
**Vodacom written representation in response to the
Draft Processes and Procedures Amendment
Regulations, 2015**

Government Gazette No. 38921 of 26 June 2015

A Introduction

1 Vodacom (Pty) Limited welcomes the opportunity to make written representations in response to the Draft Processes and Procedures Regulations as *gazetted* in Government Gazette No. 38921 of 26 June 2015 ("the Draft Regulations").

2 Our written representation is structured as follows:

2.1 Transfer of control of an individual licence vis-à-vis change of control of a firm

2.1.1 Jurisdictional thresholds: Transfer of control of an individual licence;

2.2 Purpose of setting-out the concept of control

2.2.1 Jurisdictional thresholds: Change of control;

2.3 Section 13 of the Act and the evaluation of empowerment considerations

2.3.1 Section 13(3) read with section 13(5) of the Act;

2.3.2 The Authority's approach in relation to section 13(3) read with section 13(5) of the Act;

2.3.3 Empowerment considerations: the Act, the ICASA Act and the B-BBEE Act;

2.3.4 Contemplated regulatory dispensation for B-BBEE

2.3.5 B-BBEE Amended Codes of Good Practice;

2.3.6 Sections 13(3) and (5) of the Act read with the Revised Notice.

2.4 Conclusion

Transfer of control of an individual licence *vis-à-vis* change of control of a firm

Jurisdictional thresholds: Transfer of control of an individual licence

- 3 Broadly, Vodacom has considered section 13 of the Act to be concerned with the consideration of transfers of beneficial and quasi-proprietary interests, and the transfer of individual licences in their entirety. Individual licences are ordinarily possessed by persons, including juristic persons and these persons ordinarily exercise control over licences.
- 4 Vodacom believes that there is a material distinction between on the one hand a transfer of control of a licence, and on the other hand the change of control of a person in control of a licence. The Draft Regulations have seemingly not sought to sustain this distinction and have inadvertently conflated these two distinct concepts. This conflation has been occasioned by the incorporation by reference of the concept of control, in particular the change of control as set-out in section 2(2) of the Companies Act, 2008 (Act No. 71 of 2008) (“**Companies Act**”).
- 5 In formulating the definitions of the Draft Regulations, Vodacom has understood the Authority to have sought to determine a *jurisdictional threshold* wherein an application for the transfer of control of an individual licence is required to be made to the Authority. In this regard, the Authority has set-out a definition of *Transfer of Control* which reads as follows:

“Transfer of Control” means transfer of shareholding in the issued licence to a new shareholder.” (Own emphasis)

- 6 Further, the Authority has proposed the transposition of the concept of control as set-out in the Companies Act. Taken cumulatively, the definition of transfer of control and the incorporation by reference of the concept of control from the Companies Act operate rather antagonistically and are seemingly irreconcilable concepts for the following reasons:
- 6.1 At the minimum, the *trigger* wherein an application to the Authority is required for a transfer of control of an individual licence cannot reasonably be set at the level where the mere transfer of *any* shareholding is occasioned. Further, the mere transfer of shareholding cannot reasonably be equated with those instances set-out in section 2(2) of the Companies Act where a change of control may be said to have materialised.
- 6.2 In other words, *any* transfer of shareholding from one person to another, irrespective of the threshold of shareholding to which such a transfer relates, may not necessarily materialise in the conferment of the ability of the transferee to exercise control within the meaning of the Companies Act. Here, the logicity of section 2(2) of the Companies Act is plain and reasonable: control is deemed to be conferred where the majority of voting rights are transferred to another person, and a majority amounts to a *numeric qualification* of votes required to exercise control i.e. >50%.
- 7 It may very well have been the Authority's intention to set-out a *jurisdictional threshold* wherein the transfer of control of an individual licence ought to be understood in the same manner as the conferment of control in the Companies Act. That is, the conferment of control to another person within the meaning of the Companies Act ought to be understood as synonymous with the transfer of control of an individual licence.
- 8 However, the definition of Transfer of Control negates such an interpretation plainly because that definition is devoid of any numeric qualification in relation to a shareholding threshold which would be tantamount to the conferment of

control. Further, the phrase "...transfer of shareholding in the issued licence" in the definition of Transfer of Control is presumptive of there being shareholding vested in an issued *licence* instead of shareholding being vested in a *licensee* or a person who is licensed.

