DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 1148 **06 SEPTEMBER 2019**

MEMORANDUM OF AGREEMENT
("MOA")

Entered into between

THE COMPETITION COMMISSION OF SOUTH AFRICA
("the Commission")

a juristic person established in terms of section 19 of the Competition Act No. 89 of 1998 as amended, ("the Competition Act"), herein duly represented by Mr. Tembinkosi Bonakele, in his capacity as the Commissioner of the Competition Commission of South Africa

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 No. 13 of 2000 as amended ("the ICASA Act"), herein duly represented by Dr Keabetswe Modimoeng in his capacity as the Acting Chairperson of the Independent Communications Authority of South Africa.

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WHEREAS, the Commission is mandated to, *inter alia*, investigate and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, as well as conducting market inquiries;

AND WHEREAS, the Commission, in terms of the provisions of section 21(1) (h) read with sections 3(1A)(b) and 82 (1) and (2) of the Competition Act 89 of 1998 as amended ("the Competition Act"), has 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;

WHEREAS the Authority is established in terms of the Independent Communications Authority of South Africa Act 13 of 2000, as amended (the "ICASA Act") to regulate broadcasting, electronic communications and regulate postal matters in the public interest;

WHEREAS the key functions of the Authority is to regulate the electronic communications, broadcasting and postal services; issue licenses to providers of the aforesaid services; monitor the environment and enforce compliance with licence conditions and regulations; investigate and decide on disputes and complaints brought by industry or members of the public against licensees; plan, control and manage the frequency spectrum and protect consumers; promote competition within the ICT, postal and broadcasting sectors;

AND WHEREAS, the Commission and the Authority have concurrent jurisdiction in respect of competition matters as set out in section 67 of the Electronic Communications Act 36 of 2005, as amended (the "EC Act") and the Commission and the Authority recognise that their respective mandates are mutually reinforcing and should thus encourage the optimal utilisation of the most effective remedies available between the two institutions, as the case may be;

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AND WHEREAS, the Authority, in terms section 4(3A)(b) of the ICASA Act may conclude a concurrent jurisdiction agreement with any relevant authority or institution;

AND WHEREAS, it is recorded that this Agreement shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the two statutory bodies in the electronic communications, broadcasting and postal industries. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.

THEREFORE, the Commission and the Authority agree as follows:

1. INTERPRETATION

In the interpretation of any terminology used in this Agreement, any word or expression to which a meaning is assigned in the Competition Act, ICASA Act, EC Act and Postal Services Act No. 124 of 1998, as amended, has the meaning assigned to it unless otherwise specified.

2. OBJECT OF THE AGREEMENT

2.1. This Memorandum of Agreement ("the Agreement") is entered into to establish the manner in which the Commission and the Authority will interact with each other to enable them to, *inter alia*:

2.1.1. effectively coordinate the exercise of concurrent jurisdiction powers when taking decisions;

2.1.2. apply a consistent interpretation and application of the principles of competition when exercising their powers and their respective functions in terms of their enabling legislation;

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2.1.3. consult each other regarding the definition of markets for electronic communications, broadcasting and postal services and determining whether there is effective competition in these markets, and undertaking enquiries regarding dominance or significant market power in such markets; and

2.1.4. timeously provide each other with necessary information in respect of the investigation of anti-competitive practices, regulation of mergers and acquisitions, as well as research developments or studies within the electronic communications markets.

2.2. The Commission and the Authority may inform each other of any previous decision/judgement that either of them has previously taken in respect of the anticompetitive practice or conduct involving the same respondent, in so far as it pertains to competition matters.

3. PRINCIPLES OF COOPERATION

3.1. In order to achieve the purposes of this Agreement, the Parties have adopted and will comply with the principles of co-operation set out below:

3.1.1. the Parties will cooperate with each other in mutual trust and good faith;

3.1.2. the Parties will assist and support each other in respect of agreed upon services and commitments between them in terms of this Agreement;

3.1.3. the Parties will inform each other of, and consult each other on matters of common interest; and

3.1.4. the Parties will avail to each other the necessary support for the successful performance of the tasks and programmes envisaged in this Agreement.

