Annexure A

Memorandum Regarding Control

1. **Introduction**

1.1 The Electronic Communications Act, 2005 ("ECA") contains a number of references to the term "control", but these terms are not defined in the ECA.

1.2 It has become apparent to the Authority that stakeholders have differing views and interpretations as to what constitutes "control". The Authority therefore considered it appropriate to issue this memorandum to explain how it views this concept.

1.3 The Authority follows the approach to control set out in the Competition Act, 1998. Accordingly, it considers that a party controls a licensee in the following circumstances:

1.3.1 it owns more than 50% of the shares of the licensee.

1.3.2 it is entitled to vote a majority of the votes that may be cast at a general meeting of the licensee, or has the ability to control the voting of a majority of those votes, either directly or through an entity that it controls.

1.3.3 it is able to appoint or to veto the appointment of a majority of the directors of the licensee.

1.3.4 it is a holding company, and the licensee is a subsidiary as contemplated in section 3(1) of the Companies Act, 2008.

1.3.5 it has the ability to materially influence the policy of the licensee in a manner comparable to a person, who in ordinary commercial practice, can exercise an element of control referred to above.

1.4 Note that these are examples, and not an exhaustive list.

1.5 It can therefore be seen that a party may hold less than 50% of the shares in a licensee, or hold or control less than 50% of the votes, and yet still be considered to “control” the licensee because it has “material influence” over the licensee. **Material influence**A party will be considered to exercise material influence over a licensee where it has the ability to influence the strategic direction of the licensee.

2.2 Put differently, material influence will be judged by reference to whether the actions, conduct or rights (even without implementation of such rights) are strategic (in the sense of being able to direct strategy or policy of the licensee) as against being designed or granted to protect the financial interests or investment in the licensee of the party holding those rights.

2.3 The ability to direct and control or the factual direction of representatives on the board of directors of a licensee by a shareholder will give rise to potential control if the issues concerned are strategic. Veto rights on these issues will thus normally be regarded as giving rise to control.

2.4 Examples of veto rights that would confer control would include where the party has minority protection rights which would enable it to veto strategically important decisions such as the appointment of directors and the adoption of the budget or business plan.

2.5 Veto rights in respect of the conclusion of contracts, other than contracts concluded in the ordinary course of business may, depending on the facts, amount to material influence. A crucial question is whether the rights amount merely to a protection of an investment (which would not generally be considered to confer material influence) or would enable the party holding the rights to exercise strategic influence (which would be considered to amount to material influence and thus control).

2.6 Where agreements are concluded between shareholders (such as a shareholders’ agreement between all of them, or a voting pool agreement between some of them) in terms of which they agree to act together – in concert – to achieve a specific objective is likely to be considered as establishing joint control between the parties to such agreement if:

2.6.1 the agreement relates to or covers strategic issues, as opposed to financial issues;

2.6.2 the effect of the agreement is that the parties are able to vote or direct or materially influence the outcome of a decision on such issues.

2.7 A party may have control over a licensee, despite holding less than 50% of the shares in the licensee, where the licensee is a widely held public company. As the Competition Tribunal commented in Ethos Private Equity Fund / Tsebo Outsourcing

> *"Typically this would be the shareholder of a widely held public company, where no shareholder had an interest in the company above 50%, and that shareholder might, because not all shareholders in public companies vote their shares, command the majority of the votes at a general meeting of the company, notwithstanding that its share of the company's total voting rights is well below half."*

2.8 However, where other shareholders include institutions, experienced and shrewd investors, a single shareholder may not have control – see for example Johnnic Holdings / HCI, where the Tribunal found that HCI did not have *de facto* control of Johnnic based on previous percentage of voted shares, stating that –

> *The other shareholders in Johnnic, holding altogether 60%, are in the main, as to some 44.5%, substantial and in some cases powerful institutions, experienced and shrewd investors, well capable of advancing and defending their own interests when they find it necessary by exerting their muscle in the affairs of Johnnic.*

2.9 Intention is an important factor in analysing 'control'. If a shareholder with less than 50% shareholding has no intention to control a licensee (and merely wishes to protect its investment for example), this may be a factor to take into account when determining whether or not that party does indeed control a licensee.