



15 October 2014

## ICASA

### Attention: Godfree Maulana

Per email: [ecsecns.compliance@icasa.org.za](mailto:ecsecns.compliance@icasa.org.za)

CC: Dr Tracy Cohen, [tracy.cohen@neotel.co.za](mailto:tracy.cohen@neotel.co.za)

Dear Godfree

### **Submissions in respect of the Application for Approval of the Acquisition of Neotel (Pty) Ltd by Vodacom (Pty) Ltd**

1. ISPA refers to the notice in terms of section 13(6) read with section 9(2)(a) of the Electronic Communications Act 36 of 2005 ("the ECA") regarding the application by Neotel (Pty) Ltd ("Neotel") for the prior written approval in respect of the acquisition by Vodacom (Pty) Ltd ("Vodacom") of 100% of the issued share capital of Neotel as well as all of the Neotel shareholders' loan claims against Neotel ("the proposed transaction"), submitted on 17 June 2014 ("the Application").
2. ISPA has noted the content of the notice and reviewed the Application and sets out its submissions below.

### **Legal Framework for the Application**

3. As indicated in paragraph 3 of the Application, the Application is made in terms of:
  - 3.1. Section 13(1) of the ECA as amended<sup>1</sup> for the prior written permission of the Authority for the transfer of control over Neotel's individual electronic communications network service (IECNS) and individual electronic communications service (IECS) licenses ("the service licences") from the Neotel shareholders ("the Sellers") to Vodacom; and

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<sup>1</sup> 13(1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and 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.

(2) 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.

3.2. Section 31(2A) of the ECA as amended<sup>2</sup> for the prior written permission of the Authority for the transfer of control over Neotel's radio frequency spectrum licenses as set out in the Application ("the radio frequency spectrum licences") from the Sellers to Vodacom.

4. Paragraph 5 of the Application further indicates that Sellers and Vodacom (together "the Parties") have affected the various applications for transfer of control through the provision of information required under the Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services ("the Ownership and Control Regulations 2003")<sup>3</sup> published in January 2003 under the Telecommunications Act 103 of 1996 ("the Telecommunications Act").

5. Paragraphs 5 and 6 of the Application read as follows:

*5. For the purpose of the applications described in paragraphs 3.1 and 3.2 above, the parties have provided the information required under the Regulations in Respect of the Limitation of Ownership and Control of Telecommunications Services (published under Government Notice R105, Government Gazette 24288 of 16 January 2003) published in terms of the Telecommunications Act 103 of 1996 ("the Ownership and Control Regulations") which remain in effect under the ECA. These Ownership and Control Regulations prescribe the process to be followed in respect of an application for the transfer of control of an individual licence as provided in section 13(2) of the ECA.*

*6. For the purpose of the application described in paragraph 3.3. above, the parties have provided the same information as must be provided in terms of the Ownership and Control Regulations. This is on the basis that, as yet, no regulations have been prescribed in terms of section 31(3)(c) of the ECA. The fact that no regulations have been prescribed for the purposes of section 31(3)(c) of the ECA, does not impede the Authority's ability to consider and decide on the Parties' application given that, while the Authority has the power to make such regulations, there is no obligation placed on the Authority to do so.*

6. ISPA notes the difference in approach as regards the service licences as opposed to the radio frequency spectrum licences.

6.1. In respect of the transfer of control over the service licences the Parties aver that the Ownership and Control Regulations 2003 are of direct application and prescribe the process to be followed.

6.2. In respect of the transfer of control over the radio frequency spectrum licences the Parties indicate that – in the absence of directly applicable regulations – they have provided the information set out in Regulation 5 of the Ownership and Control Regulations 2003 and that the Authority should use this information to evaluate the application.

### **The Control and Ownership Regulations 2003**

7. ISPA's position is that the provisions of the Ownership and Control Regulations 2003 are fatally outdated and is extremely difficult to apply to the current regulatory framework under the ECA and the market reality post the completion of the licence conversion process in 2009.

7.1. The concept of a "concentrated market" is no longer of any application given the outcome of the 2009 licence conversion process.

