

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 858

25 AUGUST 2017

MEMORANDUM OF UNDERSTANDING

Entered into by and between

The South African Bureau of Standards

(Hereinafter referred to as "SABS")

A juristic person established in terms of the Standards Act 24 of 1945, continuing to exist in terms of Section 3 of the *Standards Act*, No. 8 of 2008, herein represented by Dr. Boni Mehlomakulu in her capacity as the Chief Executive Officer of the South African Bureau of Standards.

And

The Competition Commission

(Hereinafter referred to as "the Commission")

A juristic person established in terms of Section 19 of the *Competition Act*, No. 89 of 1998, as amended, herein duly represented by Mr Tembinkosi Bonakele in his capacity as the Commissioner of the Competition Commission.

(Hereinafter jointly referred to as "the Parties")



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PREAMBLE:**THE SABS - ITS OBJECTS AND FUNDAMENTAL LEVERS**

The SABS was established in terms of the *Standards Act*, No. 24 of 1945 and continues to exist in terms of Section 3 of the *Standards Act*, No. 8 of 2008 ("the *Standards Act*"), as the peak national standardisation institution in South Africa, responsible for the development, maintenance and promotion of South African National Standards.

Standards are important in facilitating fair competition by providing identifiable references that are consulted widely and agreed by consensus. The protocols governing standards development processes are maintained by international organizations granted general consultative status with the United Nations Economic and Social Council. The South African obligations and interests in the international standardisation efforts are represented by the SABS. These protocols explicitly sets out obligations for managing anti-competitive practices in standardisation activities.

The SABS in line with the international protocols uses technical committees to develop and review South African National Standards and provides the governance framework for developing national standards which are voluntary by application and involves the voluntary participation of a diverse stakeholder representation.

NOW WHEREAS the participants in the Standards development process are often competing stakeholders who come together to develop standards that are relevant to their markets and may potentially exchange information that has value in predicting the future commercial behaviour of competitors, future development trends or market conditions and may include potentially exclusionary parameters in the standards, based on rationale, other than safety and performance considerations, with the potential to lead to undesirable lock-in into sub-optimal technologies and allow incumbents to create barriers to market entry.

AND WHEREAS South Africa is a signatory to the *Technical Barriers to Trade Agreement* of the World Trade Organisation.


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AND WHEREAS the purpose of standardization is, *inter alia*, to support competition for the benefit of industry, consumers and society in general.

AND WHEREAS Compliance with competition law in the standard setting process is essential to ensure that markets operate efficiently and competitively and that the standards development process remains a platform of trust for industries.

AND WHEREAS the SABS must build capacity - establish and maintain the necessary expertise at an internationally acceptable level, to monitor and manage anti-competitive practices and conduct which can be perceived as fostering anti-competitive behaviour and cause damage to the economy of South Africa, when standards are set.

THE COMMISSION - ITS OBJECTS AND FUNDAMENTAL LEVERS

The Commission is established in terms of Section 19 of the *Competition Act*, No. 89 of 1998 ("the *Competition Act*") in order to, *inter alia*, investigate, control, and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, and to promote the efficiency, adaptability and the development of the South African economy.

NOW WHEREAS The Commission and the SABS acknowledge that where competitors get together, as it is the case during the standards development process, there is potential for anti-competitive conduct and that the SABS requires support and cooperation from the Commission to build capacity, establish and maintain the necessary expertise at an internationally acceptable level, to monitor and manage anti-competitive practices and conduct which can be perceived as fostering anti-competitive behavior.

AND WHEREAS The Commission and the SABS, in terms of section 41(1)(h) of the *Constitution of the Republic of South Africa, 1996*, must co-operate with one another in mutual trust and good faith by, *inter alia*, assisting and supporting one another and informing one another of and consulting one another on matters of common interest.

AND WHEREAS As an organ of state, the SABS must, in terms of section 20(3) of the *Competition Act*, assist the Commission to effectively carry out its powers and duties which powers and duties entail, *inter alia*, to investigate, control, and evaluate restrictive practices, abuse of dominant position and to promote the efficiency, adaptability and the development of the South African economy.

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The parties recognize the existing potential to leverage on areas of convergence and complementary statutory mandates, underpinned by the objective to promote quality, efficiency, adaptability and the development of the South African economy.

NOW THEREFORE - the Parties agree as follows:

The Parties agree to conclude this Co-operation Agreement ("the Agreement") as follows:

1. INTERPRETATION

- 1.1. In the interpretation of any terminology used in this Agreement, any word or expression to which a meaning is assigned in the Standards Act and the Competition Act has the meaning assigned to it unless otherwise specified.
- 1.2. In this agreement unless inconsistent with the context the following expressions and words bear the meanings set out below and derivative expressions and words will have corresponding meaning:
 - 1.2.1. "Agreement" means this Memorandum of Understanding;
 - 1.2.2. "Commission" means the Competition Commission, a juristic entity established in terms of the Competition Act;
 - 1.2.3. "Competition Act" means Competition Act, No 98 of 1998, as amended from time to time;
 - 1.2.4. "The South African Bureau of Standards" means a juristic person established in terms of the Standards Act 24 of 1945, continuing to exist in terms of Section 3 of the *Standards Act*, No. 8 of 2008;
 - 1.2.5. "SABS" means the South African Bureau of Standards;
 - 1.2.6. "Standards Act" means the *Standards Act*, No. 8 of 2008
 - 1.2.7. "Party" means each party to this Agreement being either of the South African Bureau of Standards or the Commission and "Parties" has a corresponding meaning;


