

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 581

2 July 2021

MEMORANDUM OF UNDERSTANDING

("MOU")

Entered into between

THE COMPETITION COMMISSION OF SOUTH AFRICA

("Commission")

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

And

SOUTH AFRICAN COUNCIL FOR THE ARCHITECTURAL PROFESSION

(Hereinafter referred to as "SACAP")

A statutory body established in terms of the Architectural Profession Act 2000, Act 44 of 2000 ("Architectural Profession Act") herein duly represented by **Mr. Ntsindiso Charles Nduku** in his capacity as **President** of SACAP.



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PREAMBLE

WHEREAS the Commission and SACAP acknowledge that there are a number of competition issues arising in the architectural sector, most of which are related to the Identification of Work Policy (“IDOW”) and the publication of Professional Guideline Fees. The Commission has been approached by complainants on these matters.

WHEREAS section 20 of the Council for the Built Environment Act, 43 of 2000 (“CBE Act”) impels the Council for the Built Environment to identify the scope of work for each category of registered persons.

AND WHEREAS section 26(2) of the Architectural Profession Act, 44 of 2000 (“Architectural Profession Act”) impels SACAP to consult and submit recommendations to the Council for the Built Environment on the scope of work for every category of registered persons in the architectural profession.

WHEREAS in terms of section 20(1)(2) of the CBE Act, the Council for the Built Environment must, after receipt of the recommendations from SACAP and before liaising with the Competition Commission in terms of section 4(q); determine policy with regard to the identification of work for the different categories of registered persons; consult with any person, body or industry that may be affected by the identification of work. The Council for the Built Environment must, after consultation with the Competition Commission, and in consultation with the Council, identify the scope of work for every category of registered persons.

WHEREAS the objectives of the IDOW are to:

- (i) comply with the section 26 (1), (2) of the Architectural Profession Act read with Section 20 (1), (2) of the CBE Act.
- (ii) protect the public by identifying the type of architectural work that each registration category in the architectural profession can undertake;
- (iii) protect the environment;
- (iv) provide a policy for the identification of work between categories of registration in the architectural profession;
- (v) provide for an effective and efficient mechanism for addressing and recognizing overlaps and duplication between work identified by different built environment professions;



- (vi) ensure that where work is to be carried out by different categories of professional registration, there are clear and transparent ways of determining the category of professional to carry out the work;
- (vii) facilitate the most economically, socially and technically efficient use of the built environment professions and their categories of registration with a view to attaining maximum benefit for the public; and
- (viii) ensure that the identification of work is inclusive and promotes adequate competition to benefit both the consumers and registered persons;
- (ix) ensure a unified alignment for determination of professional competence.

WHEREAS the purpose of the IDOW is to guide SACAP in their Identification of Work, incorporating existing standards and legislation while guarding against imposing unnecessary regulation and uncompetitive practices. The IDOW also serves to harmonise the overlaps between work identified by SACAP and work identified for the various categories of registered architects within SACAP.

WHEREAS the purpose of the IDOW is to set out the qualifications and skills requirements for the performance of architectural work and to detail the kind of architectural work that can be undertaken under each of its registration categories. The IDOW identifies mechanisms that can be used by professionals who continue to do work which has not been identified for their category, as well as the mechanism which can be used to move up to higher categories. Such mechanisms include:

- (i) Recognition of Prior Learning which recognises prior learning and provides an opportunity for registered professionals who do not have formal qualification but have informal qualification to perform architectural work.
- (ii) The Special Consent mechanism which grants permission to registered professionals who have made an application to do a type of project that is not identified for their category of registration.
- (iii) The Special Limited Dispensation which enables registered persons in lower categories to continue to perform work outside of their category of registration for a period of one year from the date the of the publication of the IDOW.



- (iv) The Transitional Provision which enables registered professionals to continue to practice work outside of their category of registration until the effective date of the publication of the Identification of work policy.

