

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 465

28 May 2021

Memorandum of Understanding

Entered into by and between

The Auditor-General of South Africa

duly established in terms of Section 181(1)(e) of the Constitution, 1996 read with the Public Audit Act, 2004 (Act No. 25 of 2004)

(Hereinafter referred to as the "AGSA")

and

The Competition Commission

a juristic person established in terms of Section 19 of the Competition Act, 1998 (Act No.89 of 1998), as amended.

(Hereinafter referred to as "the Commission")





Memorandum of Understanding between the AGSA and the Commission

1. PURPOSE

- 1.1 The purpose of this Memorandum of Understanding ("MoU") is to renew the cooperation between the Commission and the AGSA (collectively referred to hereunder as "the Parties").
- 1.2 The renewal of the MoU is in light of the amendments to the Public Audit Act No. 25 of 2004 ("Public Audit Act") which prescribe that the Auditor-General may, in addition to identifying collusive tendering in public sectors supply chain management process, refer a suspected material irregularity¹ to another public body for investigation.
- 1.3 The MoU provides the basis for cooperation between the Parties in order to lay the basis for seeking ways to complement each other's legal mandates and share technical information and expertise.
- 1.4 The MoU establishes the manner in which the Parties will interact with each other in respect of referrals of suspected material irregularities which may constitute a contravention in terms of the Competition Act No. 89 of 1998, as amended ("Competition Act").
- 1.5 The provisions and principles envisaged in the MoU apply to this MoU to the extent that they relate to the activities in this MoU. In the event of a conflict, the provisions of the MoU will prevail to the extent of that conflict, unless a deviation from or exception to a provision in the MoU has been specifically provided for in this MoU.

¹ means any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under the PAA that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public.



Memorandum of Understanding between the AGSA and the Commission

2. BACKGROUND AND OBJECTIVE OF MEMORANDUM OF UNDERSTANDING

- 2.1. In line with the functions of the Parties, as prescribed in relevant legislation, the Parties agree that their respective functions, in relation to any contravention of the Competition Act in the public sector's supply chain management processes, complement each other.
- 2.2. In recognizing the synergy between them, the Parties deem it necessary to develop a mechanism aimed at enhancing cooperation, efficiency and effectiveness in uncovering and eradicating *inter alia* collusive tendering in the public sector.
- 2.3. This MoU is entered to establish the manner in which the Commission and the AGSA will interact with each other to, among other things, enable them to, *inter alia*:
- 2.3.1. effectively coordinate the exercise of their mandate and powers when taking decisions;
 - 2.3.2. apply a consistent interpretation and application of the principles of competition when exercising their powers, and their respective functions in terms of their enabling legislation;
 - 2.3.3. consult each other and undertake enquiries regarding improper conduct in the public sector's supply chain management, specifically collusive tendering detected in audits, reviews and during investigations; and
 - 2.3.4. timeously provide each other with the necessary information in respect of the investigation of a suspected material irregularity and collusive tendering as well as research developments or studies within the public sector's supply chain management.
- 2.4. The Parties may inform each other of any previous decisions or judgements in respect of any practice, conduct or a suspected material irregularity that either of them have previously taken involving the same respondent, insofar as it pertains to any contravention of the Competition Act.
- 2.5. The Parties may collaborate on and participate in each other's advocacy and outreach initiatives to educate and raise awareness to the public.

3. PRINCIPLES GOVERNING COOPERATION BETWEEN THE PARTIES

- 3.1. The primary principles that shall govern the MoU are as follows:

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- 3.1.1. Each Party recognises and respects the independence, governance structures and internal processes of the other;
- 3.1.2. Each Party shall be transparent regarding planned activities that might potentially impact the work of the other Party and the Parties shall seek ways to complement each other in the performance of their respective functions;
- 3.1.3. The Parties shall cooperate with each other in mutual trust and good faith;
- 3.1.4. The Parties shall inform each other of, and consult each other on, matters of common interest;
- 3.1.5. The Parties shall assist and support each other in respect of agreed upon services and commitments between them in terms of this MoU; and
- 3.1.6. The Parties shall avail to each other the necessary support for the successful performance of the tasks and programmes envisaged in this MoU.