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- 1.2.8. "Prohibited practice" means a practice prohibited in terms of Chapter 2 of the Competition Act; and
- 1.2.9. "Signature Date" means the date of signature of this Agreement by the party last signing;
- 1.3. The headings of the clauses in the Agreement are for purposes of convenience and reference only and shall not be used in the interpretation of, nor modify, nor amplify the terms of this Agreement or any clause hereof.
- 1.4. Unless the context indicates otherwise:
- 1.4.1. a reference to a person includes natural persons, juristic persons, partnerships and trusts;
- 1.4.2. a reference to the singular includes the plural and vice versa; and
- 1.4.3. one gender includes the other genders.

1. BASIS OF THIS AGREEMENT

- 1.1 This Agreement is entered into in order to establish the manner in which the Parties will interact with each other in dealing with matters of mutual interest pertaining to, the creation of awareness of competition issues when standards are set, as envisaged in Section 21(1)(b) of the *Competition Act* and building the SABS capacity to monitor and manage anti-competitive practices and conduct which can be perceived as fostering anti-competitive behavior. The agreement also establishes the manner in which the Parties will interact with each other when sharing information pertinent to carrying out their respective functions.
- 1.2 This Agreement is entered into on the basis of mutual respect, in the spirit of goodwill and in no way affects the independence of the Parties hereto.

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2. MUTUAL ASSISTANCE

2.1 The Parties undertake to, in the course of performing their functions and to the extent permitted by law, use reasonable efforts to provide assistance to each other.

2.2 Without derogating from the generality of clause 2.1 the Parties may, upon request from each other:

2.2.1 participate in each other's processes in an advisory capacity or obtain the other's input on an aspect within the technical competence of the other;

2.2.2 share each other's available resources in order to bring the provisions of this Agreement into full effect, provided that such a process is reasonable, shall not compromise the independence of either of the parties and does not contravene any statute with which the Parties must conform; and

2.2.3 second personnel to each other on such terms and conditions as may be agreed to by them, and in order to provide training and specific skills and knowledge transfer on matters of mutual interest. In particular, the Commission shall assist the SABS to build capacity - establish and maintain the necessary expertise at an internationally acceptable level, to monitor and manage anti-competitive practices and conduct which can be perceived as fostering anti-competitive behaviour and cause damage to the economy of South Africa, when standards are set.

2.2.4 Support each other in investigating perceived collusive behavior of stakeholders within the scope of services offered by the SABS.

2.3 When the Commission and the SABS participate in each other's processes or obtain each other's inputs as contemplated in clause 2.2.1, they shall do so at no cost to each other and they shall act as expeditiously as circumstances permit.

3. ESTABLISHMENT OF A JOINT WORKING COMMITTEE

3.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the SABS, as nominated by the respective Parties, shall be established pursuant to this Agreement and shall function on an on-going basis.

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3.2 The functions of the Committee shall be, to:

3.2.1 facilitate and manage co-operation and consultation in respect of matters dealt with by each Party in terms of this Agreement;

3.2.2 facilitate and manage awareness and capacity building programs intended to establish and maintain the necessary expertise for the SABS to be able to monitor and manage anti-competitive practices and conduct which can be perceived as fostering anti-competitive behaviour and cause damage to the economy of South Africa, when standards are set.

3.2.3 propose, when necessary, any amendment of or supplementation to this Agreement; and

3.2.4 advise management of both the Commission and the SABS on issues affecting competition in the development of standards, as the case may be, and make recommendations on how to deal with same.

4. REQUEST FOR ASSISTANCE AND INFORMATION

4.1 Subject to clauses 2.1, 4 and 5, the Commission and the SABS may, in the manner set out below, request assistance from each other and exchange such information as may be necessary to give effect to this Agreement.

4.2 To facilitate communication and ensure continuity in the co-operation between the Parties, each Party has designated the contact person as set out in clause 6, for communications under this Agreement.

4.3 A Party requesting assistance ("the Requesting Party") shall make its request for assistance in writing by sending it to the contact person of the other Party ("the Requested Party"). The request must amongst others provide:

4.3.1 a description of both the subject matter of the request and the purpose for which the information is sought and the reasons why this information will be of assistance;


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- 4.3.2 the legal provisions concerning the matter that is the subject matter of the request;
- 4.3.3 any information in the possession of the Requesting Party that might assist the Requested Party in identifying such information; and
- 4.3.4 the desired period of time for the reply.

