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| MEMORANDUM FROM THE PARLIAMENTARY OFFICE |

**NATIONAL ASSEMBLY**

**FOR WRITTEN REPLY**

**QUESTION 1539**

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**INTERNAL QUESTION PAPER NO 15 OF 2023**

**Ms N I Tarabella Marchesi (DA) to ask the Minister of Higher Education, Science and Innovation:**

What (a) intellectual property (IP) rights have been sold to international companies that have not benefited South African companies, (b) amount were they sold for, (c) were the spin-offs companies accrued from the specified IP rights and (d) number of jobs did the international companies create in their respective countries?

**NW1782E**

**REPLY:**

1. **INTRODUCTION**

The Intellectual Property Rights from Publicly Financed Research and Development Act (IPR Act) was enacted in 2010 with an objective to ensure that intellectual property (IP) emanating from publicly funded research and development (R&D) is identified, protected, utilised, and commercialised for the benefit of the Republic.

Section 11(1)(c) of the IPR Act further states that "*The recipient determines the nature and conditions of intellectual property transactions relating to any intellectual property held by it,* ***but must take into account*** *the following: preference must be given to parties that seek to use the intellectual property in ways that provide optimal benefits to the economy and quality of life of the people of the Republic*" [own emphasis added].

In terms of the IPR Act, recipients[[1]](#footnote-1) (including Higher Education Institutions and Science Councils) must request approval from the National Intellectual Property Management Office (NIPMO), a specialised service delivery unit with the Department of Science and Innovation, to enter certain IP transactions.

The IP transactions requiring NIPMO approval, is summarised in the table below, indicating the legislated form to be submitted.

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|  | **Legislatively prescribed IP Form to submit** |
| **LOCAL IP TRANSACTIONS** |  |
| Exclusive, royalty-free licence | IP8 |
| Non-exclusive, royalty-free licence | IP8 |
| Assignment | IP4 |
| **OFFSHORE IP TRANSACTIONS** |  |
| Exclusive, royalty/revenue-bearing licence | IP6 |
| Exclusive, royalty-free licence | IP6 |
| Non-exclusive, royalty-free licence | IP8 |
| Assignment | IP5 |

1. **IP TRANSACTIONS IN MORE DETAIL**

Assignment is a legal term for the transferring of rights, property, or other benefits to another. The IPR Act makes provision for local or offshore assignment. The legislative background will be set out below:

A recipient intending on transferring (or assigning) its IP emanating from publicly financed R&D within South Africa must submit a IP4 form to NIPMO for approval (see Regulation 11(9) of the IPR Act). In addition to the IP4 form, the recipient must motivate that the assignment is in the public interest or provide reasons as to why the IP cannot be commercialised through other means such as an exclusive licence (Regulations 11(10) of the IPR Act).

A recipient wishing to assign IP offshore or outside South Africa must submit a IP5 form to NIPMO for approval (Regulation 12 (7) of the IPR Act). In addition to the IP5 form, the recipient must satisfy NIPMO that there is insufficient capacity in the Republic to develop or commercialise the IP locally; and that the Republic will benefit from such offshore transaction (Section 12(2) of the IPR Act).

Regulation 17 of the IPR Act states that “*Failure by a recipient to obtain from NIPMO, approval for an intellectual property transaction for which approval is required in terms of the Act and these regulations; will render such Intellectual Property transaction and relevant agreement void from the beginning*”.

