

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 1267

23 NOVEMBER 2018

MEMORANDUM OF UNDERSTANDING

Entered into by and between

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

And

The Federation of Governing Bodies of South African Schools

(Hereinafter referred to as "FEDSAS")

A non-profit organisation registered in terms of the Non-profit Organisation Act, No. 79 of 1997, with registration number 128-598 NPO, herein duly represented by Mr Paul Colditz, Chief Executive Officer.

(Hereinafter jointly referred to as "the Parties")

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PREAMBLE

WHEREAS the Commission is mandated to, *inter alia*, investigate and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, as well as conducting market inquiries; and to promote the efficiency, adaptability and the development of the South African economy.

WHEREAS FEDSAS is the national representative organisation for governing bodies of public schools and has a total of 2070 school governing bodies as members. The organisation has established national and provincial structures to provide a service to all their members across the country. It focuses on the development of capable school governing bodies by providing independent, expert advice to its members.

WHEREAS FEDSAS's function is, *inter alia*, to assist its members with matters across the entire spectrum of school governance, including staff appointments, labour relations, strategic planning, financial management, the procurement of goods and services, as well as compliance with, *inter alia*, the Competition Act, No. 89 of 1998, as amended ("the Competition Act")

AND WHEREAS FEDSAS acknowledges that compliance with competition law by schools in the procurement of goods and services is essential to ensure markets operate efficiently and competitively, and that it must build capacity, establish and maintain the necessary expertise to monitor and manage anti-competitive conduct which can be perceived as fostering anti-competitive behaviour by schools.

AND WHEREAS The Commission and FEDSAS recognize the importance of co-operation with one another in mutual trust and good faith by, *inter alia*, assisting and supporting one another and informing one another of conduct which will have an anti-competitive outcome and will harm parents.

NOW THEREFORE, the Parties agree to conclude this Memorandum of Understanding

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("MOU") as follows:

1. INTERPRETATION

1.1. In the interpretation of any term used in this MOU, any word or expression to which a meaning is assigned in the South African Schools Act 84 of 1996, the Non-profit Organisation Act of 1997 and the Competition Act, No. 89 of 1998, as amended, has the meaning assigned to it unless otherwise specified.

1.2. In this MOU, 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. "Commission" means the Competition Commission, a juristic entity established in terms of the Competition Act;

1.2.2. "Competition Act" means Competition Act, No. 98 of 1998, as amended from time to time;

1.2.3. "Complaint" means a complaint against a FEDSAS member lodged by a third party with the Commission in terms of Section 49B(2)(b) of the Competition Act or initiated by the Commission in terms of Section 49B(1) of the Competition Act;

1.2.4. "DBE Circular" means a circular that was distributed by the National Department of Basic Education ("DBE") in May 2015 to all Members of the Executive Councils of Provincial Education Departments, Heads of Departments of Provincial Education Departments, District Managers of Provincial Education Departments, Provincial School Governing Body Associations and school principals.

1.2.5. "FEDSAS" means The Federation of Governing Bodies of South African Schools, a non-profit organisation registered in terms of the Non-profit Organisation Act No. 79 of 1997 with registration number 128-598 NPO;

1.2.6. "Goods and services" means all external procurement and contracting

conducted by the school. This includes, though is not limited to, the following list:

- 1.2.6.1. Teaching and learning material (textbooks, stationery, copying and other educational material)
 - 1.2.6.2. Equipment for the school (such as school uniforms, sports clothes and sports equipment)
 - 1.2.6.3. Services for the maintenance and improvement of school property (such as cleaning services and plumbers)
 - 1.2.6.4. The procurement of equipment and other assets (such as computers and computer programmes, furniture, office equipment, media equipment, audio-visual equipment and vehicles)
 - 1.2.6.5. Building and construction (new buildings, building systems and infrastructure services, as well as their improvement and replacement)
 - 1.2.6.6. Lease agreements (copiers, fax machines and buildings)
 - 1.2.6.7. Businesses run on school property (such as the tuck or clothing shop)
 - 1.2.6.8. Other, diverse ad hoc services approved by the governing body
- 1.2.7. "Governing Body" means means a governing body contemplated in section 16(1)(ii) of the South African Schools Act 84 of 1996;
- 1.2.8. "MOU" means this Memorandum of Understanding including all annexures, schedules and addenda attached hereto;
- 1.2.9. "Non-profit Organisation Act" means the Non-profit Organisation Act No. 79 of 1997;
- 1.2.10. "Party" means each party to this MOU being either FEDSAS or the Commission and "Parties" has a corresponding meaning;
- 1.2.11. "'Prohibited practice' means a practice prohibited in terms of Chapter 2 of the Competition Act;
- 1.2.12. "Schools" means FEDSAS Member Schools;
- 1.2.13. "Schools Act" means the South African Schools Act No. 84 of 1996;
- 1.2.14. "Signature Date" means the date of signature of this MOU by the party