5. CONFIDENTIALITY

- 5.1 Any information shared by the Commission and the SABS pursuant to this Agreement shall be used only for lawful supervisory or statutory purposes.
- 5.2 The Parties shall share confidential information subject to their statutory confidentiality obligations as set out in the *Competition Act 1998 and Standards Act 2008* or any other applicable law.
- 5.3 Where confidential information was obtained from a third party by the SABS, the SABS shall obtain permission from the party which submitted such confidential information to it, prior to such confidential information being disclosed to the Commission. The Commission shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.
- 5.4 Where information was obtained from a third party by the Commission, the Commission shall obtain permission from the party which submitted such confidential information to it, prior to such confidential information being disclosed to the SABS. The SABS shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.
- 5.5 To the extent permitted by law, the Commission and the SABS shall hold confidential all information, including the information contemplated in clauses 5.2 to 5.4, received from each other pursuant to this Agreement and shall not otherwise disclose such information than is necessary to carry out their statutory responsibilities or otherwise in accordance with national law.



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5.6 The Commission and the SABS shall, prior to disclosing any confidential information or a part thereof amongst each other, consult each other for direction and advice on such disclosure.

5.7 The Commission and the SABS, in providing confidential written material pursuant to this Agreement, shall mark every page of the material provided with the following words: "CONFIDENTIAL – PROVIDED PURSUANT TO THE COMPETITION COMMISSION / SOUTH AFRICAN BUREAU OF STANDARDS CO-OPERATION AGREEMENT".

5.8 Where confidential information is made available by either the Commission or the SABS in contravention of this Agreement, such disclosing party shall be solely liable in law for such disclosure.

6. CONTACT PERSONS

6.1 The Parties designate the following individuals as their contact persons who will have the authority to administer this Agreement on their behalf and who will be responsible for the communication between them:

For the SABS:

Joseph Leotlela

Head: Legal Services

Contact number: (012) 428 - 6242

E-mail address: joseph.leotlela@sabs.co.za

And



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For the Commission:

Mr. Mziwodumo Rubushe

Head: Stakeholder Relations

Contact number: (012) 394 - 3194

E-mail address: MziwodumoR@compcom.co.za

6.2 Either Party may, by way of a letter to the other, replace its contact person referred to in clause 6.1 with any other person. The letter referred to above shall be deemed to have been received and the replacement shall be deemed to have been made on the fourteenth (14) calendar day of the one Party dispatching the said letter to the other, unless the contrary is established.

7. GENERAL PROVISIONS

7.1 The provision of, or request for, information under this Agreement may be denied:

- 7.1.1 where compliance would require the Commission or the SABS to act in a manner that would violate the applicable law;
- 7.1.2 under circumstances where there is an imminent risk to national security; or
- 7.1.3 where compliance with a request or provision of information would interfere with an ongoing investigation, in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

7.2 The Parties shall consult each other before either of them issues a media statement concerning any matter emanating from this Agreement.


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8. VARIATION OF THE AGREEMENT

This constitutes the entire agreement between the Parties on matters covered in this Agreement. Any variation of this Agreement shall have no legal effect and shall not be binding on the Parties unless reduced to writing and signed by persons authorized to act on behalf of both Parties.

9. EFFECTIVE DATE OF THE AGREEMENT

This Agreement shall come into effect on the date on which it is last signed by the persons authorized to act on behalf of either of the Parties.

10. DURATION OF THIS AGREEMENT

10.1 This Agreement shall remain in force in perpetuity unless as may be terminated by:

10.1.1 either Party on written notice of two (2) months to the other Party;

10.1.2 way of an agreement between the Parties; or

10.1.3 operation of the law.

10.2 If any Party gives the other a notice of termination of this Agreement or the Parties agree to terminate the Agreement as contemplated in clause 10.1.1 or 10.1.2, their cooperation in terms of this Agreement will continue in respect of all requests for assistance that were made before the termination date until the requests under consideration are completed.

11. 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.

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12. DOMICILIUM CITANDI ET EXECUTANDI

The Parties choose the following addresses as their respective *domicilium citandi et executandi* for purposes of this Agreement:

The Competition Commission:

DTI Building Meitjies Street Sunnyside Pretoria

Postal: Private Bag X23 Lynwood Ridge

Pretoria 0040

Contact Person: Mr Mziwodumo Rubushe, Head: Stakeholder Relations

The South African Bureau of Standards:

1 Dr Lategan Road

Groenkloof

Pretoria

Postal: Private Bag X 191

Pretoria, 0001

Contact Person: Joseph Leotiela: Head Legal Services

13. PUBLICATION

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


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13. SIGNATURE


Signed at PRETORIA on this 8th day of AUGUST 2017 by Mr. Tembinkosi Bonakele, Commissioner of the Competition Commission South Africa.



COMPETITION COMMISSION



WITNESS 1




WITNESS 2

Signed at _____ on this ____ day of _____ by Dr Bonakele Mehlomakulu in her capacity as Chief Executive Officer of the South African Bureau of Standards.



SOUTH AFRICAN BUREAU OF STANDARDS



WITNESS 1



WITNESS 2