

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 724

13 August 2021

**NOTICE IN TERMS OF SECTION 79(3) OF THE COMPETITION ACT 89 OF 1998, AS AMENDED****Draft Guidelines on collaboration between competitors on localisation initiatives**

The Competition Commission (“**Commission**”) hereby, in terms of section 79(3) of the Competition Act No. 89 of 1998 (as amended) (“**Act**”), issues draft guidelines on collaboration between competitors on localisation initiatives, for public comment.

The Commission invites interested parties to submit written representations on the draft guidelines in terms of section 79(3) of the Act within 30 business days from date of publication of this notice in the Government Gazette.

The draft Guidelines on collaboration between competitors on localisation initiatives is attached hereto and can also be downloaded from www.compcom.co.za.

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CLOSING DATE FOR SUBMISSION OF COMMENTS: 27 September 2021



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Guidelines on collaboration between competitors on localisation initiatives

August 2021

Draft

1. PREFACE

- 1.1. These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) (the Act) which authorises the Competition Commission (Commission) to prepare and issue guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act. These Guidelines are not binding on the Commission, the Competition Tribunal or the Competition Appeal Court in the exercise of their respective functions in the interpretation of the Act.¹ However, any person interpreting or applying the Act is obliged to take the Guidelines into account.²
- 1.2. In response to the economic consequences of the Covid-19 pandemic, government developed the Economic Reconstruction and Recovery Plan (“ERRP”) which maps out interventions aimed at promoting inclusive growth and employment in the domestic economy. One of the key objectives of the ERRP is increased localisation – increasing the share of total procurement of an identified input from local suppliers and decreasing the share of procurement of imports of the same input.
- 1.3. Increasing localisation will stimulate economic growth and lead to greater economies of scale for local producers, greater investment locally and, ultimately, improved competitiveness in export markets in the longer term. For the purposes of this guideline, a “localisation initiative” is any project or effort to achieve greater levels of local procurement or production. Localisation initiatives may be initiated by Government or private players themselves.
- 1.4. Government-initiated localisation initiatives may include initiatives such as the Department of Trade, Industry and Competition’s (DTIC’s) CEO

¹ Section 79(2)(b) of the Act.

² Section 79(4) of the Act.

Localisation Initiative³ or localisation initiatives that arise of the DTIC's Master Plan processes⁴. In addition, localisation initiatives may be initiated by any government entity.

- 1.5. Outside of government, the Commission recognises that industry participants/market players may also wish to engage in initiatives to increase localisation in terms of the ERRP, and in line with government policy.
- 1.6. Whether led by Government or industry, collaboration amongst competitors may be required in order to advance such localisation initiatives. These guidelines have been developed to guide the process by which such collaboration between competitors may occur. For avoidance of doubt, all forms of collaboration between competitors on localisation initiatives are covered by these guidelines.
- 1.7. Given the potential for collaboration between competitors to amount to prohibited conduct in terms of the Act, these guidelines are aimed at providing guidance to industry and government as to how localisation initiatives may be appropriately identified and implemented, in a manner that does not raise competition concerns.
- 1.8. These guidelines are in respect of localisation processes and relate to collaboration amongst purchasers and/or suppliers of products earmarked for greater localisation. The Commission may from time to time update these Guidelines when necessary.

³ Under the DTIC CEO Localisation Initiative, the DTIC will explicitly task specific CEOs to lead a process of identifying products in their own supply chains where greater localisation is possible. These CEOs are best placed to identify these opportunities and collaboration may be needed to implement the initiative.

⁴ Master Plans focus on supply-side restructuring and investment in an industry, and in that respect may seek exemptions from the Competition Act as required to provide for collaboration amongst competing industry producers. Master Plans may not need to deal with the demand-side of the industry concerned but collaboration on the demand-side may be needed where there is greater scope for localisation to support the supply-side restructuring efforts.