4. LEGISLATIVE FRAMEWORK

- 4.1 Section 5(3) of the Public Audit Act provides that the Auditor-General is responsible for reporting any matter within its function to any other organ of state with a direct interest in the matter, including collusive tendering identified during the audit process.
- 4.2 Section 5(1A) of the Public Audit Act provides that the Auditor-General may, as prescribed, refer any suspected material irregularity identified during an audit performed under that Act to a relevant public body for investigation, and the relevant public body must keep the Auditor-General informed of the progress and the final outcome of the investigation. A suspected material irregularity may take the form of a contravention of the Competition Act including collusive tendering in the public sector's supply chain management processes.
- 4.3 Section 5(2)(a) of the Public Audit Act provides that the Auditor-General may co-operate with persons, institutions and associations, nationally and internationally;
- 4.4 The Commission and the AGSA enter into this MoU for the effective discharge of the obligation imposed on the AGSA by the amendments to the Public Audit Act. The Commission falls under the "relevant public body" and "persons, institutions and associations, nationally" categories per the Public Audit Act.

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- 4.5 Section 21(1)(c) of the Competition Act provides that the Commission is responsible for investing and evaluating alleged contraventions of the Competition Act, including collusive tendering.
- 4.6 In terms of the provisions of section 21(1)(h) read with sections 3(1A)(b) and 82 (1) and (2) of the Competition Act, the Commission has to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act;
- 4.7 This MoU shall in no way affect the independence and the exercise of statutory powers and obligations by the two parties in terms of enabling legislation.

5. COOPERATION BETWEEN THE PARTIES**5.1 AREAS OF COOPERATION**

The areas of cooperation between the parties shall include the following:

- 5.1.1 Collaboration, cooperation on, and referrals on, matters encountered by either Party that affects the mandate and functions of the other, including investigation requests on suspected improper conduct in state affairs or irregularities detected in audits, reviews, and during investigations;
- 5.1.2 Strategic collaboration on measures to promote governance, accountability and the maintenance of effective public finance and administration and a high standard of professional ethics in state affairs;
- 5.1.3 Collaboration on advocacy and outreach initiatives to facilitate better access to the public and become more visibly involved in education and promotional campaigns, particularly in rural areas;
- 5.1.4 Any other areas of interest as may be identified from time to time.

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5.2 MANNER OF COOPERATION

The manner of cooperation between the Parties shall depend on the specific areas of cooperation indicated in clause 5.1 above and may include but are not limited to the following:

- 5.2.1. The referral of any suspected material irregularity identified during an audit to the relevant body for investigation.
 - 5.2.2. Requesting and receiving advice from each other, in respect of the referral and investigation of a suspected material irregularity as set out in clause 6 below or any other matters of common interest
 - 5.2.3. Sharing practical experiences and common areas of interest including but not limited to complaints, support systems and procedures, best practices, trends, training and development, through roundtable discussions, seminars and knowledge sharing sessions with the aim of enhancing the capacity of both parties in an effort to ensure that both parties benefit from existing best practice guidance when applying oversight methodologies;
 - 5.2.4. Collaborating on outreach and advocacy initiatives and opportunities to extend and communicate the services of the Parties through effective engagement with stakeholders and partners to raise awareness and build trust, confidence and faith with stakeholders.
 - 5.2.5. Undertaking joint projects and/or investigations that are identified by the Parties from time to time.
- 5.3 Where the Parties consult each other under this MoU they shall do so at no cost to each other and with an acknowledgement of their respective areas of expertise and competence.

6. REFERRAL OF A SUSPECTED MATERIAL IRREGULARITY

- 6.1 The AGSA may for purposes of section 5(1A) of the Public Audit Act refer a suspected Material Irregularity, which may constitute a contravention of the Competition Act to the Commission for investigation.

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- 6.2 The suspected Material Irregularity shall be referred and investigated as per the respective Acts of the Parties as detailed in the Annexure to the MOA.