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<sup>2</sup> 31(2A) A radio frequency spectrum licence may not be assigned, ceded or in any way transferred, and the control of a radio frequency spectrum licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.

<sup>3</sup> Government Notice R105, GG24288, 16 January 2003

- 7.2. The concept of a “telecommunication service category” is no longer of any application in the current context given the horizontal licensing framework introduced by the ECA.
- 7.3. As a result Regulation 2 - “Limitation of Ownership and Control of Telecommunications Services” - is no longer of any practical application.
- 7.4. Regulation 3 has been effectively repealed by the provisions in the Compliance Manual Regulations 2011<sup>4</sup> relating to the obligation on all service licensees to submit annual ownership and control information in the prescribed format on an annual basis.
- 7.5. In addition, and as set out in paragraph 10 of the Application, the process for notifying the Authority of changes in a control interest of a licensee is now determined by clause 2(1)(c) of Schedule 3 of the Standard Terms and Conditions for Individual Electronic Communications Network Services 2010 read with regulation 14(A) of the Individual Licensing Processes and Procedures Regulations, 2010.
- 7.6. The substantive requirement to obtain prior written approval set out in Regulation 4 – “Transfers of ownership interests and control interests” – is no longer of any practical application due to the operation of sub-regulation 4(2)(b):

*Transfers of ownership interests and control interests*

*4 (1) A licensee shall obtain prior written approval from the Authority in accordance with the procedure prescribed by regulation 5 in any case where the transfer results in-*

*(a) the transfer of a control interest in the licensee;*

*(b) a decrease in the ownership interests held by historically disadvantaged persons in a licensee within the first two years of initial grant of the licence where the licensee proposed such ownership interests to be held by historically disadvantaged persons in its application for a licence in response to an invitation to tender issued by the Minister under section 34 of the Act.*

*4 (2) Sub-regulation 4 (1) shall not apply to-*

*(a) the issued share capital of a licensee that is trading on the JSE Securities Exchange South Africa or other internationally recognised securities exchange where the trading of such issued share capital would not result in the transfer of a control interest in the licensee;*

*(b) the transfer of any ownership interest or control interest in a licensee where the market is not a concentrated market;*

*(c) the transfer of any ownership interest held by the Government of the Republic of South Africa (or any agency, instrumentality or political subdivision thereof) acting in its capacity as a shareholder holding an ownership interest in the issued share capital of a licensee (regardless of whether such transfer results in a transfer of a control interest in the licensee), but would apply to such licensee in cases where such licensee holds ownership interests in another licensee; or*

*(d) transfer of ownership interests where such transfer does not result in a transfer of a control interest.*

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<sup>4</sup> General Notice 902 of 2011, GG 34863, 15 December 2011

(our emphasis)

- 7.7. Regulation 5 sets out the procedure for transfers and the information required from the parties thereto, but it is explicitly subject to sub-regulation 4(1), which – as demonstrated above – is no longer of any practical application:

***Procedures for transfers of ownership interests or control interest***

*5(1) A licensee who must obtain approval under sub-regulation 4(1) must in the application to the Authority –*

*...*

- 7.8. Regulation 7 – which sets out, inter alia, the criteria to be used by the Authority in evaluating a transfer application suffers from the same defect as it in turn is reliant on sub-regulation 5(1):

***Application Review***

*7 (1) If an application is made under sub-regulation 5 (1) the Authority may-*

8. While the proposed transactions falls within the meaning of the transfer of a “control interest” as that term is defined in the Ownership and Control Regulations 2003, it is evident that these Regulations are extremely difficult to apply in the current context.
9. It is also ISPA’s submission that there are procedures for the transfer of ownership of licences which have been established under the ECA which are more correct to utilise in the circumstances. The nature and locus of these procedures is different as regards the service licences as opposed to the radio frequency spectrum licences, so these will be separately considered below.
10. ISPA is uncertain as to that the parties have not elected to utilise the procedures set out in the ICASA Licensing Processes and Procedures Regulations 2010 (as amended)<sup>5</sup> and the Radio Regulations for the service licence and spectrum licence transfer applications respectively.

