the Commission and the Authority reach an agreement following the course suggested in 2.3.1 above, the Commission and the Authority shall make known their unanimous decision to the applicant(s) and the transaction shall be approved or disapproved accordingly;
  - 2.3.3 If the difference in conclusion cannot be resolved following the course suggested in 2.3.1 above, the Commission and the Authority shall make known their respective determinations and reasons for the decisions to the applicant(s);
  - 2.3.4 If either of the regulators does not approve the transactions such transaction will not be an approved transaction.

- 2.4 Where a transaction requires the approval of either the Commission or the Authority, but not of both, the following procedure shall apply:
- 2.4.1 The applicant seeking approval shall lodge the application with the regulator with jurisdiction;
- 2.4.2 If the Authority is the regulator whose approval is required, it shall, if it deems it advisable under its legislation to take into account considerations of competition, be entitled to liaise and consult with the Commission so as to ensure the consistent application of competition principles to the transaction in question;
- 2.4.3 The Commission shall be entitled to do likewise when its approval is required, and be entitled to consult with the Authority on the regulatory aspects subject to the jurisdiction of the Authority, in order to obtain the input of the Authority on regulatory issues pertaining to the transaction.
- 2.5 In the circumstances contemplated in 2.4 above, the decision by the regulator exercising jurisdiction over the transaction to consult the other regulator, shall be discretionary and voluntary, and the regulator exercising jurisdiction shall, with or without consultation, make its independent decision.
- 2.6 In either of the circumstances set out in 2.1 or 2.4 above, the Commission and the Authority may participate in each other's proceedings and may advise or receive advice from each other.
- 2.7 When the two regulators consult each other as contemplated in 2.2 or 2.4 above, they shall do so at no cost to each other.
- 2.8 In either of the circumstances contemplated in 2.1 and 2.4 above, the two regulators shall act as expeditiously as circumstances permit and shall each encourage the other party to achieve a timely response.

### **3. COMPLAINTS**

3.1 The Commission deals with complaints relating to the following prohibited practices:

3.1.1 restrictive horizontal practices prohibited in terms of section 4 of the Competition Act;

3.1.2 restrictive vertical practices prohibited in terms of section 5 of the Competition Act; and

3.1.3 abuse of a dominant position prohibited in terms of section 8 and 9 of the Competition Act, subject to the limitations in section 6 and section 7 of the Competition Act.

3.2 The Authority deals with complaints relating to the following practices:

3.2.1 contravention of telecommunications and broadcasting licence conditions; and

3.2.2 contravention of telecommunications and broadcasting legislation.

3.3 Where a complaint is lodged about a practice in respect of which the Commission and the Authority have concurrent jurisdiction, the following process shall be followed:

3.3.1 The regulator that receives the complaint ("the recipient regulator") shall ensure that the said complaint is made available to the other regulator;

3.3.2 The recipient regulator shall inform the complainant(s) that the matter will be discussed jointly by the Commission and the Authority in order to establish how the complaint is to be dealt with;



- 3.3.3 The Commission and the Authority shall consult with each other and evaluate the complaint in order to establish whether the matter will be dealt with by either or both regulators;
- 3.3.4 The recipient regulator shall advise the complainant(s) of the decision of the joint discussion between the Commission and the Authority;
- 3.3.5 The recipient regulator shall give the complainant(s) further directions regarding the prosecution of the complaint in question;
- 3.3.6 In the event that the matter is allocated to the Commission, persons from the Authority will participate in an advisory capacity in the matter;
- 3.3.7 In the event that the matter is allocated to the Authority persons from the Commission will participate in an advisory capacity in the matter.
- 3.4 The circumstances that may indicate that the Commission will deal with the matter include the following:
  - 3.4.1 where a complaint relates primarily to practices outlined in 3.1 above; or
  - 3.4.2 where a complaint does not relate to a condition(s) of a licence issued in accordance with any Act administered by the Authority.
- 3.5 The circumstances that may indicate that the Authority will deal with the matter include the following:
  - 3.5.1 where a complaint relates primarily to a licence condition(s) issued in accordance with any Act administered by the Authority; or
  - 3.5.2 where a complaint relates primarily to the contravention of any Act administered by the Authority; or
  - 3.5.3 where a complaint does not relate to practices outlined in 3.1 above.