7. REFERRAL TO MULTIPLE PUBLIC BODIES

- 7.1 The AGSA may refer the same suspected Material Irregularity or different aspects of the same suspected Material Irregularity to different public bodies for investigation, but must in the event of doing so, in writing inform the Commission thereof and provide the Commission with a copy of the referral to the other public body.

- 7.2 Nothing in this MoU prevents the Commission from interacting with such other public body, subject to applicable law and with due regard to the provisions contained in the MoU between the Parties.

8. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE

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

- 8.2 The functions of the Committee shall be:

- 8.2.1 To manage and facilitate co-operation and consultation in respect of matters dealt with by each Party in terms of this MoU;
- 8.2.2 To propose, when necessary, any amendment of or supplementation to this MoU;
- 8.2.3 To advise management of both the Commission and the AGSA on issues affecting competition in the public sector's supply chain management 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 Competition Act and the Public Audit Act;
- (b) International approach to issues affecting competition in the public sector's supply chain management, as the case may be;
- (c) Amendments to the relevant or applicable statutes that may be necessary from time to time; and

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(d) Any other related matter.

8.3 The Committee shall agree on the dates of the meetings.

9. INSTITUTIONAL CONTACT PERSONS

For purposes of this MoU, the Divisional Manager of the Advocacy Division will be the main contact person at the Commission and the Business Executive of Investigations will be the main contact person at the AGSA.

10. CONFIDENTIALITY

10.1. Any information shared by the Parties pursuant to this MoU must be used only for lawful purposes in matters of concurrent jurisdiction.

10.2. Any request made by either of the Parties for confidential information in possession of the other shall be dealt with in accordance with the procedures set out in the Parties' respective establishing Acts, and regulations and policies pursuant thereto.

10.3. The Parties shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.

10.4. To the extent permitted by law, the Parties shall keep confidential the information 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 competent Court or Tribunal.

10.5. When required to do so by the law or an order of a competent Court or Tribunal, and prior to disclosing such confidential information, the Parties shall notify each other of the law or an order of a competent Court or Tribunal requiring such disclosure.

10.6. The sharing of confidential information, in accordance with this MoU, relies on the assurances given in this MoU. None of these assurances shall constitute a waiver of any legally recognizable grounds for refusing disclosure of information.

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- 10.7. Where confidential information is disclosed either of the Parties, and in contravention of this MoU, such disclosing party shall be solely liable in law for such disclosure.
- 10.8. Either of the Parties may, in its sole discretion, decline a request for confidential information made in terms of this MoU. Such discretion shall be an exercise with the bona fide intention to protect an interest that, if otherwise the information were to be disclosed, will adversely prejudice the Party or the person/s to whom the confidential information belongs.

11. DATE OF IMPLEMENTATION AND DURATION

- 11.1 This MoU shall come into force and effect on the last signature date ("the effective date") and shall remain in force for a period of 5 (five) years.
- 11.2 This MoU may be terminated at any time by either Party who shall provide the other Party with at least 3 (three) months' written notice setting out the reasons for such termination.
- 11.3 Notwithstanding clause 11.1 above, the Parties may agree to renew or extend the MoU upon such terms and conditions as may be negotiated between the Parties. The extension or renewal of the MoU shall only be valid if reduced to writing.
- 11.4 The provisions of clause 8 above shall survive any expiry or termination of this MoU.

12. REVIEW OF THE MEMORANDUM OF UNDERSTANDING

This MoU shall be reviewed annually.

13. AMENDMENT

Any amendment to this MoU shall be agreed upon by the Parties in writing.

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SIGNATURES

THUS DONE AND SIGNED AT BLOOMINGTON ON THIS 27th DAY OF OCTOBER 2020.

FOR THE AGSA:

Tsokani Maluleke

Full name of signatory

Deputy Auditor General

Designation of signatory

Tsokani Maluleke

Signature

[Signature]
Witness 1

[Signature]
Witness 2

THUS DONE AND SIGNED AT _____ ON THIS _____ DAY OF _____ 2020.