2. DEFINITIONS

Unless the context indicates otherwise, the following terms are applicable to these Guidelines-

- 2.1. **“The Act”** means the Competition Act No. 89 of 1998, as amended;
- 2.2. **“Aggregated information”** means information which does not identify an individual firm’s competitively sensitive information;
- 2.3. **“Competitively sensitive information”** means information that is important to rivalry between competing firms and likely to have an impact on one or more of the dimensions of competition (price, output, quality, and innovation). Competitively sensitive information includes, *inter alia*, prices, customer lists, production costs, sales volumes, capacities, business plans, and investment plans;
- 2.4. **“The Commission”** means the Competition Commission, a juristic person established in terms of section 19 of the Act empowered to investigate, control and evaluate competition matters in South Africa in accordance with the Act;
- 2.5. **“The DTIC”** means the Department of Trade, Industry and Competition;
- 2.6. **“Facilitator”** refers to both an appointed independent facilitator and any government entity performing the same function as an independent facilitator;
- 2.7. **“Firm”** includes a person (juristic or natural), partnership or a trust. This may include a combination of firms that form part of a single economic entity, a division and/or a business unit of a firm;
- 2.8. **“Guidelines”** mean these guidelines which have been prepared and issued in terms of section 79(1) of the Act;

- 2.9. **“Independent facilitator”** is a person or firm, with no direct or indirect commercial links or otherwise with the industry or the concerned firm, appointed to facilitate the sharing of competitively sensitive information by individual firms, and the aggregation of such competitively sensitive information amongst firms in the industry; and
- 2.10. **“SMMEs”** means small, micro and medium-sized enterprises within the meaning of the National Small Business Act of 1996 (as amended).

3. INTRODUCTION

- 3.1. A number of industries in South Africa face decline amidst the economic consequences of the Covid-19 pandemic. The economic decline threatens job losses across the economy, in some of the most vulnerable areas of the country, and may result in the exit from the market of a significant number of players.
- 3.3. One policy route to address these concerns is to promote localisation initiatives through the ERRP. One example of such an initiative is the industry Master Plan process which aims to deliver a social compact aimed at, among other things, securing agreement amongst all stakeholders on an intervention plan to reinvigorate an industry. Master Plans typically include objectives such as preventing or reversing job losses, restoring competitiveness by increasing efficiencies and restructuring capacity, transformation through inclusive and broad-based participation in the value chain, increasing investment, and increased localisation of procurement.
- 3.4. However, localisation initiatives may also originate from industry itself or any other government department or entity in order to reinvigorate an industry or merely to capitalise on opportunities to further local procurement objectives.

4. PURPOSE

- 4.1 In achieving the objective of localisation, industry collaboration may be required. These Guidelines are aimed at providing guidance to industry and government on how industry players may collaborate in identifying opportunities for localisation and implementing commitments related to localisation initiatives in a manner that does not raise competition concerns.
- 4.2 In view of the fact that the process of implementation of such localisation initiatives is dynamic and may be iterative in nature, to the extent that other issues may arise which are not covered in these Guidelines, specific guidance on those issues may be sought from the Commission on a case-by-case basis.

5. LEGAL FRAMEWORK

- 5.1 The legal framework for assessing agreements on collaboration among competitors is found in section 4(1) of the Act. Section 4(1) of the Act states as follows:

“4. Restrictive horizontal practices prohibited

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) It has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological efficiency or other pro-competitive gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.”

5.2 Section 4(1)(a) of the Act prohibits an agreement between competitors that has the effect of substantially preventing or lessening competition, unless a party to the information exchange can prove efficiency benefits that arise from the information exchanged.

5.3 Section 4(1)(b) of the Act outright prohibits an agreement that involves:

5.3.1. the direct or indirect fixing of a purchase or selling price or any other trading condition;

5.3.2. the dividing of markets by allocating customers, suppliers, territories, or specific types of goods or services; and

5.3.3. collusive tendering.

5.4 The main difference between section 4(1)(a) and section 4(1)(b) is the opportunity given to parties in terms of section 4(1)(a) to put up an efficiency justification.

5.5 Section 4(1)(b) provides for an outright prohibition when an agreement results in the conduct listed under section 4(1)(b) and there is no opportunity for raising efficiency, pro-competitive or technological gains as a defence to the alleged anti-competitive conduct.

6. FRAMEWORK FOR COLLABORATION ON IDENTIFICATION AND IMPLEMENTATION OF LOCALISATION INITIATIVES

6.1. Collaboration around localisation initiatives may involve the following elements:

- 6.1.1. the identification of opportunities for localisation initiatives;
- 6.1.2. the process of setting industry local procurement targets;
- 6.1.3. the process of setting individual firm local procurement targets; and
- 6.1.4. demand forecasting.