last signing;

1.3. The headings of the clauses in the MOU 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 MOU 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.

2. THE PURPOSE OF THIS MEMORANDUM OF UNDERSTANDING

2.1. The Commission and FEDSAS acknowledge that procurement practices of schools may lead to anti-competitive outcomes, such as a reduction of choices for parents of learners, and/or higher prices of school uniforms and other goods and services procured by schools.

2.2 This MOU is entered into to establish the manner in which the Commission and FEDSAS will co-operate with each other to enable FEDSAS to, *inter alia*:

2.2.1 assist the Commission with the investigation of complaints pertaining to anti-competitive conduct.

2.2.2 advocate for schools to comply with competition law principles including, *inter alia*, the DBE circular.

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3. PRINCIPLES OF CO-OPERATION

3.1 This MOU 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.

3.2. The Parties agree to support each other in identifying and investigating behavior of Schools, within the scope of services offered by FEDSAS, that may be in contravention of the Competition Act in relation to when Schools design their uniforms, set policies in this regard, as well as when they determine the manner in which the School's respective uniform items and other goods and services are sourced, procured and supplied to parents of learners attending the respective Schools, including, but not limited to -

3.2.1. An active endorsement of the principles contained in the DBE Circular by FEDSAS to each of the Schools that they represent;

3.2.2. Advising and encouraging Schools to approach the Commission to enter into settlement agreements with the Commission in instances where the School has had a long term exclusive supply arrangements for school uniform items with a particular supplier, where a supplier was not appointed through a competitive process and, lastly, where said supplier has been supplying the School for more than a period of three (3) consecutive years.

4. THE PARTIES' UNDERTAKINGS IN RESPECT OF THIS MOU

4.1 Where a Complaint is lodged with or initiated by the Commission regarding a practice of a FEDSAS member in respect of which the Commission has jurisdiction, the following process will be followed –



4.2.1. The Commission may, in its discretion, make the CC1 Form available to FEDSAS.

4.2.2. The Commission may, in its discretion, invite FEDSAS to assist in the investigation through, *inter alia*, attending meetings when required, providing inputs during the case investigation and making representations to the Competition Commission if necessary.

4.4 Nothing in the procedures contained in this MOU shall:

4.4.1 detract from the jurisdiction of the Commission to receive and deal with complaints in terms of its enabling statutes, or preclude the public from lodging complaints with the Commission;

4.4.2 prevent the Commission from continuing with its investigation into a complaint during or after the negotiation contemplated in this clause.

5. ESTABLISHMENT OF A JOINT WORKING COMMITTEE

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

5.2. The functions of the Committee shall be, to:

5.2.1. facilitate and manage co-operation and consultation in respect of matters dealt with by each Party in terms of this MOU;

5.2.2. facilitate and manage awareness and capacity building programs intended to establish and maintain the necessary expertise for FEDSAS to be able to monitor potential anti-competitive practices and conduct of Schools;

5.2.3. propose, when necessary, any amendment of or supplementation to this MOU; and

5.2.4. advise management of both the Commission and FEDSAS on issues affecting competition when policies (procurement or otherwise) regarding goods and services, including the School's uniforms are set, as the case may be, and make recommendations on how to deal with same.

6. REQUEST FOR ASSISTANCE AND INFORMATION

6.1. Subject to clause 7, the Commission and FEDSAS 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 MOU.

6.2. 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 8, for communications under this MOU.

6.3. 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:

6.3.1. 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;

6.3.2. the legal provisions concerning the matter that is the subject matter of the request;

6.3.3. any information in the possession of the Requesting Party that might assist the Requested Party in identifying such information; and

6.3.4. the desired period of time for the reply.