FOR COMMISSION:

TEMBINKOSI BONAKELE

Full name of signatory

COMMISSIONER

Designation of signatory

Signature

[Signature]

Witness 1

Witness 2



Annexure to Memorandum of Understanding

Entered into by and between the

Auditor-General South Africa

duly established in terms of section 181(1)(e) of the Constitution of the Republic of South Africa, 1996 and governed by the Public Audit Act, 2004 (Act No. 25 of 2004)
(hereinafter referred to as "AGSA")

and

Competition Commission South Africa

duly established in terms of the Competition Act, 1998 (Act No. 89 of 1998)
(hereinafter referred to as "CC")

(collectively referred to as "the Parties" or individually as "Party")



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INTRODUCTION

1. Purpose of the annexure

- 1.1 The purpose of this Annexure is to define the roles and responsibilities of the Parties and the processes that will facilitate the referral of a suspected material irregularity ("MI") to the Commission by the AGSA in terms of section 5(1A) of the Public Audit Act.
- 1.2 This Annexure shall be governed by the Memorandum of Understanding ("MoU") signed between the Parties to strengthen and regulate the co-operation between the Parties.
- 1.3 This Annexure establishes the manner in which the Parties will interact with each other when a suspected material irregularity is referred for investigation.

2. Definitions

- 2.1 **"Material irregularity (MI)"** means any non-compliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under the PAA that resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public sector institution or the general public.
- 2.2 **"Complaint"** means the suspected MI or prohibited practice reported to the Commission by means of a Form CC1 (Complaint Form) in terms of section 49B(2)(b) of the Competition Act.
- 2.3 **"Complainant"** means a person who has submitted a complaint in terms of section 49B(2)(b) of the Competition Act.
- 2.4 **"Material Irregularity Regulations (MI regulations)"** means the regulations published in Government Notice No. 526 in *Government Gazette* No. 42368 of 1 April 2019.
- 2.5 **"Referral"** means a referral of a suspected MI by the AGSA to the Commission in terms of section 5(1A) of the Public Audit Act.



2.6 **“Memorandum of Understanding (“MoU)”** means the memorandum signed between the Parties to enhance cooperation and that outlines the principles governing the cooperation between the Parties.

2.7 **“in writing”** includes any electronic means recognised by the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

2.8 **“days”** means working days and are exclusive of the first and inclusive of the last day.

3. Interpretation

3.1 The headings of the clauses in the Annexure are for purpose of convenience and reference only and shall not be used in the interpretation nor to modify nor amplify the terms of this Annexure nor any clause hereof, unless a contrary intention clearly appears.

3.2 Expressions defined in this Annexure shall bear the same meaning in MoU that do not themselves contain their own definitions.

4. Statutory mandates of Parties

4.1 The Parties are respectively principally governed by the Public Audit Act, 2004 (Act No. 25 of 2004) and the Competition Act, 1998 (Act No. 89 of 1998) and this Annexure must be read and interpreted subject to the provisions of those Acts, the MI regulations and any other applicable law.

4.2 This Annexure focuses on the matters contemplated in section 5(1A) of the Public Audit Act.

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PROCESS OF REFERRAL OF A SUSPECTED MATERIAL IRREGULARITY

5. Referral of a suspected material irregularity

- 5.1. The AGSA may for purposes of section 5(1A) of the Public Audit Act, refer a suspected MI to the Commission for investigation, and that referral must be in writing and include –
- (a) full details of the background to and the circumstances pertaining to the suspected MI; and
 - (b) any relevant supporting documents.
- 5.2. When referring a suspected MI to the Commission for investigation, the AGSA may –
- (a) submit information concerning the suspected MI in terms of section 49B(2)(a) of the Competition Act; or
 - (b) submit a complaint in terms of section 49B(2)(b) of the Competition Act by completing a Form CC1 which is a formal complaint form that is used for lodging complaints with the Commission.
- 5.3. The Form CC1 may be obtained from the Commission's website, www.compcom.co.za.
- 5.4. The completed Form CC1 and supporting documents can be emailed to the Registry Division of the Commission at ccsa@compcom.co.za.
- 5.5. Upon receipt of the Form CC1 and the supporting documents, the Registry Division will issue a case number.