3.6 The procedure in 3.3 above is adopted to ensure that proceedings of such complaints are not unduly duplicated and to avoid separate penalties being imposed in respect of the same dispute by the Commission and the Authority.

3.7 If it is decided in the consultation process contemplated in 3.3.3 above that the Authority will deal with the matter, then –

3.7.1 the complaint shall be deemed to have been submitted to the Authority on the date on which the decision in 3.3.3 above is communicated to the parties; and

3.7.2 the Commission shall issue a notice of non-referral in terms of section 50(2)(b) of the Competition Act, and in instances where the Commission received the initial complaint, the complainant(s) shall not be precluded from pursuing the matter with the Competition Tribunal (established in terms of section 26 of the Competition Act) .

3.8 Where a complaint relates to a matter where either the Commission or the Authority has jurisdiction, but there is no concurrent jurisdiction, the following shall apply:

3.8.1 The complaint must be lodged with the regulator that has jurisdiction;

3.8.2 If upon receiving a complaint, the regulator is of the view that it does not have jurisdiction over the matter, the regulator with whom the complaint is lodged shall refer the complaint to the regulator with jurisdiction and advise the complainant(s) accordingly;

3.8.3 If the Authority is the regulator that has jurisdiction, it shall, if it deems it advisable under its legislation to take into account considerations of competition, be entitled to liaise and consult with the Commission so as to ensure the consistent application of competition principles to the matter in question;

3.8.4 The Commission shall be entitled to do likewise when it is the regulator with jurisdiction, and be entitled to consult with the Authority on the regulatory aspects subject to the Authority's jurisdiction in order to obtain the Authority's input on regulatory issues pertaining to the complaint;

3.8.5 The Commission and the Authority may, upon request from each other, participate in each other's proceedings in their advisory capacity.

3.9 In the circumstances contemplated in 3.8 above, the decision by the regulator exercising jurisdiction over the complaint to consult the other regulator, shall be discretionary and voluntary, and the regulator exercising jurisdiction shall, with or without consultation, make its independent decision.

3.10 When the two regulators consult each other as contemplated in 3.3 or 3.8 above, they shall do so free of charge to each other.

3.11 In either of the circumstances contemplated in 3.3 and 3.8 above, the two regulators shall act as expeditiously as circumstances permit and shall on both sides facilitate that the other party achieve a timely response.

#### **4. ESTABLISHMENT OF JOINT WORKING COMMITTEE**

4.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the Authority as nominated by the regulators respectively, shall be established pursuant to this Agreement and shall function on an on-going basis.

4.2 Functions of the Committee shall include:

4.2.1 to manage and facilitate cooperation and consultation in respect of matters dealt with by each regulator in terms of this agreement;

4.2.2 to propose, when necessary, any amendment of or supplementation to

this agreement;

4.2.3 to advise management of both the Commission and the Authority on issues affecting competition in the telecommunications and broadcasting sectors, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to, the following:

4.2.3.1 types of conduct or transactions affected by both the Competition Act and any of the Acts administered by the Authority in respect of which concurrent jurisdiction is to be exercised by the two regulators;

4.2.3.2 international approach to issues of jurisdictional overlap between a competition authority and a telecommunications and/or broadcasting regulator;

4.2.3.3 amendments to the relevant or applicable statutes that may be necessary from time to time; and

4.2.3.4 any other related matter.

## **5. SHARING OF RESOURCES**

The Commission and the Authority may, under certain circumstances, share each other's available resources in order to bring the provisions of this Agreement into full effect; provided such a process is reasonable, shall not compromise the respective independence of the two institutions and does not contravene any statute with which the two parties must conform.

## **6. EXCHANGE OF INFORMATION**

Subject to paragraph 7 below, the Commission and the Authority may exchange such information as may be necessary to give effect to this Agreement.

