

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 640

23 July 2021

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

GOVERNING BODY FOUNDATION (Hereinafter referred to as "[GBF]")

A public benefit organisation approved in terms of the Income Tax Act with number 930 035 381 herein represented by ANTHEA MARIAN CERESETO in her capacity as the 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 the GBF's function is, *inter alia*, to support its members with matters across the entire spectrum of school governance, including advocating, liaising, consulting and/or negotiating on issues of concern and/or interest to its members with the national and provincial education authorities and other relevant statutory bodies, institutions of higher education and relevant stakeholders in pre-primary, primary, secondary and/or pre-tertiary education.

AND WHEREAS the GBF 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 the GBF recognise the importance of co-operation with one another in mutual trust and good faith by, inter alia, assisting and supporting one another and educating 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 ("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,

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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 school 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. The GBF means a public benefit organisation number 930 035 381.
 - 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 MOUs (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 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 the GBF 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 Act" means the South African Schools Act No. 84 of 1996;
- 1.2.13. "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. This MOU is entered into to establish the manner in which the Commission and the GBF will co-operate, specifically with regards to *inter alia*:

2.2.1. advocating for schools to comply with competition law;

2.2.2. promote compliance among schools to the Competition Act and/or any Guidelines issued by the Commission;

2.2.3. where feasible, collaborate on the resolution of complaints arising regarding non-compliance of specific schools within the GBF membership.

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 Commission takes heed to the importance and value of school uniform to the schooling community. The Commission supports the general objectives that schools pursue in managing the procurement and wearing of school uniform by learners in relation to efficiency, identity, markers and other variables.

3.3. The Commission's approach to regulating school procurement seek to provide parameters on how schools ought to approach procurement processes in a pro-competitive manner. The principles are in no way prescriptive and are not intended at taking away the independence of schools.



- 3.4. The Parties agree to support each other in assisting members to co-operate regarding compliance to the Competition Act, specifically in relation to the manner in which the Schools govern the procurement of their respective uniform items and other goods and services and the related rules applicable to suppliers and parents of learners attending the respective Schools.

Education and Awareness

- 3.5. The parties will collaborate on efforts to educate and raise awareness on anti-competitive procurement or sourcing practices by *inter alia* developing and sharing relevant educational materials for schools and participating in each other's conferences, workshops or promotions on any other relevant communication platform.

Compliance Promotion


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- 3.6. The GBF will encourage its members to comply with competition law principles and/or to undertake pro-competitive practices as follows:
- 3.6.1. that uniform items are as generic as possible and that unique school items are limited to only a few items;
 - 3.6.2. that suppliers of school uniform are appointed through a competitive process;
 - 3.6.3. that more than one supplier is appointed where it is feasible to do so;
 - 3.6.4. that the duration of supplier contracts is limited to no longer than 5 years.
- 3.7. The GBF will support the Commission in promoting compliance by schools, by:
- 3.7.1. promoting the Commission's compliance and compliance-monitoring programs to its members.
 - 3.7.2. where feasible, assisting with the distribution of compliance or compliance-monitoring communiques to schools.
- 3.8. The Commission's compliance programs with schools include, *inter alia*, undertakings or pledges by schools to practice pro-competitive procurement. Compliance-monitoring programs conducted by the Commission include, *inter alia*, the undertaking of surveys, compliance tracking questionnaires, review of school procurement policies, among others.

Co-operation on Cases

- 3.9. Where a Complaint is lodged with or initiated by the Commission regarding a practice of a school belonging to any of the members of the GBF in respect of which the Commission has jurisdiction, the following process will be followed –
- 3.9.1. The Commission may, in its discretion, inform the members and the GBF of such complaint and make the CC1 Form available to both the GBF and the members.
 - 3.9.2. Where possible, the GBF may encourage its members to support and/or assist the Commission in its endeavors to resolve the matter.



- 3.10. Nothing in the procedures contained in this MOU shall:
- 3.10.1. 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;
 - 3.10.2. prevent the Commission from continuing with its investigation into a complaint during or after the negotiation contemplated in this clause.