- 5.6. The Registry Division will send an Acknowledgement of Receipt to the AGSA within 5 days of receipt of the complaint. The Acknowledgment of Receipt will reflect the case number allocated to the complaint and which will be used by the parties as a reference.
- 5.7. In considering the complaint or information, the Commission may consult with the AGSA as the complainant in respect of the complaint and avail to each other the necessary resources for the successful investigation of complaints.
- 5.8. In consulting each other in respect of the complaint, the Parties must have regard to the principle that the Commission is to exercise primary authority to detect and investigate alleged prohibited practices to give effect to the Competition Act.
- 5.9. The Commission may, for purposes of its investigation, request additional information on the suspected MI from the AGSA and the AGSA as the complainant must provide within a reasonable time such information to the Commission.
- 5.10. As contemplated in section 50(2) of the Competition Act, the Commission must make a decision on the complaint within one year (12 months) after the complaint was submitted.
- 5.11. In certain instances, the Commission may in terms of section 50(4)(a) of the Competition Act, approach the AGSA as the complainant to extend the one year (12 months) period to a future date which shall be agreed upon by the Parties.
- 5.12. The Commission may decide to refer the complaint to the Competition Tribunal in terms of section 50(2)(a) of the Competition Act if it determines that a prohibited practice has been established. In these circumstances, the Commission will notify the AGSA in writing of its decision to refer the case to the Competition Tribunal.
- 5.13. The AGSA shall, upon the request of the Commission avail its resources, documentary evidence and witnesses to the Commission to allow for the successful prosecution of the case.

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- 5.14. In any other case, where the Commission finds that the alleged conduct does not constitute a contravention under the Competition Act, the Commission may decide not to refer the complaint to the Competition Tribunal (established in terms of Section 26 of the Competition Act).
- 5.15. In these circumstances, the Commission will notify the AGSA in writing of its decision not to refer the matter. The Commission will issue a Form CC 8 which is a Notice of Non-Referral and a Non-Referral letter in terms of section 50(2)(b) of the Competition Act detailing the reasons for the Commission's decision not to refer the complaint.
- 5.16. The Commission's decision not to refer a complaint shall not preclude the AGSA as the complainant, from pursuing the matter with the Competition Tribunal.
- 5.17. The Commission shall report on the investigation of all suspected MIs referred by the AGSA in the Commission's Quarterly Reports.
- 5.18. The Commission shall provide the AGSA with the Commission's Quarterly for purposes of the AGSA's reporting requirements in terms of section 10(1)(e) of the Public Audit Act, which requires that the AGSA report on all of the suspected MI matters referred to public bodies.
- 5.19. The Commission shall, in submitting any information to the AGSA for reporting purposes have due regard to the provisions of confidentiality as provided for in section 44 of the Competition Act and as set out in clause 10 of the MoU.

INVESTIGATION PROCESS

6. Considerations on receipt of a referral

- 6.1 The Commission shall forthwith upon receipt of the referral, consider whether its legislative mandate and functions permit an investigation as requested in that referral and if its legislative mandate and powers do so permit, initiate proceedings to so conduct an investigation as contemplated in section 5(1A) of the Public Audit Act.
- 6.2 The Commission may, for purposes of considering the referral and assessing the suspected MI matter in terms of their internal operational process, in writing request



additional information on the suspected MI from the AGSA and the AGSA must provide such information to the Commission within a reasonable time.

- 6.3 In the event that the AGSA fails to provide the information requested within a reasonable time, or indicates to the Commission that it cannot locate or access such information, the Commission may utilise the tools and measures available to it within the confines of the Competition Act to obtain such information or any additional information required for purposes of conducting its investigation.
- 6.4 The Commission shall within one year (12 months) as contemplated in section 50(2) of the Competition Act or at an extended date, determined by the Parties in terms of section 50(4)(a) of the Competition Act, finalise its investigation.
- 6.5 The Commission shall, in terms of section 50(2)(a) and (b), inform the AGSA as the complainant, in writing of the outcome of the investigation.
- 6.6 In the event of undue or extraordinary delays, in the Commission finalising its investigation within one year (12 months) as contemplated in section 50(2) of the Competition Act, the Commission and the AGSA as the complainant, may agree to extend the period in terms of 50(4)(a) of the Competition Act, to a future date agreed upon by the Parties.

