

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 668

30 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

South African National Association for Specialised Education

(Hereinafter referred to as "SANASE")

A non-profit organisation registered in terms of the Non-profit Organisation Act, No. 79 of 1997, with registration number **016 -915 NPO** herein represented by Mamoroka Jacqueline Mehale in her capacity as the President.

(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 SANASE is the national representative organisation for governing bodies of public schools and has over 7000 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 SANASE'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 SANASE 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 SANASE recognise 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.

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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, 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 SANASE 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, School Governing Body Associations and school principals.
- 1.2.5. “SANASE” means the South African National Association for Specialised Education, a non-profit organization registered in terms of the Non-profit Organisation Act No. 79 of 1997 with registration number **016 -915 NPO**.

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- 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 or the Commission SANASE 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 SANASE 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 SANASE 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 SANASE will co-operate with each other to enable SANASE to, *inter alia*:
- 2.2.1 advocate for schools to comply with competition law principles including, *inter alia*, the School Uniform Guidelines;
- 2.2.2. assist the Commission in monitoring the compliance of schools to the provisions set out in the School Uniform Guidelines;
- 2.2.3. assist the Commission with the resolution of complaints by parents regarding non-compliance of specific schools to the pro-competitive principles governing the school uniform procurement process.

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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 the behavior of Schools, within the scope of services offered by SANASE, 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 –

Education and Awareness

- 3.2.1. Collaboration 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.

Addressing Anti-Competitive Procurement Process

- 3.2.2. Promoting and endorsing pro-competitive practices by ensuring that schools comply with the principles as follows;
- 3.2.2.1. that uniform items are as generic as possible and that unique school items are limited to only a few items;
- 3.2.2.2. that suppliers of school uniform are appointed through a competitive process;

- 3.2.2.3. that more than one supplier is appointed where it is feasible to do so;
- 3.2.2.4. that the duration of supplier contracts is limited to no longer than 5 years.

Monitoring of Compliance

- 3.2.3. The Parties shall collaborate on efforts to ensure compliance to the principles that promote pro-competitive sourcing of school uniform through actively encouraging all member schools to sign undertakings or commitment to practice pro-competitive procurement.
- 3.2.4. The Parties shall collaborate on implementation of measures and controls aimed at mitigating anti-competitive conduct by all member schools, including supporting the Commission in administering compliance related communicate to schools.
- 3.2.5. The SANASE shall assist the Commission administer its compliance measures by inter alia;
 - 3.2.5.1. collecting and collating information required by the Commission from the member schools including but not limited to compliance tracking questionnaire,
 - 3.2.5.2. providing the Commission with a status update annually on the number of undertakings signed, the number of complaints or queries received against any their member schools pertaining to school uniform, the number of schools still having exclusive MOUs in place, the number of schools still having long-term MOUs in place and any other information that would be useful for purposes of tracking of compliance.
- 3.2.6. SANASE shall provide the Commission with such status update no later

than 30 September of each year.

3.2.7. The Commission shall assess the information provided by GA and provide feedback on the compliance of member schools.

4. DEALING WITH QUERIES FROM PARENTS ON SCHOOL UNIFORM

4.1. In instances where parents, guardians or other school stakeholders have complaints regarding the procurement of school uniform by a specific school, SANASE shall assist the Commission in resolving such disputes following these principles;

4.1.1. Advising parents to refer all queries and complaints related to member schools to SANASE as the first line of resolution

4.1.2. Mediating in and taking all reasonable steps to resolve the dispute between the aggrieved party and the respective member school.

4.1.3. Advise the Commission in writing on the outcomes of the resolution of the dispute.

4.2. In the instance where SANASE is unable to successfully resolve the issue between the party lodging the query and its member school, SANASE and or the Complainant shall refer the matter to the Commission for investigation.