**The Service Licences**

11. Applications for the transfer of ownership of service licenses are made in terms of Regulations 11 and 12 of the ICASA Licensing Processes and Procedures Regulations 2010 (as amended) and utilising Form G which is a schedule to such Regulations:

***11. Application to transfer an individual Licence (section 13(2) of the Act)***

*(1) An application to transfer a Licence must be:*

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

*(2) Where in the opinion of the Authority, it is necessary as a matter of procedural fairness, the Authority may take any or all of the following steps:*

- (a) publish a notice in the Gazette of the application to transfer the Licence;*

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<sup>5</sup> Government Notice 522, GG 33293, 14 June 2010

*(b) invite interested persons to submit written representations in relation to the application within the period specified in the notice;*

*(c) allow the applicant an opportunity to submit written responses to representations received in relation to the application within the period specified by the Authority; and*

*(d) conduct a public hearing in relation to the application.*

## **12. Restrictions on transfer and renewal of an individual Licence**

*The Authority may refuse to renew or transfer a Licence if the Licensee has not complied with one or more of the following:*

*(a) Where the Licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of ICASA Act; or*

*(b) Where the Licensee has not paid the Licence fees due and payable at the date of the application; or*

*(c) Where the Transferee's ownership and control by historically disadvantaged persons is less than 30%.*

12. ISPA understands that this process applies to transfer of ownership of service licences and that the ECA draws a distinction between transfer of ownership of a service licence and transfer of control over a service licence. Notwithstanding this, however, the two forms of transaction are closely related, particularly as regards the legal and practical effect which flow therefrom: in both instances it is the acquiring party which obtains the ability to control the activities associated with the licences in question.
13. The Application asserts in paragraph 5 that it is the Ownership and Control Regulations 2002 which prescribe the process to be followed in respect of an application for the transfer of control of an individual licence as provided in section 13(2) of the ECA. ISPA understands the reasoning underpinning this statement, but must respectfully disagree:
  - 13.1. As shown above the Ownership and Control Regulations 2002 have extremely circumscribed practical application and dubious legal relevance. As things stand there is no prescribed manner in which the Authority should evaluate the Application or clarity on the criteria to be employed. The information supplied by the Parties under the Control and Ownership Regulations 2003 is, in any event, insufficient for any meaningful evaluation of the desirability of the proposed transfer of control.
  - 13.2. The substantive and procedural requirements set out in the ICASA Licensing Processes and Procedures Regulations 2010 have been drafted, debated and finalised within the current legislative and regulatory framework, taking into account the service licensing reality post-2009.
  - 13.3. The requirements of the ICASA Licensing Processes and Procedures Regulations 2010 in respect of the transfer of ownership of a service licence encompass and supersede all of the requirements laid out in the Ownership and Control Regulations 2003. Stated differently: in completing an application for transfer of ownership under the ICASA Licensing Processes and

Procedures Regulations 2010 the Parties would be required to provide all information – and more – required to be provided under the Ownership and Control Regulations 2003.

- 13.4. ISPA has noted in particular that the Application does not even attempt to canvass the impact of the proposed transaction on the percentage ownership in the service licences held by historically disadvantaged groups. As noted above in the analysis of the Ownership and Control Regulations 2003, the requirement in those Regulations to set out this information does not appear to apply to the proposed transaction. The ICASA Licensing Processes and Procedures Regulations 2010, on the other hand, require detailed information in this regard to be submitted. This is in line with the current focus on transformation of licensees under the ECA and is, ISPA submits, a crucial and relevant consideration for the Authority to take into account in evaluating the Application.
- 13.5. Regulation 12 further sets out in clear and unequivocal terms the criteria to be employed by the Authority in evaluating an application of this nature.
14. ISPA accordingly submits that the correct process to be followed by the Parties in seeking the prior written approval of the Authority for the transfer of control of the service licences is that set out in Regulations 11 and 12 of the ICASA Licensing Processes and Procedures Regulations 2010.
15. Alternatively ISPA submits that it is incumbent upon the Authority to seek appropriate legal advice to provide it with guidance on the correct process to be followed by the notifying Parties.