7. CONFIDENTIALITY

- 7.1. Any information shared by the Commission and FEDSAS pursuant to this MOU shall be used only for lawful supervisory or statutory purposes.
- 7.2. Any request made by either party, for confidential information in possession of the other, shall be dealt with in accordance with the procedures set out in their respective enabling legislation or policies.
- 7.3. The Commission and the FEDSAS, shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or wilful conduct on its behalf.
- 7.4. To the extent permitted by law, the Commission and FEDSAS shall hold confidential all information, including the information contemplated in 7.2 and 7.3 above, received from each other pursuant to this MOU and shall not otherwise disclose such information except when required to do so by the law or an order of a Court or a Tribunal.
- 7.5. The Commission and FEDSAS shall, prior to disclosing such confidential information or a part thereof when required to do so by the law or an order of a Court or a Tribunal, notify each other.
- 7.6. The sharing of confidential information, in accordance with this MOU relies on the assurances given in 7.1, 7.2 and 7.3 above and shall not constitute a waiver of any legally recognizable grounds for refusing disclosure of information.
- 7.7. Where confidential information is disclosed either by the Commission or the FEDSAS in contravention of this MOU or any law, such disclosing party shall be solely liable in law for such disclosure.

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8. CONTACT PERSONS

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

For FEDSAS:

Juané van der Merwe

Legal Officer: FEDSAS

Contact number: (051) 522 6903

E-mail address: lo@fedsas.org.za

And

For the Commission:

Mr. Mziwodumo Rubushe

Principal: Stakeholder Relations

Contact number: (012) 394 3194

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

- 8.2. Either Party may, by way of a letter to the other, replace its contact person referred to in clause 8.1 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.



9. GENERAL PROVISIONS

- 9.1 Each Party will, with regard to the implementation of this MOU and any activities arising from it, bear its own expenses, unless otherwise agreed upon by the Parties.
- 9.2 Failure to follow any procedure set out in this MOU shall not have any effect on the validity of any investigation by the Commission in terms of the Competition Act.

10. VARIATION OF THE MOU

- 10.1 This constitutes the entire agreement between the Parties on matters covered in this MOU. Any variation of this MOU 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.

11. EFFECTIVE DATE OF THE MOU

- 11.1 This MOU 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.

12. DURATION OF THIS MOU

- 12.1 This MOU shall remain in force for a period of three years from the date of signing, with the option to renew or extend it further, in such a manner and such periods as agreed by the parties in writing, unless as may be terminated by:

- 12.1.1 . either Party on written notice of two (2) months to the other Party; and the terminating party shall not be obliged to provide reasons for the termination;

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Three handwritten signatures in blue ink are visible in the bottom right corner of the page. The signatures are stylized and appear to be of different individuals.

- 12.1.2. way of an agreement between the Parties; or
- 12.1.3. operation of the law.

12.2 If the Parties agree to terminate the MOU as contemplated in clause 12.1.1 or 12.1.2, their cooperation in terms of this MOU will continue in respect of all requests for assistance that were made before the termination date until the requests under consideration are completed.

13 DISPUTE RESOLUTION

13.1 Any difference or dispute arising from the interpretation, application or implementation of this MOU shall be resolved amicably through consultation or negotiations between the Parties.

14 DOMICILIUM CITANDI ET EXECUTANDI

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

The Competition Commission:

Block C, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, 0002

Postal: Private Bag X23, Lynwood Ridge, Pretoria, 0040

Contact Person: Mr Mziwodumo Rubushe, Head: Stakeholder Relations

FEDSAS:

7 Tennant Cres, Fichardt Park, Bloemfontein, 9317

P.O. Box 31963, Fichardt Park, Bloemfontein, 9317

Contact Person: Juané van der Merwe, Legal Officer

15 SIGNATURE

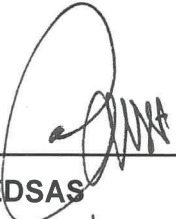
Signed at PRETORIA on this 12th day of November 2018 by
Mr. Tembinkosi Bonakele, Commissioner of the Competition Commission of South
Africa.




