

ECONOMIC DEVELOPMENT DEPARTMENT

NO. 426

15 APRIL 2016

MEMORANDUM OF AGREEMENT

entered into between

THE COMPETITION COMMISSION

(Herein after referred to as "the Commission)
a juristic person established in terms of
The provisions of Section 19 of the Competition Act 1998 (Act 89 of 1998), as
amended,
herein duly represented by Mr Tembinkosi Bonakele
in his capacity as the Commissioner of the Commission

and

DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES

(Hereinafter referred to as "the Department")
Department herein represented by KCM Manny in his capacity as the acting
Director General of the Department.

(Hereinafter referred to jointly as "the parties")



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PREAMBLE

WHEREAS the purpose of the Competition Act 1998 (Act 89 of 1998), as amended (the Act), is to promote and maintain competition in South Africa in order to amongst other, provide consumers with competitive prices and product choices, ensure small and medium sized entities have an equal opportunity in participating in the country's economy and to promote and increase ownership especially of historically disadvantaged persons;

AND WHEREAS the Commission is established in terms of Section 19 of the Act 1998 (Act 89 of 1998), as amended (the Act), to ensure the purpose of the Act is realised in part by inter alia implementing and invoking the provisions of Chapter 2 and 3 of the Act;

AND WHEREAS the the Act in section 21(1)(h) read with sections 3(3)(b) and 82(1) and 82(3) of that Act requires the parties to enter into an agreement in order to:

- a) Identify and establish procedures for the management of concurrent jurisdiction;
and
- b) Co-ordinate and harmonize the exercise of jurisdiction over competition matters within the agricultural industry.

AND WHEREAS the Department in terms of various pieces of legislation, grants rights and/or certain other benefits including permits and financial assistance to 3rd persons and also regulates the fisheries, forestry and agriculture sectors in South Africa, in fulfilment of its mandate,

AND WHEREAS the the granting of such rights and/or benefits to 3rd persons and certain industry roleplayers may impact on the purpose of the Act;

AND WHEREAS FURTHER the parties recognise it would be mutually beneficial to work together in promoting the purpose of the Act and the Department's mandate;

A handwritten signature in black ink, consisting of a stylized 'A' followed by a large, looped 'B'.

NOW THEREFORE the parties agree to co-operate with each other as follows:

1. Objectives and Scope

The objective of this agreement is to establish a formal basis for

- 1.1 Co-operation in the exercise of concurrent jurisdiction over competition matters within the agricultural, forestry and fisheries sector.
- 1.2 Managing areas of concurrent jurisdiction.
- 1.3 Promoting co-operation between the parties in general, including in respect of setting standards or conditions that affect competition in the agricultural, forestry and fisheries sectors, any joint investigations and/or research studies that the parties may agree to undertake and
- 1.4 Providing for the exchange of information and protection of confidential information.

2. Commencement and duration

The Agreement shall commence on the date of signature thereof by the party last to sign it and shall endure until termination in accordance with clause 7.

3. Approval of Merger Transactions

Application for Merger Approval: Concurrent Jurisdiction

- 3.1 Where a transaction appears to the Department or the Commission to require the approval of both parties, the parties may consult each other in terms of clause 3.2 below.
- 3.2 The parties may consult each other for purposes of evaluating the manner in which the transaction may be managed. In doing this, the parties must have regard to the principle that:
 - 3.2.1 the Commission is to exercise primary authority in the review of mergers within the agricultural, forestry and fisheries sector in order to give effect to the the Act; and
 - 3.2.2 the Department has primary authority to exercise powers and perform duties assigned to it in terms of various legislation.

Application for merger approval: No concurrent jurisdiction

- 3.3 Where an application to the Commission or the Department requires the approval of either party, but not both, the following shall apply -
 - 3.3.1 if the Department is the party whose approval is required, it may, if it is required by law or Policy take into account considerations of competition,

and if it deems it necessary consult with and obtain input from the Commission so as to ensure the consistent application of competition principles to the transaction in question.

- 3.3.2 if the Commission is the party whose approval is required, it may, if it deems it necessary to take into account regulatory aspects that affect or relate to the agricultural, forestry and fisheries sector regulated by the Department, consult with and obtain input from the Department so as to ensure the consistent application of regulatory principles to the transaction in question.