## **7. CONFIDENTIALITY**

- 7.1 Any information shared by the Commission and the Authority pursuant to this Agreement shall be used only for lawful supervisory or statutory purposes.
- 7.2 Where the Authority has declared information submitted to it by parties as confidential in terms of its own legislation or regulations, the Authority shall notify the parties who have lodged such confidential information with it, that the confidential information will be disclosed to the Commission and that the Commission will ensure that the information remains confidential and is not placed in the public domain. If any party objects to confidential information being submitted to the Commission, that party shall be given an opportunity to withdraw that information.
- 7.3 To the extent permitted by law, the Commission and the Authority shall hold confidential all information, including the information contemplated in clause 7.2 above, received from each other pursuant to this Agreement and shall not otherwise disclose such information than is necessary to carry out their regulatory or statutory responsibilities or otherwise in accordance with national law.
- 7.4 The Commission and the Authority shall, prior to disclosing such confidential information or a part thereof, consult each other for direction and advice on such disclosure.
- 7.5 The sharing of confidential information in accordance with this Agreement relies on the assurances given in 7.1, 7.2 and 7.3 above and shall not constitute a waiver of any legally recognisable privilege by any person other than the parties to this Agreement.
- 7.6 The Commission and the Authority, in providing confidential written material pursuant to this Agreement, shall mark every page of the material provided with a legend reading as follows:

**"CONFIDENTIAL - PROVIDED PURSUANT TO THE COMPETITION COMMISSION / INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA AGREEMENT"**

- 7.7 Where confidential information is made available by either the Commission or the Authority in contravention of Clause 7 above, such disclosing party shall be solely liable in law for such disclosure.

**8. GENERAL PROVISIONS**

- 8.1 The provision of, or request for, information under this Agreement may be denied:

8.1.1 where compliance would require the Commission or Authority to act in a manner that would violate the applicable law;

8.1.2 under circumstances where there is an imminent risk to national security;  
or

8.1.3 when compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

- 8.2 No provision of this Agreement shall give rise to the right on the part of any person, entity or government authority other than the Commission and the Authority, or other competition authorities, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this Agreement.

- 8.3 The provisions set forth under clauses 7 and 8 above shall prevail with respect to any information provided or actions taken under this Agreement prior to its termination.

- 8.4 The two regulators shall consult each other before either of them issues a media release concerning a transaction covered by this Agreement.

## **9. VARIATION OF THE AGREEMENT**

Any variation of this Agreement shall have no legal effect and shall not be binding on the parties unless reduced to writing and signed by persons authorised to act on behalf of both the parties.

## **10. EFFECTIVE DATE OF THE AGREEMENT**

This Agreement shall come into force on the date on which it is signed by persons authorised to act on behalf of both the parties.

## **11. DURATION OF THE AGREEMENT**

This Agreement shall remain in force until it is changed or repealed by both parties hereto, acting jointly.

**12. DOMICILIUM CITANDI ET EXECUTANDI**

The parties choose the following addresses as their respective domicilium citandi et executandi for purposes of this Agreement:

THE COMPETITION COMMISSION  
BUILDING B  
GLENFIELD OFFICE PARK  
CORNER OBERON STREET AND GLENWOOD ROAD  
FAERIE GLEN  
PRETORIA EAST  
0043  
CONTACT PERSON: **MS ZODWA NTULI**

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA  
BLOCK B  
PINMILL FARM  
164 KATHERINE STREET  
SANDTON  
2146  
CONTACT PERSON: **MS JAYSHREE NAIDOO**



**13. PUBLICATION**

This Agreement shall be published in the Gazette for public information as soon as it has been signed.

Signed at PRETORIA on this.....day of.....2002

**Advocate Menzi Simelane**  
**Commissioner: Competition Commission**

As witnesses:

1 \_\_\_\_\_

2 \_\_\_\_\_

**Mr Mandla Langa**  
**Chairperson: Independent Communications Authority of South Africa**

As witnesses

1 \_\_\_\_\_

2 \_\_\_\_\_

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