COMPETITION COMMISSION

_____**WITNESS 1**
_____**WITNESS 2**

Signed at Bloubaai on this 30th day of October 2018 by
Mr. Paul Colditz in his capacity as Chief Executive Officer FEDSAS.



FEDSAS

_____**WITNESS 1**
_____**WITNESS 2**

National Department of Education

Circular No:

To : All MECs OF PROVINCIAL EDUCATION DEPARTMENTS**: HODs OF PROVINCIAL EDUCATION DEPARTMENTS****: DISTRICT MANAGERS OF PROVINCIAL EDUCATION DEPARTMENTS****: PROVINCIAL SCHOOL GOVERNING BODY ASSOCIATIONS****: SCHOOL PRINCIPALS****NATIONAL DEPARTMENT OF BASIC EDUCATION CIRCULAR****1 EXCLUSIVE AGREEMENTS IN THE PROCUREMENT OF SCHOOL UNIFORM****1. PURPOSE**

The purpose of this Circular is to highlight the implications of the provisions of the Competition Act No. 89 of 1998 (as amended) ("the Act") to schools in their procurement of school uniforms.

2. Background

The Competition Commission of South Africa ("Commission") has received a number of complaints from potential uniform suppliers regarding their exclusion from competing in the market for the supply of school uniforms to schools. This exclusion relates to the use of exclusive agreements between schools and incumbent school uniform suppliers which in some instances are concluded for unlimited duration. Parents also complained about these exclusive agreements and the price of school uniform.

3. Provisions of the Competition Act

The provisions of the Competition Act prohibit firms from engaging in particular conduct that may prevent competition and lead to high prices and a lack of choice. In particular the Act prohibits firms from entering into vertical agreements which prevent or restrict competition¹. Vertical agreements are those agreements between a firm and its suppliers

¹ Section 5(1) of the Act states that "An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from that agreement outweighs that effect"



and/or customers, examples of which include supply agreements, distribution arrangements and agency and franchise agreements. Therefore an agreement between a school and its supplier of school uniforms is a vertical agreement within the context of the Competition Act.

The Competition Act also prohibits dominant firms from abusing their dominance by charging excessive prices and excluding its non-dominant rivals from participating in the market². Granting long term exclusive agreements may result in the creation of a monopoly supplier who may charge higher prices.

4. MEASURES TO ADDRESS THE POTENTIAL ANTI-COMPETITIVE EFFECT OF EXCLUSIVE AGREEMENTS

The following measures are recommended to mitigate the potential anticompetitive effect of exclusive agreements in the procurement of school uniform by schools.

To open up the market to other suppliers of school uniforms

Preferably school uniform should be as generic as possible such that it is obtainable from many suppliers. Where this is not possible, exclusivity should be limited to such items that the school regards as being necessary to get from preselected suppliers. Schools are recommended to engage in competitive bidding for the supply of school uniforms. The effect of this is to invite bids for the supply of school uniforms to a school. This will give all potential school uniform suppliers the opportunity to compete to supply schools with school uniforms. In this regard unless there are reasonable practical reasons, more than one supplier should be appointed so as not to totally eliminate competition during the duration of the contract.

When schools do engage suppliers in the bidding process, they should be mindful that they do not facilitate collusive conduct which is also prohibited by the Competition Act.

The Competition Act prohibits competing firms, such as different suppliers of school uniforms to schools, from entering into agreements which result in the fixing of prices, the division of markets and/or customers and the rigging of bids³.

² Section 8(a) of the Act states that, "it is prohibited for a dominant firm to charge an excessive price to the detriment of consumers".

Section 8(c) of the Act states that, "it is prohibited for a dominant firm to engage in an exclusionary act if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain"

³ Section 4(1)(b) of the Act states that "an agreement between or concerted practice by firms or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship if it involves any of the following restrictive horizontal practices:

- (i) Directly or indirectly fixing a purchase price or selling price or any trading condition;
- (ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or service; or
- (iii) Collusive tendering

School Uniform Contracts must be of a fixed or limited duration

The contract to supply a school with school uniform should be of a limited duration. This means that the tender awarded to a supplier must be for a specific period of time and should not be indefinite. At the end of the contract's duration, it should again be open to tender. This process of open, transparent and fair competitive bidding would be to the benefit of schools, students and parents as it will result in more choice, improved quality of services offered by suppliers and a reduction in prices.