4. Investigation of complaints into prohibited practices

- 4.1 Where a complaint is lodged about a practice in respect of which the parties have concurrent jurisdiction, the following process shall be followed –

4.1.1 the party that receives the complaint (“the recipient party”) shall ensure that the said complaint is made available to the other party within seven (7) days after a formal decision to investigate the complaint has been taken;

4.1.2 where the recipient party deems it appropriate, the recipient party may inform the complainant(s) that the matter will be discussed jointly by the Commission and the Department in terms of this Agreement;

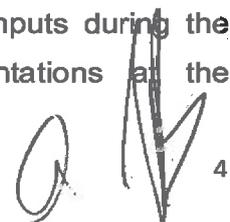
4.1.3 the parties shall consult with each other in order to establish how the matter may be managed and/or resolved; and

4.1.4 In evaluating how the complaint may be managed, the parties must have regard to the principle that –

(a) the Commission is to exercise primary authority to detect and investigate alleged prohibited practices in order to give effect to the the Act; and

(b) taking into account the powers and roles of the provincial departments of agriculture, the Department has primary authority to exercise powers and perform duties assigned to it in terms of the relevant legislation.

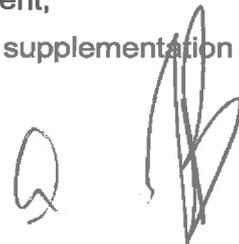
4.1.5 In the event that the matter is dealt with by the Commission, representatives from the Department may participate in the matter through, inter alia, attending meetings when required, providing inputs during the investigation of the complaint, and making representations at the Competition Tribunal hearing if necessary;



- 4.1.6 In the event that the matter is dealt with by the Department, representatives from the Commission may participate in the matter through, inter alia, attending meetings when required, providing inputs during the case investigation, and making representations at the Department's proceedings if necessary;
- 4.2 If the complaint relates to a matter where either the Commission or the Department has jurisdiction, but there is no concurrent jurisdiction, the following shall apply –
- 4.2.1 the recipient party or the complainant must lodge the complaint with the party that has jurisdiction;
- 4.2.2 if upon receiving a complaint, the party is of the view that it does not have jurisdiction over the matter; the recipient party shall advise the complainant(s) accordingly and recommend that the complainant(s) refer the matter to the relevant party;
- 4.2.3 if the Department is the party that has jurisdiction, it may if it deems it necessary take into account considerations of competition, consult with and obtain input from the Commission so as to ensure the consistent application of competition principles to the matter in question; and
- 4.2.4 If the Commission is the party that has jurisdiction, it may if it deems it necessary take into account regulatory aspects that are subject to the jurisdiction of the Department, consult with and obtain input from the Department so as to ensure the consistent application of the regulatory principles to the matter in question.
- 4.3. The decision by the relevant party that has jurisdiction over the complaint to consult the other regulatory authority shall be discretionary and voluntary.

5. Establishment of a Joint Working Committee

- 5.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the DAFF, as nominated by the respective parties, shall be established pursuant to this Agreement and shall function on an on-going basis.
- 5.2 The functions of the Working Committee shall be to:
- 5.2.1 Manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this Agreement;
- 5.2.2 Propose, when necessary, any amendment of or supplementation to this Agreement;



5.2.3 Advise management of both the Commission and the DAFF on issues affecting competition in the agriculture, forestry and fisheries sector, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to the following:

- (a) Types of conduct or transactions affected by both the Act and the respective legislation administered by the Department in respect of which concurrent jurisdiction is to be exercised by the parties;
- (b) International approach to issues of jurisdictional overlap between a commission and the Department, as the case may be;
- (c) Amendments to the relevant or applicable statutes that may be necessary from time to time; and
- (d) Any other related matter.

6. Specific Areas of concurrent jurisdiction between the parties

The Department is responsible for the following functional areas which the parties agree may share concurrent jurisdiction with the commission, namely:

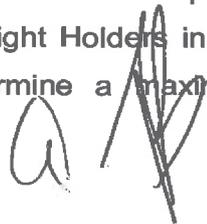
6.1 The Marine Living Resources Act No 18 of 1998 (MLRA)

6.1.1 In terms of section 23 of the Marine Living Resources Act No 18 of 1998 provides that no person shall use a fishing vessel or any other vessel to exercise any right of access unless a local fishing licence has been issued to such a person

6.1.2 In terms of section 18 of the Marine Living Resources Act No. 18 of 1998 provides that no person shall undertake commercial fishing or subsistence fishing or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister

6.1.3 The Policy for the Transfer of Commercial Fishing Rights issued by the Minister and gazetted on the 31 July 2009 makes reference to the creation of a fair competitive industry where no one firm is allowed to dominate. The Transfer policy states that:

- a) Whilst the Department encourages the consolidation of Right Holders in the Fishing Industry, the Department is opposed to monopolies which may operate to the detriment of smaller Right Holders in any fishing sector. The Department will not determine a maximum



threshold of the Total Allowable Catch (TAC) that any one Right Holder may hold or control, but will monitor whether any large Right Holder acts in a manner contrary to fair competition practices.