WHEREAS the Commission has considered the revised IDOW and acknowledges the proposed reforms to be put in place by SACAP to address the competition and transformation concerns that emanated from previous versions of the IDOW in order to ensure that it is inclusive and promotes competition. Such proposed reforms include:

- (i) The reconsideration of the fees required for the application of each of the mechanisms listed above. This entails the development of a framework to deal with different fee scales that are reasonable for the different categories of registration.
- (ii) The diversification of the Panel of Assessors to include more academics, retired professionals, and independent persons who are not affiliated to any Council, for purposes of maintaining independence of the Panel of Assessors.
- (iii) Regular substantive review of the IDOW that involves extensive consultation with all persons and industries affected by the IDOW.
- (iv) Inclusion of unregistered persons in the sector through advocacy initiatives aimed at policy and legislative amendments.

AND WHEREAS SACAP is obliged to consult with the Council of Higher Education and South African Qualifications Authority in connection with the educational standards, as well as with the Council for the Built Environment on matters such as the Code of Conduct and Identification of Work.

WHEREAS the purpose of the Professional Guideline Fee is to provide clients, in particular Government entities, with guidance on the fees relating to the various types of projects.

WHEREAS the Commission has considered the proposed Professional Guideline Fee *vis-a-vis* to the previous Professional Guideline Fee. The Commission is satisfied that the proposed Professional Guideline Fee is an improvement from a competition perspective on its predecessor in that it will now:

- (i) be determined by a third-party not affiliated with SACAP; and
- (ii) use actual fees charged by registered professionals plus the costs of providing architectural services to determine the fee.

AND WHEREAS, the Commission will monitor the impact of the Professional Guideline Fee on the market against concerns that may be detrimental to competition in the market.

THEREFORE, the Commission and SACAP are entering into this Memorandum of Understanding ("MOU") within this context.

WHEREAS it is recorded that this Agreement shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the Commission and SACAP in the built environment. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.

WHEREAS the intention of the parties entering into this Agreement is to work together to promote competition within the architectural profession, nothing in this Agreement shall preclude the Commission from investigating complaints lodged against SACAP on matters falling within its jurisdiction.

NOW THEREFORE, the Commission and SACAP agree 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 Competition Act 89 of 1998, as amended ("Competition Act") and the Architectural Profession Act, has the meaning assigned to it unless otherwise specified.

2. PURPOSE OF THE MOU

- 2.1. Effectively coordinate exercise of the Commission's and SACAP's jurisdiction and powers when taking decisions on competition matters within the architectural profession.
- 2.2. Timeously provide each other with necessary information in respect of the investigation of anti-competitive practices, regulation of mergers and acquisitions, as well as research developments or studies within the built environment.
- 2.3. Advocate for professional councils to advocate for compliance with competition law principles including on regulatory policies such as the identification of work and guidelines professional fees.



3. LEGISLATIVE FRAMEWORK

- 3.1. The Commission has jurisdiction to investigate and evaluate alleged prohibited practices within any industry or sector, to grant or refuse exemption applications, to review mergers within any industry or sector and to conducting market inquiries in terms of section 21(1) of the Competition Act. Accordingly, SACAP agrees that the Commission shall exercise its jurisdiction as provided for in the Competition Act, to investigate and evaluate alleged prohibited practices, to grant or refuse exemption applications, and to review mergers within the built environment.
- 3.2. the Commission, in terms of the provisions of section 21(1) (h) read with section 82 (2) of the Competition Act has to negotiate agreements with any regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of the Competition Act. In respect of a particular matter within the regulatory authority's jurisdiction, the regulatory authority may exercise its jurisdiction by way of an agreement.
- 3.3. SACAP is a statutory body established in terms of the Architectural Profession Act to regulate the architectural profession.
- 3.4. Section 18 of the Architectural Profession Act provides for the registration of Professional Architects, Senior Architectural Technologists, Architectural Technologists, Architectural Draughtspersons and Candidates in each of the categories of registration.
- 3.5. SACAP's core mandate is to regulate the architectural profession by setting up standards for registration, education and training, professional skills, conduct, performance and ethics; keep a register of candidates and professionals who meet the standards; approve programmes at higher institutions of learning which persons must complete to register; and take action when professionals on the register do not meet the standards; make recommendation with regard to the type of work identified for each category of registered person and determine guideline professional fees and publish those fees in the Government Gazette.