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4. LEGISLATIVE FRAMEWORK

4.1. Section 4B(8)(a) of the ICASA Act provides that before the exercise and performance of any of its powers and duties in terms of this section, the Authority must consider whether or not, in terms of any concurrent jurisdiction agreement concluded between the Authority and the Commission, it would be appropriate to refer an inquiry to the Commission; and

4.2. Section 4B(8)(b) of the ICASA Act, subject to section 67 of the EC Act, provides that the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Commission, must bear in mind that the Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act;

4.3. Section 4B(8)(b) of the ICASA Act provides that the Commission shall exercise primary authority to detect and investigate past or current commissions of alleged prohibited practices, as defined in the Competition Act, within the communications sector and to review mergers within the ICT sector in terms of the Competition Act;

4.4. Section 4B(9) of the ICASA Act provides that subject to the terms and conditions of the concurrent jurisdiction agreement or unless otherwise agreed to by the Authority and the Commission, the Authority may not take any action where a matter has already been brought to the attention of and is being dealt with by the Commission.

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4.5. Section 67(11) and (12) of the EC Act provides that the Authority may ask for and receive from the Competition Commission, assistance or advice on relevant proceedings of the Authority including competition related inquiries and, similarly, the Commission may ask for and receive from the Authority, assistance or advice on relevant proceedings of the Competition Commission.

4.6. This Agreement shall in no way affect the independence and exercise of statutory powers by the two regulatory bodies in terms of enabling legislation.

5. GUIDELINES FOR INTERACTION BETWEEN THE COMMISSION AND THE AUTHORITY UNDER THIS AGREEMENT

5.1. The Authority may request and receive advice from the Commission, in respect of regulatory aspects in the electronic communications, broadcasting and postal industries or proceedings as set out in clauses 5,6 and 7 below;

5.2. The Commission may request and receive advice from the Authority, in respect of proceedings which require consideration of regulatory aspects falling under the competency of the Authority as set out in clauses 5,6 and 7 below;

5.3. All requests for advice or information by either regulatory authority will be submitted in writing.

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5.4. The regulatory authority seeking advice or information must indicate a deadline before or upon which such advice or information should be given by the other regulatory authority.

5.5. When the Commission and the Authority consult each other under this Agreement, they shall do so at no cost to each other and with an acknowledgement of their respective areas of expertise.

5.6. Should either regulatory authority consider a matter before it, in terms of a timeline, such regulatory authority would share with the other, its expected process, and the other regulatory authority would cooperate to the best of its ability, towards achieving the targets set out in the project timelines.

6. APPLICATION FOR APPROVAL IN RESPECT OF MERGER TRANSACTIONS

6.1. Where a merger transaction ("transaction") requires the approval of both the Commission and the Authority, such as one involving the transfer of the licence or control, the Commission and the Authority shall consider the transaction in accordance with their enabling legislation. The merging parties shall submit applications containing the required information to both the Commission (in accordance with the Competition Act) and to the Authority (in accordance with the EC Act) for their respective consideration.

6.2. The Commission and the Authority shall make independent determinations on the basis of the criteria and mandates of their respective legislative and regulatory frameworks. In arriving at these determinations, the Commission and the Authority may consult each other in as far as competition matters are concerned.

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6.3. When consulting each other in terms of sub-clause 5.2 above, the Commission and the Authority must have regard to the principle that:

6.3.1 the Commission is to exercise primary authority in the review of mergers in any industry, including the electronic communications, broadcasting and postal, as required to give effect to the Competition Act; and

6.3.2 the Authority is to exercise primary authority to establish conditions within the electronic communications, broadcasting and postal industries as required to give effect to its applicable statutes.

6.4 Where a transaction requires the approval of either the Commission or the Authority, but not of both, the Authority and the Commission may consult each other so as to ensure the consistent application of competition principles to the transaction in question.