9 In the circumstances, the formulation of the text in the Draft Regulations is unfortunate and falls short of providing the requisite clarity for instances where the Authority's regulatory purview becomes operative in terms of section 13 of the Act.

10 In demonstrating the unintended consequences of the manner in which the current formulation of text reads;

10.1 It is reasonably and factually conceivable that the transfer of control of a licence from one person to another may be occasioned *without* there necessarily being a transfer of any shareholding or a change of control in the transferor. Here, Firm A may ostensibly wish to cease rendering services for which a licence is required under the Act, and for these purposes enter into a commercial transaction with Firm B for the transfer of control of that individual licence. In this instance, although control of the individual licence has been transferred from Firm A to Firm B, this transfer would not have been triggered or occasioned by any change in the shareholding of either Firm A or Firm B. Further, in this instance there would be no change of control within the meaning of section 2(2) of the Companies Act.

11 Therefore, the current formulation of the Draft Regulations would not operate to encompass the consideration of the above scenario.

12 Of course, where as part of a broader corporate transaction entailing the change of control within the meaning of the Companies Act and the transfer of control of an individual licence is incidental thereto, then these transactions fall squarely within the requirement for notification in terms of section 13(1) of the Act.

Summary

- 13 The preceding narrative has sought to demonstrate the undesirability of the Draft Regulations in imputing the concept of control from the Companies Act as the *trigger* for applications for the transfer of control of an individual licence under section 13(1) of the Act. The proposed formulation of the definition of Transfer of Control also does not provide the requisite assistance to the Authority in determining those transfers of control that are susceptible to be made to the Authority in terms of Section 13(1) of the Act. Further, the definition of Transferee in the Draft Regulations also presents the same definitional challenges.
- 14 All in all, the use of control within the meaning of the Companies Act and the formulation of Transfer of Control may prove problematic in providing the necessary certainty for the operation of the *triggers* or *screen* for purposes of section 13(1) of the Act.
- 15 In the foregoing assessment, we proceed to reflect on the existence of similarly conceived *triggers* in the Companies Act, 2008 (Act No. 71 of 2008) ("**Companies Act**") and the Competition Act, 1998 (Act No. 89 of 1998) ("**Competition Act**").
- 16 Here, we demonstrate the following:
- 16.1 The desirability of these *triggers* for purposes of setting-out *jurisdictional thresholds*; and
- 16.2 The operation of the *triggers* within the context of the Companies Act and the Competition Act.
- 17 Overall, Vodacom seeks to demonstrate to the Authority the need to reconsider the formulation of the triggers for the operation of section 13 of the Act. In the subsequent part of the submission, we demonstrate that the setting of these triggers and giving effect to the entirety of section 13 lies in

the Authority embarking upon the process envisaged in section 13(5) of the Act. It is within the context of this process that appropriately formulated triggers may be set for the operation of section 13(1) of the Act for purposes of rendering the remainder of section 13 operative.

Purpose of setting-out the concept of control

Jurisdictional thresholds: change of control

The Companies Act, 2008 (Act No. 71 of 2008)

- 18 The purpose of setting-out the concept of control in the Companies Act ought to be understood as being concerned with defining the relationships between companies and their respective shareholders or members and directors. The concept of control also sets-out the instances where the change of control amongst shareholders would serve to *trigger* the need to comply with subsequent regulatory requirements. These regulatory requirements include *inter alia* providing for equitable and efficient amalgamations, mergers and takeovers of companies.
- 19 Section 2 of the Companies Act further sets-out those instances wherein the change of control within the meaning thereof would be occasioned by some alteration of the level of shareholding such that a change of control may be said to have occurred. Broadly, the instances where a change of control may be deemed to have occurred in terms of section 2(2) entail the transfer of more than the majority of voting rights i.e. >50%.