#### **The Radio Frequency Spectrum Licences**

16. The same logic as set out above applies in respect of the radio frequency spectrum licences currently held by Neotel and in respect of which Vodacom would have effective control post-transaction.
17. In this case, however, ISPA submits that the reliance of the Parties on the provisions of the Ownership and Control Regulations 2003 is even more misplaced given that these Regulations were never intended to govern a transfer of ownership or a transfer of control of spectrum. Further there is again no clear set of criteria in these Regulations which serve to guide the Authority as to the manner in which the application in this regard should be evaluated.
18. ISPA submits that the transfer of radio frequency spectrum licences is not an automatic incidence of the transfer of service licences (i.e. the transfer of the electronic communications network service and electronic communication service licences in terms of which a radio frequency spectrum licence is held). Nor does an application submitted in terms of section 13 of the ECA for the transfer of control of service licences cover an application for transfer of control of a related radio frequency spectrum licence in terms of section 31(2A).
19. ISPA notes that there is a procedure set out in section 31 of the ECA and Regulation 10 of the Radio Frequency Spectrum Regulations 2011<sup>6</sup> which explicitly contemplates a separate regulatory process for the transfer of ownership radio frequency spectrum licence and submits that it is this process which the Authority should utilise in evaluating the Application insofar as it pertains to the proposed transfer of control of Neotel's radio frequency spectrum licences.
20. The Authority has exercised the power accorded by section 31(3)(b) of the ECA and set out in the Radio Frequency Spectrum Regulations 2011 procedures and criteria for the transfer of a radio

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<sup>6</sup> General Notice 184, GG 34172, 31 March 2011

frequency spectrum licence. These are Regulations finalised under the ECA which take into account the current licensing framework and market reality.

21. As noted, applications for the transfer of a radio frequency spectrum licence are governed by regulation 10 of the Radio Frequency Spectrum Regulations, 2011:

#### **10. Procedures in Respect of Transfers**

(1) (a) *Except with the approval of the Authority, no licensee must transfer a Radio Frequency Spectrum Licence.*

(b) *An application to transfer a licence must be -*

- (i) in the format as set out in Form C of Annexure A;*
- (ii) accompanied by the applicable fee; and*
- (iii) submitted by the prospective transferor.*

(2) *For Radio Frequency Spectrum Licences and assignments that would have been subject to an extended procedure for application, the transferee must submit the same information as for an extended application.*

(3) *For Radio Frequency Spectrum Licences that would have been subject to an extended procedure for application, the Authority shall take the following steps -*

- I. publish a notice in the Gazette of the application to transfer the licence;*
- II. invite interested persons to submit written representations in relation to the application within the period specified in the notice;*
- III. allow the applicant an opportunity to submit written responses to representations received in relation to the application within the period specified by the Authority; and*
- IV. may conduct a public hearing in relation to the application.*

(2)<sup>7</sup> *Where the Radio Frequency Spectrum Licence has been granted for a frequency as envisaged in section 31 (3) of the Act, any amount paid by the transferee to the transferor must not exceed the value of the bid or auction price paid by the original licence holder adjusted on a pro-rata basis to the remaining duration of the licence/ assignment.*

(3) *The radio frequency spectrum licence transfer application will be evaluated on the basis of the following parameters:*

- (a) Technical efficiency*
- (b) Functional efficiency*
- (c) Economic efficiency*

(4) *The application will receive a total score based upon the sum of the technical, functional and economic efficiencies as outlined in section 20 of the extended application form.*

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<sup>7</sup> There is a numbering error in the Regulations

*(5) Before initiating the radio frequency spectrum licence transfer process both the transferor and transferee shall ensure that the following conditions have been met:*

*(a) Except when the Radio Frequency Spectrum Licence would have been issued according to the Standard Procedure, the Radio Frequency Spectrum Licence shall have been held for at least one year before the application for the transfer can be made;*

*(b) That the terms and conditions applicable to the radio frequency spectrum licence can be met by the transferee.*

*(c) A duly completed application form must be submitted by the transferor or transferee, with proof of payment of the prescribed application fee at any office of the authority.*

*(d) Written consent of the transferor must accompany the application.*

*(e) When the transferee is a juristic person or an association, a certified copy of the registration certificate or constitution of the association must accompany the application.*

