



Independent Communications Authority of South Africa

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**APPLICATION FOR THE TRANSFER OF AN INDIVIDUAL ELECTRONIC
COMMUNICATIONS SERVICE LICENCE FROM THE WEB DATA & SERVICES
(PTY) LTD TO PANTELE COMMUNICATIONS (PTY) LTD**

REASONS FOR DECISION

APRIL 2021

1. INTRODUCTION

This document sets out the reasons for the decision of the Independent Communications Authority of South Africa ("the Authority") in relation to an application for the transfer of an Individual Electronic Communications Service ("I-ECS") licence from The Web Data & Services (Pty) Ltd ("the Applicant") to Pantele Communications (Pty) Ltd ("the Transferee").

2. BACKGROUND

- 2.1. On 22 July 2019, the Authority received an application from the Applicant to transfer its I-ECS licence to the Transferee.
- 2.2. The application was submitted using Regulation 11 (Form G) of the Individual Licensing Processes and Procedures Regulations 2010¹ ("the Regulations").
- 2.3. The Applicant did not request confidentiality over any information submitted in terms of section 4D of the Independent Communications Authority of South Africa Act No. 13 of 2000 ("the ICASA Act").
- 2.4. On 02 August 2019, the Authority published General Notice 404 in Government Gazette No. 42608 inviting all interested persons to make written representations in relation to the applications within fourteen (14) working days of the date of the publication of the notice in the Government Gazette.
- 2.5. No written representations were received by the closing date of 23 August 2019.
- 2.6. The Authority elected not to hold public hearings as it was of the view that the applications were clear, and it did not receive any written representations from the public with respect to the applications.

¹ As amended by Government Gazette No. 39871 of 30 March 2016

- 2.7. On 07 July 2020, the Authority approved the Applicant's transfer application.

3. THE TRANSFER APPLICATIONS

- 3.1. The full name of the Applicant is The Web Data & Services (Pty) Ltd. The Applicant's principal place of business is 13 Aurora Road, Gordon's Bay, 7140.
- 3.2. The Applicant is a private company incorporated in terms of the Companies Act 71 of 2008 ("Companies Act"), with the following registration number: 2010/018060/07.
- 3.3. The full name of the Transferee is Pantele Communications (Pty) Ltd. The Transferee's principal place of business is 27 Parfitt Avenue, Westdene, Bloemfontein, 9301.
- 3.4. The Transferee is a private company incorporated in terms of the Companies Act with the following registration number: 2015/241867/07.

4. APPLICABLE LEGISLATIVE FRAMEWORK

- 4.1. Legislative and regulatory provisions applicable to the transfer application are as follows:
- (a) Section 9(2)(b) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended ("EC Act")²;
 - (b) Section 13 (1), (2) and (6) of the EC Act;
 - (c) Regulation 11 (Form G) of the Processes and Procedures Regulations for Individual Licences, 2010 as amended ("Licensing Process and Procedures Regulations")³;

² The Authority must give notice of the application in the gazette and include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act.

³ An application to transfer a licence must be (a) in the format set out in Form G; (b)

- (d) Regulation 12 of the Processes and Procedures Regulations;
- (e) Clause 9 of Form G of the Licensing Processes and Procedures Regulations⁴; and
- (f) Schedule 2 of the General Licence Fees Regulations as published in Government Gazette No 42370 of 01 April 2019 (Fees Regulations).

5. DISCUSSION AND ANALYSIS

5.1. Historically Disadvantaged Groups Ownership

5.1.1. Section 13(6) of the ECA provides that section 9(2) to (6) of the ECA applies to transfer applications.

5.1.2. Section 9(2)(b) of the ECA requires the Authority to give notice of the application in the Government Gazette and:

“include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act.”

The Applicant has indicated that its ownership interests are as follows:

- H2C Trust, IT 921/2019: 30%

This Trust has only one beneficiary, Ms Zanele Hilda Mbane, a Black South African female.

- Schabert Family Trust, IT 2069/2018: 35%

accompanied by the applicable fee; and (c) submitted by the prospective transferor.

⁴ 9.2 Provide an independent competition analysis report regarding the impact of this transaction on the relevant market clearly marked Appendix 9.2 of Form G.

9.3 Provide a consumer interest analysis report post the transaction clearly marked Appendix 9.3 Form G

The beneficiaries of this Trust are the following:

- a) Christian JH Schabert, Caucasian male;
- b) HE Schabert, Caucasian female;
- c) Matthias Heinrich Schabert, Caucasian male; and
- d) Christina Margarete Rackow, Caucasian female.