The Competition Act, 1998 (Act No. 89 of 1998, as amended)

- 20 On the other hand, the purpose of the Competition Act in setting-out the instances where a change of control may be deemed to have occurred is two-fold:

20.1 First, section 12 provides a *trigger* for those corporate transactions where a change of control may have been occasioned, requiring the transaction to be notified with the Competition Commission (“the **Commission**”). Further, section 13 of the Competition Act provides for the prohibition of the prior implementation of a merger transaction without such transaction having been notified to the Commission for its evaluation. So, this *trigger* operates to identify those transactions where the change of control requires that such corporate activity is notified to the Commission prior to the consummation and implementation of the transactions;¹ and

20.2 Second, the notification of the change of control presents the Commission with the premise to evaluate the potential implications of these changes of control. Here, the Competition Act sets-out an analytical framework within which the assessment of the likely effect that the transaction may have on competition. Here, section 12A provides for such a framework and the inquiry is invariably factual.

Summary

21 Both the Companies Act and the Competition Act articulates the concept of control for *jurisdictional purposes*. Here, where a change of control is deemed to have occurred in accordance with the scenarios envisaged in both statutes, there are regulatory permutations which consequently flow therefrom. Further, the jurisdictional inquiry is fact-based and must be adjudicated upon on a case-by-case basis. Conversely, where the change or transfer of shareholding does not materialise in the change of control within the meaning of both statutes, that change or transfer of shareholding does not operate to *trigger* the consideration of consequent regulatory permutations.²

¹ Section 1(1) of the Competition Act aptly provides definition of an *acquiring firm* and a *target firm* that neatly identifies the juncture and interrelationship where the change of control may be occasioned such that parties to a merger transaction may be required to notify such a transaction

² There is the exception of section 2(2)(d) of the Companies Act, the essence of which is reflected in the provisions of section 12(2)(g) of the Competition Act. Here, the notion of *material influence* operates to replace the *static* concept of the change of control which are occasioned from the mere transfer of the majority of voting rights. The very nature of the factual inquiry differs substantially and

- 22 We have demonstrated the desirability of *triggers* and the manner in which these operate to screen those changes of control requiring further regulatory assessment. In doing so, we have alluded to the inappropriateness of imputing *triggers* and screens that have been developed for a particular purpose in other statutes so as to give effect to section 13 of the Act. Here, the unintended consequences are plain and obvious, while the regulatory uncertainty which will invariably result therefrom is undesirable.
- 23 With this backdrop, we proceed to reflect on the manner in which the Authority has sought to give effect to the remainder of section 13 of the Act, in particular subsection (3) thereof.
- 24 Here, we set-out the following:
- 24.1 Briefly, the overall regulatory intent of sections 13(1) and (2) of the Act;
 - 24.2 Our understanding of the operation of section 13(3) of the Act;
 - 24.3 The interrelation between section 13(3) and section 13(5) of the Act;
 - 24.4 The Authority's approach towards giving effect to section 13(3) of the Act; and
 - 24.5 Empowerment considerations within the context of the Act.
- 25 Overall we demonstrate the inappropriateness of the Authority's approach, and the need for a reconsideration of the manner in which the Authority has sought to give effect to section 13(3) of the Act. We further reflect on the statutory requirements set-out in the Act for purposes of giving effect to section 13(3) of the Act. Here, we have regard to the purpose and intent of

requires a consideration of more factors operating to confer upon a person the ability to exercise control comparable to having the majority of voting rights.

section 13(5) of the Act. Lastly, we conclude with a reflection of the broader implications on empowerment matters within the ICT Sector, and the appropriateness of having recourse to the Regulations as the most optimal manner to give treatment to empowerment matters.

Section 13 of the Act and the evaluation of empowerment considerations

Transfer of control of a licence

26 The Act prohibits the transfer of beneficial quasi-proprietary rights in individual licences and the transfer of control of individual licences without the Authority's prior written permission.³ Further, the Act requires the Authority to prescribe the manner in which these beneficial interests in individual licences and the control of individual licences may be made for the Authority's consideration.⁴

27 In this regard, sections 13(1) and (2) of the Act read as follows:

“(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 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 may be made to the Authority in the prescribed manner.”

28 In requiring the prior approval of the transfer of individual licences, the Legislature's intent appears to have been to provide the Authority with the capability to assess the potential effect of such transfers on broad-based black economic empowerment (“**B-BBEE**”) and competition in the ICT sector. However, prior to being in a position to consider these two requirements, section 13(3) of the Act empowers the Authority with the discretion to

³ Section 13(1) of the Act.

⁴ Section 13(2) of the Act.

promulgate regulations setting-out the manner in which these two requirements are to be considered within the context of the transfer of control of individual licences.