4. ESTABLISHMENT OF A JOINT WORKING COMMITTEE

- 4.1. A Joint Working Committee (“the Committee”) constituted by representatives of the Commission and the GBF as nominated by the respective Parties, shall be established pursuant to this MOU and shall function on an on-going basis, with periodic meetings whose schedule shall be agreed upon by the parties.
- 4.2. The functions of the Committee shall be, to:
- 4.2.1. facilitate and manage co-operation and consultation in respect of matters dealt with by each Party in terms of this MOU;
 - 4.2.2. facilitate and manage awareness and capacity building programs intended to establish and maintain the necessary expertise for the GBF to be able to support its members to monitor potential anti-competitive practices and conduct of Schools;
 - 4.2.3. propose, when necessary, any amendment of or supplementation to this MOU; and
 - 4.2.4. advise management of both the Commission and the GBF 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.

5. INFORMATION EXCHANGE



- 5.1. Subject to clause 6, the Commission and the GBF may, in the manner set out below, request and exchange information from one another as may be necessary to give effect to this MOU.
- 5.2. 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 7, for communications under this MOU.
- 5.3. A Party requesting the information (“the Requesting Party”) shall make its request for information in writing by sending it to the contact person of the other Party (“the Requested Party”). The request must amongst others provide:
 - 5.3.1. a description of both the subject matter of the request and the purpose for which the information is sought;
 - 5.3.2. the legal provisions concerning the matter that is the subject matter of the request;
 - 5.3.3. any information in the possession of the Requesting Party that might assist the Requested Party in identifying such information; and
 - 5.3.4. the desired period of time for the reply.

6. CONFIDENTIALITY

- 6.1. Any information shared by the Parties pursuant to this MOU must be used only for lawful purposes in matters of concurrent jurisdiction.
- 6.2. 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.
- 6.3. 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 wilful conduct on its behalf.



- 6.4. 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.
- 6.5. 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.
- 6.6. 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.
- 6.7. 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.
- 6.8. 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.

7. CONTACT PERSONS

- 7.1. 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:

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For THE GOVERNING BODY FOUNDATION

DR ANTHEA CERESETO

CHIEF EXECUTIVE OFFICER

Contact number: 011 886 0031 / 061 0912374

E-mail address: ceo@gbf.org.za

And

For the Commission:

Mrs. Khanyisa Qobo

Divisional Manager: Advocacy

Contact number: (012) 394 3580

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

- 7.2. Either Party may, by way of a letter to the other, replace its contact person referred to in clause 7.1 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.

8. GENERAL PROVISIONS

- 8.1. 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.
- 8.2. 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.


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9. VARIATION OF THE MOU

- 9.1. This constitutes the entire MOU 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.

10.EFFECTIVE DATE OF THE MOU

- 10.1. 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.

11.DURATION OF THIS MOU

- 11.1. 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:

- 11.1.1. 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;
- 11.1.2. way of an MOU between the Parties; or
- 11.1.3. operation of the law.

- 11.2. If this MoU is terminated as contemplated in clause 11.1.1, 11.1.2 or 11.1.3, the cooperation of the Parties 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.

12.DISPUTE RESOLUTION

- 12.1. 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.



13. DOMICILIUM CITANDI ET EXECUTANDI

13.1. 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: Mrs Khanyisa Qobo, Divisional Manager: Advocacy

[[ASSOCIATION]]

7 CHAMBURY CLOSE, 62B GORDON AVENUE, BLAIRGOWRIE, 2194.

Postal: SUITE 22, PRIVATE BAG X2, PINEGOWRIE, 2123

Contact Person: ANTHEA CERESETO, CEO

14. SIGNATURES

Signed at _____ on this ____ day of _____ by
Mr. Tembinkosi Bonakele, Commissioner of the Competition Commission of South Africa.



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COMPETITION COMMISSION

WITNESS 1

WITNESS 2