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## GENERAL NOTICE

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### NOTICE 1805 OF 2004

#### MEMORANDUM OF AGREEMENT

Entered into between

#### THE COMPETITION COMMISSION

(Hereinafter referred to as "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 POSTAL REGULATOR

(Hereinafter referred to as "Postal Regulator")

a juristic person established in terms of section 3 of the Postal Services Act, 1998 (Act No. 124 of 1998), herein duly represented by Mr. Dupree Vilakazi in his capacity as the Chairperson of the Postal Regulator

**WHEREAS-**

The Postal Regulator, known as the Directorate: Postal Regulation, is established in terms of section 3 of the Postal Services Act No. 124 of 1998 (hereinafter "the Postal Services Act") in order to, *inter alia*, exercise regulatory functions in respect of reserved and unreserved areas, ensure that the provisions of the Postal Services Act and the terms and conditions contained in any licence are complied with, promote the interests of users of postal services in respect the cost of reserved services, the continuity of postal services and the quality thereof, ensure that all reasonable requests for postal services are satisfied and to promote and encourage the expansion of postal services.

**WHEREAS-**

The Postal Regulator must, in terms section 2 of the Postal Services Act, regulate the postal services in the public interests and for that purpose to, *inter alia*, promote the provision of a wide range of postal services in the interest of the economic growth and development, encourage investment and innovation and ensure fair competition within the postal industry.

**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(1)(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 to co-ordinate and harmonise the exercise of jurisdiction 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 Commission and the Postal Regulator (hereinafter "the regulatory authorities") will interact with each other in respect of the investigation of complaints in the postal industry with the intention of facilitating co-operation and to promote and encourage the consistent application of competition principles in the postal industry.
- 1.2 This Agreement is entered into with recognition by both regulatory authorities that whereas the Postal Regulator does not have a mandate in terms of its legislation to deal with competition matters, some sector-specific regulatory matters may raise competition concerns or require the Postal Regulator to take into account competition considerations, which will require the two regulatory authorities to interact and co-operate with each other to address such issues.
- 1.3 This Agreement is entered into with further recognition by both regulatory authorities that whereas transactions in the postal industry, such as licence transfers, may result in mergers within the meaning of section 12 of the Competition Act, the process relating to mergers is straightforward and clear, therefore, the regulatory authorities may notify, consult each other or request each other's advice on such matters on *ad hoc* basis.
- 1.4 This Agreement is entered into on the basis of co-operation, mutual respect, in the spirit of goodwill and does not affect the independence of the two regulatory authorities hereto.

## **2. PROCEDURE RELATING TO COMPLAINTS**

- 2.1 All complaints relating to conduct, practices or agreements prohibited under Chapter 2 of the Competition Act shall be lodged with the Commission in the prescribed manner and form.

**2.2** Where the Commission receives a complaint that relates to a matter in the postal industry, the following shall apply:

**2.2.1** The Commission shall, upon receipt of a complaint, notify the Postal Regulator of such a complaint in writing;

**2.2.2** The Postal Regulator shall, within a period not exceeding one (1) month from the date on which notification of a complaint is received, advise the Commission in writing on whether or not the complaint or a part thereof falls within its jurisdiction, and whether or not it intends initiating an investigation in that regard in terms of its legislation;

**2.2.3** If the Commission, upon review of the complaint, is of the view that the complaint lodged with it or a part thereof relates to a matter(s) that appears to fall purely within the jurisdiction of the Postal Regulator, it shall refer such a complaint or a part thereof, as the case may be, to the Postal Regulator;

**2.2.4** When the Commission refers a complaint or a part thereof as contemplated in 2.2.3 above, it must issue a Notice of Non-referral in respect of the complaint or a part thereof, as the case may be, in the prescribed form and inform the complainant(s) that the complaint or a part thereof, as the case may be, has been referred to the Postal Regulator.