*(f) In the case of liquidation or insolvency of the transferor, the liquidator/curator must give written consent to the transfer.*

*(g) In the case of a deceased estate, the executor of the deceased estate must give written consent to the transfer;*

*(h) The transferee should have a score no less than that of the transferor.*

*(6) Licensees who fail to meet any criteria will be required to resubmit the application within 14 days.*

*(7) The Authority will not approve the transfer of a spectrum licence*

*a) Where the Licensee has been found to have contravened provisions of the Act, legislation, regulations or terms and conditions of the licence by the Complaints and Compliance Committee ("the CCC") of the Authority and has not complied with the order by the Authority in terms of section 17 of the ICASA Act, or*

*b) If such transfer will reduce or limit competition or*

*c) If such transfer will result in the reduction of direct ownership by HDIs.*

22. Regulation 10 applies to "transfers" without referencing "transfers of control" as a result of the recent amendment of section 31 of the ECA. ISPA notes in this regard that the Authority has – in respect of transfers of control of individual service licences – adopted the practical approach of using the existing procedures, criteria and forms for transfers of individual service licences where an application for transfer of control has been received. There is no reason why the same approach should not be adopted in respect of radio frequency spectrum licences so that regulation 10 of the Radio Frequency Spectrum Regulations 2011 applies to transfers of control as it does for transfers of ownership.

23. ISPA understands that this process applies to transfer of ownership of radio frequency spectrum licences and that the ECA draws a distinction between transfer of ownership of a radio frequency spectrum licence and transfer of control over a radio frequency spectrum licence. Notwithstanding this, however, the two forms of transaction are closely related, particularly as regards the legal and practical effect which flow therefrom: in both instances it is the acquiring party which obtains the ability to control the activities associated with the licences in question.

24. Further – as noted in paragraph 6 of the Application – the "fact that no regulations have been prescribed for the purposes of section 31(3)(c) of the ECA, does not impede the Authority's ability to consider and decide on the Parties' application given that, while the Authority has the power to make

such regulations, there is no obligation placed on the Authority to do so". ISPA submits that the proper basis for use in considering and deciding on the Applications is that set out in the Radio Frequency Spectrum Regulations 2011.

25. ISPA accordingly submits that the correct process to be followed by the Parties in seeking the prior written approval of the Authority for the transfer of control of the radio frequency spectrum licences is that set out in Regulation 10 of the Radio Frequency Spectrum Regulations 2011.
26. Alternatively ISPA submits that it is incumbent upon the Authority to seek appropriate legal advice to provide it with guidance on the correct process to be followed by the notifying Parties.

**Does the proposed transaction result in a reduction in ownership by historically disadvantaged persons?**

27. The Application does not set out any information regarding the impact of the proposed transaction on the percentage control by historically disadvantaged persons over the service licences and the radio frequency spectrum licences respectively.
28. It is ISPA's understanding, however, that the net effect of the proposed transaction is that there will be a reduction in ownership by historically disadvantaged persons in respect of both the service licences and the radio frequency spectrum licences.
29. It appears that the Parties – by electing to utilise the processes set out in the Ownership and Control Regulations 2003 – are seeking to avoid the application of the provisions of Sub-Regulation 12(c) of the ICASA Licensing Processes and Procedures Regulations 2010 and Sub-Regulation 10(7)(c) of the Radio Frequency Spectrum Regulations 2011.

**Conclusion**

30. It is ISPA's conclusion that discerning the applicable legal framework for the transfer of control of service licences and radio frequency spectrum licences is fraught with difficulty. ISPA submits that it is incumbent upon the Authority to obtain clear and unequivocal legal advice on the correct procedure to be followed by the parties to the proposed transaction.
31. As things stand, the current Application does not afford any basis for industry to react to as it simply sets out licence and shareholder information without reference to any criteria for approving such a transfer which may be applicable.
32. ISPA reserves its rights in respect of its ability to make submissions regarding the Application as it has been notified to the Authority.
33. ISPA requests that the Authority afford it the opportunity to make oral presentations at any public hearings which it may elect to conduct in connection with this process.

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ISPA REGULATORY ADVISOR