5. DEALING WITH THIRD PARTY COMPLAINTS ON SCHOOL UNIFORM

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


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- 5.1.1. The Commission may, in its discretion, make the CC1 Form available to SANASE.
- 5.1.2. The Commission may, in its discretion, invite SANASE 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.
- 5.2. Nothing in the procedures contained in this MOU shall:
- 5.2.1. 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;
- 5.2.2. prevent the Commission from continuing with its investigation into a complaint during or after the negotiation contemplated in this clause.
- 6. ESTABLISHMENT OF A JOINT WORKING COMMITTEE**
- 6.1. A Joint Working Committee ("the Committee") constituted by representatives of the Commission and SANASE, as nominated by the respective Parties, shall be established pursuant to this MOU and shall function on an on-going basis.
- 6.2. The functions of the Committee shall be, to:
- 6.2.1. facilitate and manage co-operation and consultation in respect of matters dealt with by each Party in terms of this MOU;
- 6.2.2. facilitate and manage awareness and capacity building programs intended to establish and maintain the necessary expertise for SANASE to be able to monitor potential anti-competitive practices and conduct of Schools;
- 6.2.3. propose, when necessary, any amendment of or supplementation to this MOU; and
- 6.2.4. advise management of both the Commission and SANASE 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.

7. INFORMATION EXCHANGE

- 7.1. Subject to clause 8, the Commission and SANASE may, in the manner set out below, request and exchange information from one another's may be necessary to give effect to this MOU.
- 7.2. 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.
- 7.3. 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:
- 7.3.1. a description of both the subject matter of the request and the purpose for which the information is sought;
 - 7.3.2. the legal provisions concerning the matter that is the subject matter of the request;
 - 7.3.3. any information in the possession of the Requesting Party that might assist the Requested Party in identifying such information; and
 - 7.3.4. the desired period of time for the reply.

8. CONFIDENTIALITY

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

- 8.2. 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.
- 8.3. 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.
- 8.4. 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.
- 8.5. 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.
- 8.6. 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.
- 8.7. 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.
- 8.8. 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.

9. CONTACT PERSONS

9.1. 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 SANASE:

Name: Mr. Siphon Nkosi

Position: Secretary General

Contact number: 084 314 4033

E-mail address: sanasesecretary@gmail.com

And

For the Commission:

Mrs. Khanyisa Qobo

Divisional Manager: Advocacy

Contact number: (012) 394 3580

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

9.2. Either Party may, by way of a letter to the other, replace its contact person referred to in clause 9.1 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.

10. GENERAL PROVISIONS

10.1. Each Party will, with regard to the implementation of this MOU and any activities


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arising from it, bear its own expenses, unless otherwise agreed upon by the Parties.

- 10.2. 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.

11. VARIATION OF THE MOU

- 11.1. 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.

12. EFFECTIVE DATE OF THE MOU

- 12.1. 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.

13. DURATION OF THIS MOU

- 13.1. 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:

13.1.1. 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;

13.1.2. way of an MOU between the Parties; or

13.1.3. operation of the law.

- 13.2. If this MoU is terminated as contemplated in clause 13.1.1, 13.1.2 or 13.1.3, 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.

14. DISPUTE RESOLUTION

14.1. 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.

15. DOMICILIUM CITANDI ET EXECUTANDI

15.1. 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

South African National Association for Specialised Education:

Address....Bright Future Special School

268 Center Road

Newlands East

4037

Contact Person: Siphonkosi, Position –Secretary General


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16. SIGNATURE

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

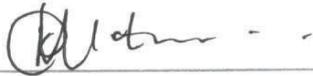


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COMPETITION COMMISSION

WITNESS 1



WITNESS 2

Signed at Polokwane on this 8th day of February 2021 by
Name: Mamoroka Jaqueline Mehale in her capacity as President, South African National
Association for Specialised Education



SOUTH AFRICAN NATIONAL ASSOCIATION FOR SPECIALISED EDUCATION



WITNESS 1

WITNESS 2