**2.2.5** If the complaint relates to both competition issues that are subject to the jurisdiction of the Commission and regulatory issues that are subject to the jurisdiction of the Postal Regulator, both regulatory authorities must investigate the matter in terms of their respective legislative mandate and procedures, and the Commission as the recipient regulatory authority shall inform the complainant(s) accordingly;

**2.2.6** If the Commission has jurisdiction over the complaint, it shall, if it deems it necessary to take into account regulatory aspects pertaining to the complaint that are subject to the jurisdiction of the Postal Regulator, be



entitled to liaise and consult with the Postal Regulator to obtain input and/or advice;

- 2.2.7 The Commission may, in addition to the process contemplated in 2.2.6 above, be entitled to request the Postal Regulator to participate in the proceedings of the Commission in their advisory capacity to provide input on regulatory aspects that may be relevant to the complaint;
- 2.2.8 The Commission shall, with or without the input or advice of the Postal Regulator, make a decision on the complaint or a part thereof that is subject to its jurisdiction, and may thereafter, as a matter of courtesy, inform the Postal Regulator of the decision taken.
- 2.3 Where the Postal Regulator receives a complaint in respect of a matter in the postal industry, the following shall apply:
- 2.3.1 The Postal Regulator shall, upon receipt of a complaint, notify the Commission of such a complaint in writing;
- 2.3.2 The Commission shall, within a period not exceeding one (1) month from the date on which notification of a complaint is received, advise the Postal Regulator in writing on whether or not the complaint or a part thereof falls within its jurisdiction, and whether or not it intends initiating an investigation in that regard in terms of its legislation;
- 2.3.3 If the Postal Regulator, upon review of the complaint, is of the view that the complaint lodged with it or a part thereof relates to a matter(s) that appears to fall purely within the jurisdiction of the Commission, it shall refer such a complaint or a part thereof, as the case may be, to the Commission and advise the complainant(s) accordingly;
- 2.3.4 If the complaint relates to both competition issues that are subject to the jurisdiction of the Commission and regulatory issues that are subject to the jurisdiction of the Postal Regulator, both regulatory authorities must

investigate the matter in terms of their respective legislative mandate and procedures, and the Postal Regulator as the recipient regulatory authority shall inform the complainant(s) accordingly;

- 2.3.5 If the Postal Regulator has jurisdiction over the complaint, it shall, if it deems it necessary to take into account competition considerations that are subject to the jurisdiction of the Commission, be entitled to liaise and consult with the Commission to obtain input and/or advice;
- 2.3.6 The Postal Regulator may, in addition to the process contemplated in 2.3.5 above, and if it is legally competent under the Postal Services Act to do so, be entitled to request the Commission to participate in the proceedings of the Postal Regulator in their advisory capacity to provide input on the competition aspects that may be relevant to the complaint;
- 2.3.7 The Commission may, with or without the request of the Postal Regulator, make representations to the Postal Regulator on competition issues relating a complaint in order to provide input or advice if it deems it necessary for the Postal Regulator to take into account such competition considerations in resolving a complaint.
- 2.3.8 The Postal Regulator shall, with or without the input or advice of the Commission, make a decision on the complaint or a part thereof that is subject to its jurisdiction, and may thereafter, as a matter of courtesy, inform the Commission of the decision taken.
- 2.4 In the circumstances contemplated in 2.2 and 2.3 above, the decision by the regulatory authority that has jurisdiction over the complaint to consult the other regulatory authority shall be discretionary and voluntary, and the regulatory authority that has jurisdiction shall, with or without consultation, make its independent decision.
- 2.3 When the regulatory authorities consult each other in terms of this Agreement, they shall do so free of charge to each other.



- 2.4 The regulatory authorities hereto shall act as expeditiously as circumstances may permit and shall on both sides facilitate that the other party achieve a timely response.

### 3. ESTABLISHMENT OF JOINT WORKING COMMITTEE

- 3.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the Postal Regulator as nominated and appointed by the two regulatory authorities respectively, shall be established pursuant to this Agreement and shall function on an on-going basis.