4. COOPERATION BETWEEN THE PARTIES

- 4.1. This MoU shall in no way affect the independence and exercise of statutory powers by the two regulatory authorities in terms of their enabling legislation.



4.2. The Parties agree to support each other in identifying and investigating the conduct within the built environment which may contravene the Competition Act in relation to the following:

4.2.1. Identification of Work Policy (IDOW)

- 4.2.1.1. The parties agree to consult with each other annually on any proposed changes to the IDOW to ensure that its provisions are pro-competitive and that nothing in the policy contravenes any section or objectives of the Competition Act.
- 4.2.1.2. The parties agree to cooperate to ensure that the design and application of the IDOW:
- i) does not exclude unregistered persons or non-members of SACAP from participating in the market;
 - ii) that it facilitates access to architectural work to all registered and unregistered persons; and
 - iii) that it promotes transformation of the architectural profession.
- 4.2.1.3. The parties agree to work together to ensure the following:
- i) That there is extensive consultation between SACAP and all parties that are interested and / or affected by the IDOW prior to its publication; and
 - ii) That the policy obtains a broad buy-in from parties that are interested and / or affected by the IDOW prior to publication.
- 4.2.1.4. The parties agree to annually co-review the effectiveness of pro-competitive policy measures and interventions including the Recognition of Prior Learning, Special Consent, Special Limited Dispensation and Transitional Provisions.
- 4.2.1.5. The parties agree to regularly co-review the composition of the Panel of Assessors, whose duties are to assess applications of architectural professionals and make recommendations, in order to ensure that the Panel is balanced.
- 4.2.1.6. The parties agree to consult each other in developing mechanisms and policies required to safeguard the independence and objectivity of the



assessment processes which entail reviewing applications of architectural professionals against criteria and standards, making a recommendation to SACAP to either accept or reject the application.

4.2.2. Setting of Fee Guidelines

4.2.2.1. The parties agree to consult with each other on the process for the setting of the fee guidelines to:

- iv) ensure that such process does not contravene any section or objectives of the Competition Act; and
- v) ensure the mitigation of any competition concerns that may arise from the process.

4.2.2.2. The parties agree to undertake periodic monitoring of the developments in the industry.

4.2.2.3. The parties agree to periodically co-review the Fee Guideline Policy in order to assess:

- i) the effects the fee guideline on the state of competition, transformation, and inclusion in the market.
- ii) The effects of the fee guideline on Government procurement practices

4.2.2.4. The parties agree that the Commission may also provide guidance for fee setting to SACAP in order to mitigate and address any competition and transformation concerns that may arise from the Professional Guideline Fee.

4.2.3. Merger Decisions

4.2.3.1. Where a merger transaction ("transaction") requires the approval of the Commission, and such a transaction has a negative impact on competition in the market, the Commission may, prior to arriving at a decision, consult SACAP to minimise any adverse effects that may possibly arise from the transaction.

4.2.3.2. When consulting each other in respect of merger transactions, the Commission and SACAP must have regard to the principles that the

Commission shall exercise jurisdiction as set out in Chapter 3 of the Competition Act, in the review of mergers in any industry, as required, to give effect to the Competition Act.