- Saga Trust, IT 244/2011: 17.5%

The beneficiaries of this Trust are the following:

- a) Carola S Freifrau von Bodenhausen, Caucasian female; and
- b) Any children of CS von Bodenhausen .

- Baur Family Trust, IT 245/2011: 17.5%

The beneficiaries of this Trust are the following:

- a) Hans George Baur, Caucasian male;
- b) S Baur, Caucasian female; and
- c) Niclas Fabian Baur, Caucasian male.

5.1.3. The Applicant is 30% owned by persons from historically disadvantaged background. The beneficiary of H2C Trust, IT 921/2019, which owns 30% is Ms Zanele Hilda Mbane, a Black South African female.

The Applicant has indicated that the Transferee's ownership interests are as follows:

- Lodewiekus Johannes Fraser: 49%; and
- Pantel Upliftment NPC: 51%.

The percentage of equity ownership to be held by persons from Historically Disadvantaged Groups ("HDG's") in the Transferee is 51%. The

shareholder, Pantel Upliftment NPC, which owns 51% shares in the Transferee, is 100% owned by Black South African Citizens from previously disadvantaged group.

5.1.4. The Applicant submitted a Due Diligence Report No: SCRE116 issued by Marisimo Due Diligence Investigations (Pty) Ltd. This report was accompanied with a Sworn Affidavit by the Lodewiekus Johannes Fraser, shareholder in the Transferee. The Affidavit dated 08 February 2019 confirms that the Transferee is 51% Black owned as per Amended Code Series 100 of the Amended Codes of Good Practice issued under section 9 (1) of Broad-Based Black Economic Empowerment Act No.53 of 2003.

5.1.5. The Authority is satisfied that the Transferee complies with the 30% minimum equity ownership by HDG's as contemplated in section 9(2) (b) of the ECA.

5.2. Approval by the Authority

Section 13(1) of the ECA states that:

"... the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority."

On 22 July 2019, the Applicant applied to the Authority seeking approval for the transfer of its I-ECS licence.

5.3. Prescribed Format

5.3.1. Section 13(2) of the ECA states that:

"An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner."

5.3.2. The prescribed format is contained in Regulation 11 (Form G) of the Regulations, which states that an application to transfer a licence must be:

- (a) in the format set out in Form G;
- (b) accompanied by the applicable fee; and
- (c) submitted by the prospective transferor.

5.3.3. The transfer application was submitted in terms of Regulation 11 (Form G) of the Processes and Procedures Regulations. The Applicant has made the required payment of R127.608.00 for the transfer of its I-ECS licence and provided the proof of payment.

5.3.4. Section 13(6) of the ECA provides that:

"The provisions of section 9(2) to (6) apply, with the necessary changes, to this section."

5.3.5. The Authority followed the process outlined in section 9 (2) to (6) read with section 13(6) of the ECA by complying with the following requirements:

- (a) Inviting interested persons to apply and submit written representations in relation to the applications within a period mentioned in the notice⁵. On 02 August 2019, the Authority gave notice of the applications in Government Gazette No. 42608.
- (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 other conditions or higher percentage. The notice included the percentage of equity ownership to be held by persons from historically disadvantaged groups. The Transferee will be 100% owned by HDPs.

⁵ Government Gazette No. 42608 of 02 August 2019

- (c) Set out the proposed licence conditions that will apply to the licence. The Applicant has indicated that the Transferee will assume and continue to discharge those obligations imposed to the Licensee. The Applicant submitted a written undertaking given by the Transferee, through its duly authorised representative, that it will comply with the Applicant's Licence obligations.
- (d) Give interested persons an opportunity to submit written responses to any representations submitted in terms of (a). The Authority did not receive any written representation in relation to the applications.

5.3.6. The Authority is satisfied that the Applicant submitted all the required information and that the requirements prescribed in terms of regulation 11 (Form G) of the Regulations read with the ECA were met by the Applicant.

5.4. Competition Analysis Report

5.4.1. Clause 9.2 requires the Applicant to provide an independent analysis report post the transaction.

5.4.2. The Applicant procured the services of Lisa Thornton Consulting to undertake an independent competition analysis and prepare a report regarding the competition impact of the transaction as per Form G of the Regulations. The purpose of this requirement is to evaluate the impact the transaction will have on competition in the ICT Sector post the conclusion of the transaction.

5.4.3. The application before the Authority falls under the definition of a merger as defined in section 12 of the Competition Act No. 89 of 1998, as amended ("Competition Act"). Further, the Competition Act provides for the determination of merger thresholds by the Minister of the Department of Trade and Industry ("DTI") in consultation with the Competition Commission ("CC"). On the 6 March 2009, the Minister (DTI) published a

notice in the Government Gazette No. 31957 about said threshold guidelines⁶. Further, on the 15 September 2017, the Minister (DTI) published a notice in the Government Gazette No. 41124 amending said guidelines⁷.