- 3.2 Functions of the Committee shall include:

3.2.1 to manage and facilitate cooperation and consultation in respect of matters dealt with by each regulatory authority in terms of this Agreement;

3.2.2 to propose, when necessary, any amendment of or supplementation to this Agreement;

3.2.3 to advise management of both the Commission and the Postal Regulator on issues affecting competition. Such advice shall be on, *but not limited to*, the following:

3.2.3.1 types of conduct, agreements or practices affected by the Competition Act and the Postal Services Act in respect of which co-operation contemplated in this Agreement is or will be required;

3.2.3.2 international approaches to issues of possible jurisdictional overlap, if any, between the Commission and the Postal Regulator for the promotion and maintenance of the existing cooperation agreement

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

3.2.3.4 any other related matter.

3.3 The number of representatives that may be nominated and appointed to constitute the Committee shall be agreed upon by both regulatory authorities hereto.

#### **4. SHARING OF RESOURCES**

The Commission and the Postal Regulator 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 regulatory authorities hereto and does not contravene any statute with which the two regulatory authorities hereto must conform.

#### **5. EXCHANGE OF INFORMATION**

Subject to paragraph 6 below, the Commission and the Postal Regulator may exchange such information as may be necessary to give effect to this Agreement.

#### **6. CONFIDENTIALITY**

6.1 Any information shared by the Commission and the Postal Regulator pursuant to this Agreement shall be used only for lawful supervisory or statutory purposes.

6.2 To the extent permitted by law, the Commission and the Postal Regulator shall hold confidential all information, 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.

6.3 The Commission and the Postal Regulator shall, prior to disclosing such confidential information or a part thereof, consult each other for direction and advice on such disclosure.

6.4 The sharing of confidential information in accordance with this Agreement shall not constitute a waiver of any legally recognisable privilege by any person other than the regulatory authorities to this Agreement.

6.5 The Commission and the Postal Regulator, in providing each other with confidential written material pursuant to this Agreement, shall mark every page of the material provided with a legend reading as follows:

**"CONFIDENTIAL - PURSUANT TO THE COMPETITION COMMISSION AND THE POSTAL REGULATOR AGREEMENT 2004"**

6.6 Where confidential information is made available by either the Commission or the Postal Regulator in contravention of Clause 6 of this Agreement, such disclosing regulatory authority shall be solely liable in law for such disclosure.

## **7. GENERAL PROVISIONS**

7.1 The provision of, or request for, information under this Agreement may be denied

7.1.1 where compliance would require the Commission or the Postal Regulator to act in a manner that would violate the applicable law;

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

7.1.3 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.

- 7.2 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 Postal Regulator, or other competition authorities established in terms of sections 26 and 36 of the Competition Act, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this Agreement.
- 7.3 The provisions set forth under clauses 6 and 7 shall prevail with respect to any information provided or actions taken under this Agreement prior to its termination.
- 7.4 The two regulatory authorities shall consult each other before either of them issues a media release concerning a matter covered by this Agreement

#### **8. VARIATION OF THE AGREEMENT**

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

#### **9. 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 regulatory authorities hereto.

#### **10. DURATION OF THE AGREEMENT**

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

#### **11. 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  
The dti Campus, Building C  
Mulayo Building  
77 Meintjies Street  
Sunnyside,  
Pretoria  
0001

Contact person: **MS ZODWA NTULI**

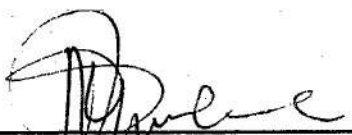
National Department of Communication  
The Postal Regulator  
iParioli Office Park  
399 Duncan Street  
Hatfield  
0083

Contact person: **MS MASABATA VIOLET LETSIRI**

## **12. PUBLICATION**

This Agreement shall be published in the Gazette for public information as soon as it has been signed by both regulatory authorities hereto.

Signed at PRETORIA on this Eleventh day of August, 2004.



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

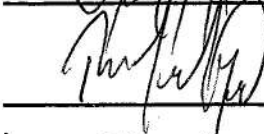
As witnesses:

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**Mr. Dupree Vilakazi**  
**Chairperson: The Postal Regulator**

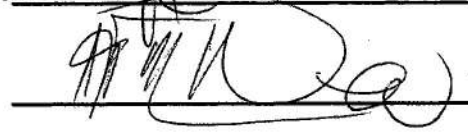
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