7. Inability to conduct an investigation

- 7.1 In the event that a suspected MI matter referred by the AGSA to the Commission, does not fall within the Commission's investigative mandate, as provided for in law, or its functions or powers will not permit an effective investigation of the referred suspected MI matter, the Commission may decide not to refer the complaint to the Competition Tribunal.
- 7.2 In these circumstances, the Commission will notify the AGSA in writing of its decision not to refer the complaint and issue a Form CC 8, which is a Notice of Non-Referral. The Commission shall in the written notice provide the AGSA with the reasons for its decision not to refer the complaint.
- 7.3 The AGSA shall upon receipt of the notification contemplated in clause 9.2 in writing acknowledge receipt thereof.



8. AGSA Processes during an investigation

- 8.1 To prevent any doubt, nothing in this Annexure prevents or prohibits the AGSA during an investigation by the Commission from performing its functions in terms of its mandate with respect to an auditee subject to an investigation by the Commission.
- 8.2 In this regard, the AGSA undertakes to conduct its operations and activities in such a way so as to not hinder or obstruct the Commission's investigation.

REPORTING

9. Reporting on referrals and investigation outcomes

- 9.1 The AGSA must in terms of section 10(1)(e) of the Public Audit Act, annually report on the suspected MI matters referred to public bodies. For this purpose, the AGSA will annually report in its accountability report on referral(s) made to the Commission, progress with these matters and any outcomes of investigations finalised.
- 9.2 The AGSA may prior to reporting on a suspected MI matter under investigation by the Commission, engage the Commission on the details that will be reported to facilitate accurate and consistent reporting.
- 9.3 The Parties may report on any matter contemplated in this Annexure in any audit report, annual report or other submissions to Parliament, legislatures, municipal councils or other organs of state, subject to the provisions of any applicable law that governs this Annexure.
- 9.4 The Commission shall provide progress on the investigation to the AGSA, which will facilitate reporting by the AGSA to the relevant legislature on a referral made to the Commission.



OUTCOME OF INVESTIGATION

10. Notification on the outcome of an investigation

- 10.1 The Commission shall notify the AGSA in writing of its decision to refer or not to refer the complaint to the Competition Tribunal.
- 10.2 The Commission may, at the request of the AGSA, issue the AGSA with the Non-Confidential Investigation Report detailing the Commission's findings and the outcome of its investigations.

GENERAL

11. Funding for an investigation

- 11.1 The funding for an investigation where a suspected MI matter has been referred is still under consideration and discussion between the AGSA and the National Treasury.
- 11.2 This provision will be updated with the funding arrangement for investigations once a final decision has been taken and agreed on between the AGSA and the National Treasury.

12. Interactions and representatives: Investigations

The AGSA represented by Senior Manager: MI Unit and the Commission represented by the Lead Investigator: Cartels Division will meet annually for purpose of agreeing on and reviewing the terms and conditions of this Annexure, assessing the effectiveness of the Annexure and to reflect on any changes to law that impacts on this Annexure.

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13. Liaison Mechanism

For purposes of interacting with each other in respect of this Annexure, the Parties determine their respective principal points of liaison as follows:

AGSA Ms Aletta van Tromp:
Business Executive: Investigations Business Unit
300 Middel Street
New Muckleneuk
Pretoria
0001

Tel no.: 012 422 9859
Email: ALETTAV@agsa.co.za

CC Mrs Khanyisa Qobo
Divisional Manager – Advocacy
DTI Campus
77 Meintjies Street
Sunnyside
Pretoria
0040

Tel no.: (012) 394 3580
Email: KhanyisaQ@compcom.co.za