- b) A licence transfer may constitute a merger in terms of section 12 of the the Act, if the combined annual turnover or assets of both the acquiring and the target firms meet the merger thresholds in the Act (<http://www.comtrib.co.za/assets/Uploads/The-Act/Merger-thresholds-gg31957nn216pg90-96.pdf>)

6.1.4 Therefore the parties recognise concurrency of jurisdiction with regards to the consideration of the effects on competition occasioned by the transfer of a licence in terms of the Policy for the Transfer of Commercial Fishing Rights of the Department and the acquisition of control in terms of section 12(1)(a) of the Act.

7. Exchange of Information

7.1 Subject to paragraph 8 below, the parties shall endeavour to exchange information necessary to give effect to this Agreement.

8. Treatment of Confidential Information

8.1 Any confidential information shared pursuant to this Agreement shall be used only for lawful purposes.

8.2 The Parties shall share confidential information subject to their statutory confidentiality obligations.

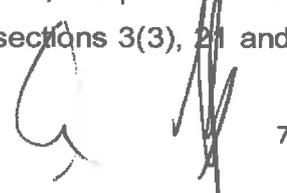
8.3 The party providing confidential information pursuant to this Agreement shall clearly indicate what information is confidential to the requesting party.

8.4. The party requesting confidential information may be required to submit a written confidentiality undertaking in respect of the confidential information provided by the other party.

9. Termination

9.1 This Agreement may be terminated by either party on written notice of 2 (two) months to the other party or by written agreement between the parties.

9.2 On termination of the Agreement in accordance with clause 8.1, the parties must negotiate and enter into another agreement consistent with sections 3(3), 21 and 82 of the the Act.



10. Dispute Resolution

Should any dispute or difference arise between the Parties with regard to interpretation and/or implementation of any one or more of the provisions of this Agreement, such dispute or difference must be resolved in a manner other than through judicial proceedings as provided for in section 40(1)(b) of the Intergovernmental Relations Framework Act 13 of 2005.

11. Mutual Cooperation and Good Faith

The parties shall, in their dealings with each other, display the utmost good faith, consult and support each other from time to time with regard to any assistance or advice which they may require in connection with fulfilling the objectives of this Agreement.

12. Representatives

12.1 The parties designate the following individuals who will have the authority to administer this Agreement on their behalf and who will be responsible for the communication between them:

12.1.1 for the Department: The Director General

and

12.1.2 for the Commission: Head: Stakeholder Relations

13. Domicilium citandi ex excutandi

13.1 The parties elect the following addresses as their respective address for purposes of this Agreement. Any notice, request, consent, or other communication made between the parties pursuant to this Agreement shall be in writing and shall be deemed to have been made when delivered in person to representative of the party referred to in clause 11.1 or when sent by registered post, telex, telegram or facsimile to such representative:



The Department:

Physical: Steve Biko Street, Arcadia, Pretoria

Postal: Private bag X250

Pretoria

0001

Facsimile: (012) 319 7329

The Commission:

Physical: The dti Building, Meintjies Street, Sunnyside, Pretoria

Postal: Private Bag x23

Lynwood Ridge

PRETORIA

0040

Facsimile: 0123940166

14. Publication

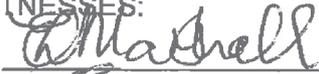
This Agreement shall be published in the Gazette for public information as soon as it has been signed.

THUS SIGNED AT Pretoria ON THIS THE 17 DAY OF December 2015
2015

In the presence of the undersigned witnesses.


for the DEPARTMENT OF AGRICULTURE
FORESTRY AND FISHERIES
(Duly authorized hereto)

AS WITNESSES:

1. 
2. 

THUS SIGNED AT Pretoria ON THIS 10 DAY OF March 2016
In the presence of the undersigned witnesses.



for the COMPETITION COMMISSION
(Duly authorized hereto)

AS WITNESSES:

- 1.  _____
- 2.  _____