The offshore IP transactions that were submitted to NIPMO for approval since the promulgation of the IPR Act are summarized as follows:

|  |  |
| --- | --- |
| Financial year | IP transaction activities |
| 2012/2013 | **1** offshore IP transaction received   * Not approved as it fell outside the scope/provision of the IPR Act. |
| 2013/2014 | No applications received. |
| 2014/2015 | **4** offshore IP transaction received and approved   * 1 assigned to University of Birmingham; and * 3 assigned to Persomics AB. |
| 2015/2016 | **1** offshore IP transaction received   * No NIPMO approval required as the intellectual property was not yet created and therefore not in a position to make a decision. |
| 2016/2017 | **2** offshore IP transactions received and approved   * Files requested from archives and information will be updated at later stage. |
| 2017/2018 | **3** offshore IP transactions received   * 1 not approved – benefit to South Africa not clearly set out; and * 2 were approved and assigned to Tawazun Dynamics and Nisonic. |
| 2018/2019 | **2** offshore IP transactions received   * No NIPMO approval required - wrong IP form sent; and * 1 was approved and assigned to the USA Department of Health, Columbia University, CAPRISA. |
| 2020/2021 | **1** offshore IP transaction received   * Not approved as it fell outside the scope/provision of the IPR Act. |
| 2021/2022 | **2** offshore IP transactions received   * Approval granted for transfer to APIX Biosciences; and * 1 submission not approved – sufficient commercialisation capacity exists in South Africa |
| 2022/2023 | **4** offshore IP transaction received and approved   * 3 assigned to UNICEF; and * 1 assigned to Greentech Investment holding. |

To date NIPMO has received 20 offshore IP transactions to consider for approval. Of these 20, 14 were approved, 3 were not approved, and 3 required no approval from NIPMO as it fell outside the scope/provision of the IPR Act.

1. **RESPONSE TO QUESTIONS POSED**

**“What (a) intellectual property (IP) rights have been sold to international companies that have not benefited South African companies, (b) amount were they sold for…”**

The IPR Act was promulgated on 22 December 2008 and commenced on 2 August 2010 following the publication of a proclamation for its’ commencement in the Government Gazette. Furthermore, no provision was made in the IPR Act indicating that the IPR Act has retrospective application and one can assume that the IPR Act applies prospectively (in order words, for IP generated from publicly financed R&D after 2 August 2010).

As can be seen from the introduction above, no offshore IP transaction referred to NIPMO was transferred to international companies that have not benefitted South Africa.

Regulation 10(1)(c) of the Exchange Control Regulations of 1961 states that “*prior National Treasury permission must be obtained before entering into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic*”. National Treasury evaluates and approves (where appropriate) the transactional value of each IP transaction transferred outside of South Africa.

The IPR Act, defines “benefits” as "*contribution to the socio-economic needs of the Republic and includes capacity development, technology transfer, job creation, enterprise development, social upliftment and products, or processes or services that embody or use the intellectual property*”.

NIPMO assess each submitted application, to determine whether such IP transaction could reasonably benefit South Africa, and if so, will not approve the transaction.

Hence National Treasury considers the transactional value while NIPMO evaluates benefit to the country as defined within the IPR Act. NIPMO therefore does not have the data on the amount for which the IP was sold/transferred.

**Question (c) were the spin-offs companies accrued from the specified IP rights and Question (d) number of jobs did the international companies create in their respective countries?**

After the NIPMO approval for the assignment of IP, the IPR Act does not require the assignee and assignor to report on the status of the IP in perpetuity.

With respect to offshore assignment, once the transaction is approved the IP becomes the property of the offshore assignee, and the assignor loses control over the IP, and therefore NIPMO no longer receives updates on the IP from the assignor.

In light of the above, we are unable to answer these questions.

1. **CONCLUSION**

Failure to obtain approval from NIPMO for an IP transaction for which approval is required in terms of the IPR Act; will render such IP transaction and relevant agreement void from the beginning.

It should be appreciated that NIPMO is unable to report on data that was not reported. Should it come to our attention that IP emanating from publicly funded R&D was indeed transferred without the Republic benefitting, the IPR Act and Regulations make provision to cancel that IP transaction.

1. Section 1 of the IPR Act: **"recipient"** means any person, juristic or non-juristic, that undertakes research and development using funding from a funding agency and includes, an institution [↑](#footnote-ref-1)