- 5.4.4. The application before the Authority is below the lower threshold on both the combined turnover or asset value and the target turnover or asset value matrices. As such it qualifies as a small merger. Guidance is placed on the Competition Commission Thresholds and Guidelines ("Guidelines") due to the Authority not developing its own.
- 5.4.5. On the requirements as set-out in the Guidelines on the small merger notifications, there is a reasonable and an adequate basis to conclude that this application does not meet the criteria for disclosure with the Competition Commission. On a public-interest basis, there is no basis to state that the application cannot be justified on public-interest grounds (i.e. decline the Application), on the evaluation of section 12A (3) (a-d) of the Competition Act.
- 5.4.6. In conclusion, on a reasonable and adequate basis, the Authority is satisfied that this transfer application is not found to likely lessen or prevent competition substantially.
- 5.4.7. The Efficiency Defence assessment is not conducted as the application before the Authority is not found to be anti-competitive.
- 5.4.8. The Transferee states that it intends to use the individual licence to compete on voice and data provision with the synergy created on a wholesale level with several interconnects. This will enable to get a national number range and compete on a national basis to supply its services to customers on a personalised platform⁸.

⁶ Determination of merger thresholds and method of calculation. Government Notice No. 216, Government Gazette No. 31957 of 6 March 2009.

⁷ Amendment of the determination of merger thresholds as set out in general notice 216 of 2009. Government Notice No. 1003, Government Gazette No. 41124 of 15 September 2017.

⁸ Submitted by the business plan,

- 5.4.9. The competition impact analysis does not find patent reasons not to grant the transfer based on its impact on competition. The transaction will not adversely affect competition in the sector.

5.5. Consumer Interest Analysis Report

- 5.5.1. Clause 9.3 of Form G requires the Applicant to provide a consumer interest analysis report post the transaction.
- 5.5.2. The Applicant procured the services of Lisa Thornton Consulting to undertake an independent consumer interest analysis and prepare a report regarding the impact of the transaction as per Form G of the Regulations. The report seeks to evaluate the impact the transaction will have on consumer's welfare post the conclusion of the transaction.
- 5.5.3. The business plan of the Transferee provides that the Transferee offers robust voice and data products and services locally in terms of its class electronic communications service ("CECS") licence. The plan with the acquisition of an I-EC is to expand service offering nationally.
- 5.5.4. As contemplated in section 3 of the Consumer Protection Act 68 of 2008 ("CPA"), the Commission exercises primary authority to promote and advance the social and economic welfare of consumers in South Africa, and the Authority exercises primary authority to ensure universal and affordable access to high quality electronic communications services, broadcasting services and postal services, to consumers⁹. Having an appreciation of who exercises primary authority in respect of consumers in individual licence transfer applications, a judicious, reasonable and adequate conclusion requires consideration of the guiding provisions in the CPA. Hence the CPA will provide guiding principles in the analysis provided hereunder.

⁹ Paragraph 1.3 Memorandum of Agreement entered into between the National Consumer Commission and the Independent Communications Authority of South Africa.

- 5.5.5. The CPA provides the relevant definition of both a consumer and a supplier. The consumer interest analysis is undertaken under the pretext of the definitions provided in the CPA. Section 5 (2) and (3) in CPA sets out transactions that are exempt from the application of the CPA. On analysis of the document provided the Transfer Application falls within the ambits of the CPA.
- 5.5.6. The Transferee currently procures services through its CECS and class electronic communications network service ("C-ECNS") licences. There is a need for an I-ECS is at a national service offering for the Transferee and service access for the consumer.
- 5.5.7. The value proposition to the consumer is the Transferee's tailor-made provision of a combination of key offerings including telecommunications and data services as well as office automation products.¹⁰ This will have the benefit of expanding the services, thus increasing the element of choice and diversity for the consumer.
- 5.5.8. The analysis does not find patent reason as to why the Application should be declined on a post transaction customer impact basis. The Authority is satisfied from the consumer analysis report provided that the transfer will provide a consumer interest post the transfer.

¹⁰ Submitted in the consumer analysis report.

6. AUTHORITY'S DECISION

In the light of the above, on 07 July 2020, the Authority approved the transfer of the Applicant's I-ECS licence to the Transferee.



DR. KEABETSWE MODIMOENG
CHAIRPERSON

DATE: 08 / 06 / **2021**