7. COMPLAINTS

7.1. Where a complaint is lodged regarding a practice or conduct in respect of which the Commission and the Authority have concurrent jurisdiction, the following process will be followed to the extent possible:

7.1.1. The regulator that receives the complaint ('the Recipient Regulator") must, notify the other regulator in terms of this Agreement;

7.1.2. The Commission and Authority may consult with each other in respect of the complaint;

7.1.3. The Recipient Regulator may notify the complainant(s) that the Commission and Authority will consult each other in terms of this Agreement;

7.1.4. In consulting each other in respect of the complaint, the parties must have regard to the principle that –

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7.1.4.1. the Commission is to exercise primary authority to detect and investigate alleged prohibited practices to give effect to the Competition Act; and

7.1.4.2. the Authority must promote competition in the ICT sector in terms of the ICASA Act, the EC Act and the Postal Services Act.

7.1.5. The Recipient Regulator may, in its discretion, advise the complainant(s) as soon as reasonably possible of the outcome of the consultation between the Commission and Authority;

7.1.6. The Recipient Regulator may give the complainant(s) further directions regarding the investigation of the complaint in question;

7.1.7. In the event that the matter is dealt with by the Commission, representatives from the Authority may, at the request of the Commission, participate in the matter through inter alia attending meetings when required; providing inputs during the case investigation and making representations at the Competition Tribunal hearing if necessary.

7.1.8. In the event that the matter is dealt with by the Authority, representatives from the Commission may, at the request of the Authority, participate in the matter through *inter alia* attending meetings, providing inputs during the case investigation and making representations at the Authority's proceedings if necessary.

7.2. If it is decided in the consultation process, contemplated above, that the Authority will deal with the matter, the Commission may, in its discretion, issue a notice of non-referral, in terms of Section 50(2)(b) of the Competition Act, and in instances where the Commission is the Recipient Regulator, 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).

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7.3. Nothing in the consultation procedures contemplated herein, shall detract from the jurisdiction of the Commission or the jurisdiction of the Authority to receive and deal with complaints in terms of their enabling statutes as they deem fit, or preclude the public from lodging complaints with both the Commission and the Authority concurrently.

7.4. Where a complaint relates to a practice or conduct where either the Commission or the Authority has jurisdiction, but there is no concurrent jurisdiction, the following shall apply:

7.4.1. The complaint may be lodged with the regulator that has jurisdiction;

7.4.2. If upon receiving a complaint, the Recipient Regulator is of a view that it does not have jurisdiction over the matter, the Recipient Regulator may advise the complainant(s) accordingly and recommend that the complainant refer the complaint to the relevant regulator.

7.5. If the Authority is the Recipient Regulator that has jurisdiction, it may in its discretion liaise and consult with the Commission;

7.6. The Commission shall be entitled to do likewise when it is the Recipient Regulator with jurisdiction, and may, in its discretion liaise and consult with the Authority;

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

7.8. The decision by any of the Parties to consult the other regulator shall be discretionary and voluntary, and either Party shall be entitled, with or without consultation, to make its independent decision in respect of the complaint in terms of its enabling legislation;

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7.9. When the Commission and Authority consult each other, as contemplated in this Agreement, they shall do so at no cost to each other and shall act as expeditiously as possible.

8. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE

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

8.2. The functions of the Committee shall be:

8.2.1. To manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this Agreement;

8.2.2. To propose, when necessary, any amendment of or supplementation to this Agreement;

8.2.3. To advise management of both the Commission and Authority on issues affecting competition in the electronic communications, broadcasting and postal industries, 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:

8.2.3.1. Types of conduct or transactions affected by both the Competition Act and the ICASA Act, EC Act and the Postal Services in respect of which concurrent jurisdiction is to be exercised by the two regulators;

8.2.3.2. International approach to issues of overlap concerning jurisdiction between a Competition Authority and the Authority, as the case may be;

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8.2.3.3. Amendments to the relevant or applicable statutes that may be necessary from time to time; and

8.2.3.4. Any other related matter.

8.3. The Committee shall meet regularly, but no less than once per quarter, to ensure both regulatory authorities are aware of developments in areas of common interest.

9. INSTITUTIONAL CONTACT PERSONS

For purposes of this Agreement:

9.1. The Head of Stakeholder Relations will be the main contact person at the Commission.

9.2. The Senior Manager of Markets Regulation will be the main contact person at the Authority.

9.3. Should the regulatory authorities have to exchange information, as a result of discussions at the Committee, the processes set out in this Agreement shall be followed.