4.2.4. Complaints

4.2.4.1. Where a complaint is lodged regarding a practice or conduct in respect of which either the Commission and SACAP have jurisdiction, and one or either of the authorities has an interest in the complaint, the following process will be followed to the extent possible:

- i) The complaint may be lodged with the regulator that has jurisdiction (“Recipient Regulator”);
- ii) If upon receiving a complaint, the Recipient Regulator is of the view that it does not have jurisdiction over the matter, the Recipient Regulator may advise the complainant(s) accordingly and recommend that the complainant refer the complaint to the relevant regulator;
- iii) The Commission and SACAP may consult with each other in respect of the complaint;
- iv) If SACAP is the recipient regulator that has jurisdiction, it may in its discretion, liaise and consult with the Commission;
- v) If the Commission is the recipient regulator that has jurisdiction, it may in its discretion, liaise and consult with SACAP;
- vi) The Commission and SACAP may, upon request from each other, participate in each other’s proceedings in an advisory capacity;
- vii) 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 investigate and evaluate alleged prohibited practices to give effect to the Competition Act. Accordingly, SACAP has primary authority to exercise powers and perform functions assigned to it in terms of the Architectural Profession Act in order to give effect to its relevant objectives and provisions contained therein;



- viii) The Recipient Regulator may, in its discretion, advise the complainant(s) as soon as reasonably possible of the outcome of the consultation between the Commission and SACAP;
- ix) In the event that a complaint is dealt with by the Commission, representatives from SACAP may, at the request of the Commission, participate in the matter through, *inter alia*, attending meetings when required, providing inputs during the case investigation and making representations at the Competition Tribunal hearing, if necessary;
- x) In the event that a complaint is dealt with by SACAP, representatives from the Commission may, at the request of SACAP, participate in the matter through, *inter alia*, attending meetings, providing inputs during the case investigation and making representations at SACAP's proceedings if necessary;
- xi) The decision by any of the Parties to consult the other regulator shall be discretionary and voluntary, and either Party shall be entitled, with or without consultation, to make its independent decision in respect of the complaint in terms of its enabling legislation;
- xii) Nothing in the consultation procedures contemplated herein, shall detract from the jurisdiction of the Commission or the jurisdiction of SACAP to receive and deal with complaints in terms of their enabling statutes as they deem fit, or preclude the public from lodging complaints with both the Commission and SACAP; and
- xiii) When the Commission and SACAP consult each other, as contemplated in this Agreement, they shall do so at no cost to each other and shall act as expeditiously as possible.

4.2.5. Other: Advocacy Projects Related to the Architectural Sector

- 4.2.5.1. The parties agree to co-operate and collaborate on efforts to advance policy and legislative reforms that promote transformation and inclusion in the sector.
- 4.2.5.2. Such reforms shall include but are not limited to issues pertaining to qualifications from varied tertiary institutions, the treatment of unregistered

persons and any other policy advocacy aimed at achieving transformation and inclusion in the sector.

4.2.5.3. The parties agree that other areas of cooperation between the Commission and SACAP shall include the following:

- i) Collaboration and cooperation on matters encountered by either regulatory authority that affects the mandate and functions of the other.
- ii) Strategic collaboration on measures to promote competition in the built environment.
- iii) Any other areas of interest as may be identified from time to time.

5. GUIDELINES FOR INTERACTION BETWEEN THE COMMISSION AND SACAP UNDER THIS MOU

- 5.1. SACAP may request and receive advice from the Commission, in respect of aspects falling under the competency of the Commission in matters relating to the architectural sector or proceedings as set out in clauses 7 and 8 below.
- 5.2. The Commission may request and receive advice from SACAP, in respect of proceedings which require consideration of regulatory aspects falling under the competency of SACAP as set out in clauses 7 and 8 below.
- 5.3. All requests for advice or information by either regulatory authority will be submitted in writing.
- 5.4. The regulatory authority seeking advice or information must indicate a deadline before or upon which such advice or information should be given by the other regulatory authority.
- 5.5. When the Commission and SACAP consult each other under this Agreement, they shall do so at no cost to each other and with an acknowledgement of their respective areas of expertise.
- 5.6. Should either regulatory authority consider a matter before it, in terms of a timeline, such regulatory authority may share with the other, its expected process, and the other regulatory authority may cooperate to the best of its ability, towards achieving the targets set out in the project timelines.