29 These two considerations are set-out in section 13(3) of the Act as follows:

“The Authority may, by regulation, set a limit on, or restrict the ownership or control of an individual licence, in order to—

(a) Promote the ownership and control of electronic communications services by historically disadvantaged groups and to promote broad-based black economic empowerment ; and

(b) Promote competition in the ICT sector.”

30 The regulations contemplated in section 13(3) of the Act would also be at the very least expected to give treatment to the following matters:

30.1 Instances where the change or transfer of ownership and/or control of individual licences requires the Authority’s prior written permission;

30.2 The manner in which applications for these instances of a change or transfer of ownership and/or control of individual licences are to be made to the Authority; and

30.3 The factors which the Authority is required to consider in determining whether to permit such transfers of ownership and/or control.

31 The regulations may also provide for other matters which are incidental to the consideration of such transfers.

Section 13(3) read with section 13(5) of the Act

32 Should the Authority elect to exercise the discretion conferred in section 13(3) of the Act and endeavour to prescribe these regulations, the Act consequently requires the Authority to undertake a regulation-making process that is guided by the provisions of section 13(5) of the Act. Here, the Authority's discretion is significantly constrained; the regulations that are to be made in terms of section 13(3) of the Act are to be guided by two factors.

33 Here, section 13(5) of the Act reads as follows:

"Regulations contemplated in subsection (3) and (4) must be made—

(a) With due regard to the objectives of the Act, the related legislation and where applicable, any other relevant legislation; and

(b) After the Authority has conducted an inquiry in terms of section 4B of the ICASA Act, which may include, but is not limited to a market study." (own emphasis)

34 In other words, the regulation-making process contemplated in section 13(4) of the Act is rather unique and requires the exercise of other concomitant powers conferred to the Authority and the consideration of other statutes.

The Authority's approach in relation to section 13(3) read with section 13(5) of the Act

35 That the Draft Regulations reflect the Authority's endeavours to give effect to section 13(3) of the Act is clear. This intent may be reasonably deduced from a plain reading of the Draft Regulations, in particular clause 5.2.

36 This provision proposes to amend Regulation 11 of the Procedure Regulations and reads as follows:

"A licence transfer or licence transfer of control application will be evaluated on the basis of the following criteria:

(a) Promotion of competition and interests of consumers; and

(b) Equity ownership by HDPs." (own emphasis)

37 However, Vodacom is of the considered view that the approach adopted by the Authority in purporting to give effect to section 13(3) of the Act is premised on a fundamental error in law. Further, there are significant impracticalities which operate to negate the plausibility and desirability of the Authority's approach. The error in law and consequent impracticalities stemming therefrom potentially renders the Draft Regulations *ultra vires*.

Empowerment considerations: the Act, the ICASA Act and the B-BBEE Act

38 Sections 1 in both the Electronic Communications Amendment Act, 2014 ("**Amendment Act**") and the ICASA Amendment Act, 2014 ("**ICASA Amendment Act**") introduced the definition of B-BBEE. This definition operates to incorporate by reference the definition of B-BBEE set-out in section 1 of the Broad-Based Black Economic Empowerment Act, 2003 ("**B-BBEE Act**").

39 Further, section 4 of the ICASA Act has been amended by the insertion of the following provision:

"(k) may make regulations on empowerment requirements to promote broad-based black economic empowerment."

40 In addition, section 2 of the Amendment Act inserted the following objective:

“(h) promote broad-based black economic empowerment, with particular attention to the needs of women, opportunities for youth and challenges for persons with disabilities.”⁵