10. EXCHANGE OF INFORMATION

Subject to paragraph 11 below, the Commission and the Authority may exchange information as may be necessary to give effect to this Agreement.

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11. CONFIDENTIALITY

11.1. Any information shared by the Commission and the Authority pursuant to this Agreement must be used only for lawful purposes in matters of concurrent jurisdiction.

11.2. Any request made by either of the parties for confidential information in possession of the other shall be dealt with in accordance with the procedures set out in the parties' respective enabling legislation or policies or procedures.

11.3. The parties shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or wilful conduct on its behalf.

11.4. To the extent permitted by law, the Commission and the Authority shall hold confidential information received from each other pursuant to this Agreement and shall not otherwise disclose such information except when required to do so by the law or an order of a Court or a Tribunal.

11.5. The Commission and the Authority shall, prior to disclosing such confidential information or a part thereof when required to do so by the law or an order of a Court or a Tribunal, notify each other of the law or an order of a Court or Tribunal requiring such disclosure.

11.6. The sharing of confidential information, in accordance with this Agreement, relies on the assurances given in 11.1; 11.2 and 11.3 above and shall not constitute a waiver of any legally recognizable grounds for refusing disclosure of information.

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11.7. Where confidential information is disclosed either by the Commission or Authority in contravention of this Agreement, such disclosing party shall be solely liable in law for such disclosure.

11.8. Any of the parties may in its discretion decline a request for confidential information made in terms of this agreement.

12. GENERAL PROVISIONS

12.1. The provision of, or request for information under this Agreement may be denied:

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

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

12.1.3. 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.

12.2. No provision of this Agreement shall give rise to a right on the part of any person, entity or organ of state other than the Commission and the Authority, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this Agreement.

12.3. The provisions set forth under clauses 9 and 10 must prevail with respect to any information provided or actions taken under this Agreement prior to its termination.

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13. NON-VARIATION

13.1. This Agreement constitutes the whole of the agreement between the parties relating to the subject matter hereof.

13.2. No amendment or consensual cancellation of this agreement or any term of this agreement, including this clause shall be binding unless recorded in a written document signed by duly authorised representatives of both regulators.

14. TERMINATION OF PREVIOUS AGREEMENTS

14.1. This Agreement terminates existing agreements entered into between the Commission and the Authority, published in Government Gazette General Notice 1747 of 2002 and the agreement entered into between the Commission and the Postal Regulator, published in the Government Gazette Notice 26712 of 2004.

14.2. Any pending transactions, projects, requests being processed in terms of the Memorandum of Agreement published in Government Notice 1747 of 2002 under Government Gazette 23857 shall be brought to completion in terms of this Agreement and shall be considered in effect.

15. EFFECTIVE DATE OF THE AGREEMENT

This Agreement comes into force after:

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15.1. it has been signed by persons authorised to act on behalf of both the regulators; and

15.2. it has been published in the Government Gazette.

16. DURATION OF THE AGREEMENT

This Agreement must remain in force until it is amended or repealed by both regulators acting jointly.

17. REVIEW OF THE AGREEMENT

This Agreement shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the two statutory bodies in the electronic communications, broadcasting and postal industries. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.

18. DISPUTE RESOLUTION

Should any dispute or difference arise between the regulators with regard to interpretation and/or implementation of any one or more of the provisions of this Agreement, such dispute or difference must be resolved in a manner other than through judicial proceedings.

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19. DOMICILIUM CITANDI ET EXECUTANDI

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

THE COMPETITION COMMISSION
The DTI Campus
Mulayo (Block C),
77 Meintjies Street,
Sunnyside,
Pretoria

CONTACT PERSON: Head: Stakeholder Relations

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

350 Witch-Hazel Avenue
Eco Point Office Park
Eco Park
Centurion

CONTACT PERSON: Senior Manager: Markets Regulation.

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THUS DONE AND SIGNED IN PRETORIA ON THIS 29 DAY OF August 2019

Mr. Tembinkosi Bonakele
Commissioner:
Competition Commission SA

Dr Keabetswe Modimoeng
Acting Chairperson:
Independent Communications Authority of SA

As witnesses:

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2.

As witnesses:

1.

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