Identification of opportunities for localisation initiatives

- 6.2. Potential opportunities for localisation would typically be identified by an industry player through its own knowledge of the supply chain and local procurement opportunities. In some cases, opportunities may be identified in conjunction with government or identified by government itself. An industry player may engage with its suppliers around the potential for expansion of local supply at any stage, however this must not involve acquiring the competitively sensitive information of competitors.
- 6.3. Following the identification of a candidate product, the scope for localisation in aggregate across an industry must be assessed, at which point collaboration between competitors would be required. In order to do this, an independent facilitator must be appointed or the government entity itself may act as the facilitator.
- 6.4. The facilitator must engage with firms on a bilateral basis in order to determine the aggregate level of localisation across the industry, and the scope for increasing it.
- 6.5. Securing agreement amongst firms on a specific product for a localisation initiative may require discussion between competing firms that must be led by the facilitator. Only aggregated information on volumes and percentages

of the identified product may be shared by the facilitator. No firm-specific competitively sensitive information may be shared, including prices, procurement, or business plans. The focus of such a meeting is to reach agreement on whether there are prospects to increase localisation of the identified product and discussions must be minuted.

- 6.6. Following identification of the product, guidance on how targets may be agreed and achieved through collaboration are covered below.

The process of setting industry localisation targets

- 6.7. The process of setting industry level localisation targets may require discussions among competitors. These discussions must be led by the appointed independent facilitator or the government entity where it acts as the facilitator.
- 6.8. No competitively sensitive information must be shared or discussed among firms in the collective discussions on localisation.
- 6.9. Only aggregated information on the percentage and volumes of industry data may be shared and discussed among firms.
- 6.10. The final industry targets must be determined by the facilitator. In determining the industry targets, the facilitator may obtain competitively sensitive information on a bilateral and confidential basis separately from each individual firm, and this individual firm information may not be shared or discussed in the collective discussions among competitors.
- 6.11. The participation by firms in the discussions on any localisation initiative within the provisions of these guidelines does not amount to a contravention of section 4(1) of the Act.

The process of setting individual firm localisation targets

- 6.12. The process of setting individual firm localisation targets in the implementation of any localisation initiative must be conducted on a bilateral and confidential basis between the facilitator and the individual firm.
- 6.13. The facilitator may obtain competitively sensitive information from an individual firm for the purpose of reaching an agreement with the firm on its localisation target, and this information may not be shared with other market participants.
- 6.14. An agreement between the facilitator and firms on individual localisation targets, facilitated by the facilitator, may not amount to a contravention of section 4(1) of the Act.
- 6.15. Progress reports on the achievement of milestones set out in the individual firm's localisation plan must be submitted to the facilitator on a bilateral and confidential basis, whereafter the facilitator may aggregate the information for any other purpose.

Demand forecasting

- 6.16. A localisation initiative may also include industry commitments to providing demand forecasting guidance to input suppliers to facilitate industry planning against the availability of the input and supply commitments.
- 6.17. In such cases, the demand forecasting guidance provided to suppliers must only contain aggregated information and must not contain firms' individual procurement plans and information.

7. CONCLUSION

- 7.1. These Guidelines set out the Commission's approach to collaboration in the identification and implementation of industry commitments on localisation initiatives initiated by government entities or industry players.
- 7.2. In accordance with the provisions of section 79(4) of the Act, the Commission will not regard collaboration on local procurement which is conducted in accordance with these Guidelines as a contravention of section 4(1) of the Act. As specified above, these Guidelines do not provide for any localisation initiative that may contravene section 4(1)(b) of the Act.
- 7.3. These Guidelines do not set out all the permutations of collaboration that may be required for localisation initiatives and do not fetter the discretion of the Commission to consider other forms of collaboration on localisation a case-by-case basis, considering the market context and the nature of the collaboration.
- 7.4. Collective discussions on localisation initiatives involving competitors and/or firms in the value-chain must be notified to the Commission within a reasonable time and all ensuing discussions must be minuted. The Commission may request access to these minutes or recordings of such meetings at any time.
- 7.5. Localisation initiatives contemplated in these guidelines must, where practical, be inclusive of firms in the affected industry, particularly SMMEs and firms owned by historically disadvantaged persons.
- 7.6. Should market participants be uncertain as to whether any other collaboration on increasing local procurement may potentially contravene the Act, they may approach the Commission for further guidance.

8. EFFECTIVE DATE AND UPDATES

- 8.1. These Guidelines become effective on the date of publication in the Government Gazette and may be updated by the Commission as necessary.

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