Contemplated regulatory dispensation for B-BBEE

- 41 It is clear that the Legislature had intended for the Act, the Amendment Act and the ICASA Amendment Act to be read together with the B-BBEE Act where the Authority intended to give treatment to empowerment matters. In this regard, not only does section 13(5) of the Act set-out peremptory requirements which the Authority is required to adhere to, section 4(3)(k) of the ICASA Amendment Act also provides the Authority with the necessary regulation-making powers to specifically address empowerment matters in the ICT sector.
- 42 It is Vodacom’s considered view that reference in section 13(5)(a) of the Act to “...and where applicable, any other relevant legislation” directly, or at the very least indirectly refers to the B-BBEE Act. That is, section 13(5) of the Act plainly requires that where the Authority intends to prescribe regulations giving treatment to empowerment matters, these regulations must necessarily be guided by the prevailing statutory dispensation pertaining to B-BBEE set-out in the B-BBEE Act and its attendant subordinate statutory instruments. Further, in doing so the Authority must undertake an inquiry as contemplated in section 4B of the ICASA Act. Lastly, the Authority has the further discretion of undertaking a market study for this purpose. All in all, the Act prescribes several administrative steps required to be followed by the Authority where the Authority intends to promulgate an empowerment regulatory dispensation.
- 43 As alluded above, in as far as the Draft Regulations intends to do so, Vodacom is of the view that these endeavours fall far short of the obligatory

⁵ Section 13(5) of the Act specifically mandates the Authority to *inter alia* have due regard to the objectives of the Act as set-out in section 2 thereof when promulgating the regulations contemplated in section 13(3) of the Act.

statutory requirements of section 13(5) of the Act. That is, the Authority has evidently not undertaken a section 4B inquiry prior to *gazetting* the Draft Regulations, nor has a market study been undertaken as provided for in section 13(5)(b) of the Act. More importantly, the Draft Regulations have plainly not taken heed of the concomitant developments regarding the implementation of the B-BBEE Amendment Act, 2013 (Act No. 46 of 2013) ("**B-BBEE Amendment Act**") as it relates to Sector Codes and Codes of Good Practice.

B-BBEE Amended Codes of Good Practice

- 44 It is common cause that neither the Minister of Communications or the Minister for Telecommunications and Postal Services have established the ICT Sector Code Council ("**Sector Council**"). The functions of the Sector Council include *inter alia* undertaking the alignment and harmonization of the existing ICT Sector Charter with the Amended Codes of Good Practice emanating from the B-BBEE Amendment Act. Although the current ICT Sector Charter is harmonised with the Codes of Good Practice promulgated in 2007, Statement 000 of the Amended Codes of Good Practice requires that further alignment and harmonization of Sector Codes and Sector Charters be undertaken in relation to the Amended Codes of Good Practice.
- 45 It is also common cause that on 5 May 2015 Honourable Minister Davies, MP *gazetted* the Revised Notice of Clarification in Government Gazette No. 38764 of 15 May 2015 ("**Revised Notice**"). The Revised Notice purported to give treatment to *inter alia* the effective date of the Amended Codes of Good Practice, B-BBEE verifications and the alignment of Sector Codes. Importantly, paragraph 1(b) of the Revised Notice reads as follows:

"Further extend the transitional period for the alignment of Sector Codes to the end of October 2015. From the 1st November 2015 Sector Codes that are aligned shall be effective in accordance with section (a) above of this Notice. Sector Codes not aligned and ready

for gazette by the end of October 2015, a consideration shall be made for them to be repealed.”

- 46 The Revised Notice operates to extend the transitional period for the alignment of Sector Codes and Sector Charters with the Amended Codes of Good Practice to 31 October 2015.

Sections 13(3) and (5) of the Act read with the Revised Notice

- 47 As alluded to above, in purporting to give effect to section 13(3) of the Act, the Authority has plainly not had regard to the peremptory requirements of section 13(5) of the Act. Were the Authority to have done so, a section 4B inquiry would have served to ventilate empowerment considerations as set-out in the B-BBEE Act, the B-BBEE Amendment Act and the current ICT Sector Charter.
- 48 However, given that the current ICT Sector Charter is required to be aligned with the Amended Codes of Good Practice, and that the Sector Council (which is yet to be established) is mandated to undertake this exercise after having undertaken a review of the prevailing level of compliance with the 2007 Codes of Good Practice, any endeavour on the part of the Authority purporting to give effect to section 13(3) of the Act *prior* to the completion of these processes may be rendered purposeless.

CONCLUSION

- 49 Vodacom has set-out its concerns and reservations regarding the process which the Authority has embarked upon. We have sought to demonstrate the weaknesses in the Authority's approach and have proposed the means by which these weaknesses may be addressed. Fundamentally, it is Vodacom's considered view that the Authority ought to proceed from the appropriate point

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of departure and derive its powers from the correct provisions of the Act. Further, the Authority ought to adhere to the peremptory provisions of the Act.

END