CONTINUES ON PAGE 130 OF BOOK 2

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6. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE

- 6.1. A Joint Working Committee ("JWC") constituted by representatives of the Commission and SACAP, as nominated by the respective regulators, shall be established pursuant to this Agreement and shall function on an on-going basis.
- 6.2. The functions of the JWC shall be:
- 6.1.1. to manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this Agreement;
 - 6.1.2. to propose, when necessary, any amendment of or supplementation to this Agreement;
 - 6.1.3. to advise management of the Commission and SACAP on issues affecting competition in the architectural 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:
 - 6.1.3.1. International approach to issues of overlap concerning jurisdiction between Commission and SACAP, as the case may be;
 - 6.1.3.2. Amendments to the relevant or applicable statutes that may be necessary from time to time; and
 - 6.1.3.3. Any other related matter.
- 6.2. The JWC shall meet regularly, but no less than twice a year, to ensure both regulatory authorities are aware of developments in areas of common interest.
- 6.3. The JWC will develop annual programmes of action with milestones.

7. INSTITUTIONAL CONTACT PERSONS

- 7.1. For purposes of this Agreement:
- 7.1.1. The Manager of the Advocacy Division will be the main contact person at the Commission.
 - 7.1.2. The Registrar will be the main contact person at SACAP.
 - 7.1.3. Should the regulatory authorities have to exchange information, as a result of discussions at the JWC, the processes set out in this Agreement shall be followed.



8. DURATION OF THE AGREEMENT

- 8.1. This Agreement must remain in force for a period of 5 years from the date of signature, until it is amended or repealed by both regulators, acting jointly.

9. TERMINATION OF PREVIOUS AGREEMENTS

- 9.1. This Agreement terminates any existing agreements entered into between the Commission and SACAP.

10. EFFECTIVE DATE OF THE AGREEMENT

- 10.1. 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.
- 10.2. This Agreement shall be governed and construed in accordance with the laws of the Republic of South Africa.

11. REVIEW AND AMENDMENT OF THE AGREEMENT

- 11.1. The parties may when necessary, amend or update this Agreement shall, to accommodate developments incidental to matters that require co-operation between the two statutory bodies in the architectural sector. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.

12. DISPUTE RESOLUTION

- 12.1. Should any dispute or difference arise between the regulators with regard to interpretation and/or implementation of any one or more of the provisions of this Agreement, such dispute or difference may be resolved in any manner other than through judicial proceedings.

13. LEGAL EFFECT

- 13.1. This Agreement is not intended to be a legally enforceable document and intends to describe the nature and co-operative intentions of the Parties involved, and to suggest



guidelines for co-operation. Nothing therefore shall diminish the full autonomy of either Party nor may constrain either Party from discharging its statutory functions.

14. DOMICILIUM CITANDI ET EXECUTANDI

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

The Competition Commission:

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

Contact Person: Mrs Khanyisa Qobo, Manager: Advocacy Division

The South African Council for the Architectural Profession:

51 Wessel Rd, Edenburg, Sandton, 2128

Contact Person: Toto Fiduli, Registrar: The South African Council for the Architectural Profession



Signatures

Signed at PRETORIA on this 04 day of JUNE 2021 by

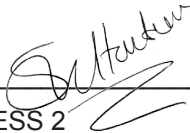
Mr. **Tembinkosi Bonakele**, Commissioner of the Competition Commission South Africa.



COMPETITION COMMISSION



WITNESS 1



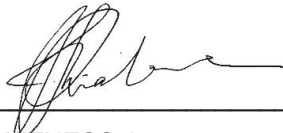
WITNESS 2

Signed at _____ on this ____ day of _____ by

Mr Ntsindiso Charles Nduku in his capacity as President of the South African Council for the Architectural Profession.



SOUTH AFRICAN COUNCIL FOR THE ARCHITECTURAL PROFESSION



WITNESS 1



WITNESS 2