

GUIDELINES ON COLLABORATION BETWEEN COMPETITORS ON LOCALISATION INITIATIVES

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1 Preface

- 1.1 These Guidelines have been prepared in terms of section 79(1) of the Competition Act 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. * However, any person interpreting or applying the Act is obliged to take the Guidelines into account. †
- 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 localisation – increasing the level of local production or services.
- 1.3 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 localisation through increasing the share of total procurement of an identified input from local suppliers. Localisation Initiatives may be initiated by any government ‡ department, industry, trade union or non-governmental organisation (NGO).
- 1.4 Government-initiated Localisation Initiatives may include initiatives such as the Department of Trade, Industry and Competition's (DTIC's) CEO Localisation Initiative § or Localisation Initiatives that arise out of the DTIC's Master Plan

* Section 79(2)(b) of the Act.

† Section 79(4) of the Act.

‡ This can be any government department or public entity.

§ Under the DTIC CEO Localisation Initiative, the DTIC will explicitly task specific CEOs to lead a process of identifying products or services 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.

processes. ** In addition, Localisation Initiatives may be initiated by any government entity, trade union or a NGO.

- 1.5 Outside of government, the Commission recognises that industry participants, market players and other entities 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, industry, trade union or a NGO, 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, any government, industry-led, trade union or NGO 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 section 4(1) of the Act, these Guidelines are aimed at providing guidance to industry, government, trade unions, NGO and other interested entities as to how Localisation Initiatives may be appropriately identified and implemented, in a manner that does not raise competition concerns.
- 1.8 These Guidelines cover any form of Localisation Initiative, including but not limited to the DTIC's CEO Localisation Initiative, the DTIC's Master Plan processes, Localisation Initiatives initiated by a government entity and industry-led Localisation Initiatives. These Guidelines are applicable to firms, trade unions or NGOs that have voluntarily chosen to participate in a Localisation Initiative.
- 1.9 The Commission may from time to time update these Guidelines when necessary.

2 Definitions

Unless the context indicates otherwise, the following terms are applicable to this Guideline-

- 2.1 '**The Act**' means the Competition Act 89 of 1998, as amended;
- 2.2 '**Aggregated information**' means information which does not identify an individual firm's competitively sensitive information or allow for any individual firm's competitively sensitive information to be inferred;
- 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 '**Competitors**' means Firms in a horizontal relationship or at the same level of the market;
- 2.5 '**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;
- 2.6 '**The DTIC**' means the Department of Trade, Industry and Competition;

** Master Plans focus on often-extensive supply-side restructuring and investment in an industry, and in that respect may seek exemptions from the Competition Act as required to provide for the kind of collaboration required 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.

†† These guidelines do not affect the application of the *South African Value Chain Sugarcane Master Plan to 2030* published in *Government Gazette* 44866 on 16 July 2021 ('Sugarcane Master Plan Guidelines') and should not be read to be in conflict with the collaboration processes in the Sugar industry as provided for in the Sugarcane Master Plan Guidelines.

- 2.7 **'Facilitator'** refers to both an appointed Independent Facilitator and any government entity performing the same function as an Independent Facilitator;
- 2.8 **'Firm'** includes a person (juristic or natural), partnership or a trust;
- 2.9 **'Guidelines'** mean these Guidelines which have been prepared and issued in terms of section 79(1) of the Act;
- 2.10 **'Historically disadvantaged persons'** means a Historically disadvantaged person as defined in sections 3(2)(a) to (d) of the Act;
- 2.11 **'Independent Facilitator'** is a person or firm, with no direct or indirect interest in the relevant Firms, appointed, *inter alia*, to facilitate the sharing of Competitively sensitive information by individual firms, and the aggregation of such competitively sensitive information amongst firms in the industry;
- 2.12 **'Individual targets'** means Firm-specific targets as determined by the Facilitator by agreement with the Firm;
- 2.13 **'Industry'** means Firms that are engaged in similar kinds of productive activities;
- 2.14 **'Industry target'** means the aggregate or collective target for the Firms that are party to a Localisation Initiative, set in agreement between the Facilitator and the Firms;
- 2.15 **'Localisation'** means increasing the level of local production or services;
- 2.16 **'Localisation Initiative'** is any project or effort to achieve greater levels of Localisation through increasing the share of total procurement of an identified input from local suppliers;
- 2.17 **'NGO'** means a trust, company or other association of persons (a) established for a public purpose; and (b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered;
- 2.18 **'SMMEs'** means small, micro and medium-sized enterprises within the meaning of the National Small Business Act 105 of 1996 (as amended); and
- 2.19 **'Trade union'** means an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations.

3 Introduction

- 3.1 A number of industries in South Africa face decline amidst the economic consequences of the Covid-19 pandemic. This 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.
- 3.2 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.
- 3.3 However, Localisation Initiatives may also originate from industry itself, a trade union, a NGO, or any other government department or public 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 between competitors 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 agreement can prove efficiency benefits that arise from the agreement.
- 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.

⁺⁺ To be substituted by s. 3(a) of Act 18 of 2018 with effect from a date fixed by the President by proclamation in the *Gazette* – date not determined.

6 Framework for collaboration on identification and implementation of Localisation Initiatives

- 6.1 Subject to para. 6.2, the nature of the Localisation Initiative is to be determined by the parties themselves. In other words, Localisation Initiatives will be led by the facilitator and firms participating in the Localisation Initiative.
- 6.2 Collaboration by firms in respect of Localisation Initiatives with respect to increasing local procurement may involve the following elements:
 - 6.2.1 the identification of opportunities for Localisation Initiatives;
 - 6.2.2 the process of setting industry local procurement targets;
 - 6.2.3 the process of setting individual firm local procurement targets; and
 - 6.2.4 demand forecasting.
- 6.3 Each of these stages is discussed below.
Identification of opportunities for Localisation Initiatives
- 6.4 Potential opportunities for localisation may be identified by an industry player or an industry association, government, trade union or a NGO through its own knowledge of the supply chain and local procurement opportunities. An industry player may, on an individual and bilateral basis, engage any of its suppliers around the potential for expansion of local supply, however this must not involve acquiring the competitively sensitive information of competitors.
- 6.5 Following the identification of a candidate product or service, the scope for localisation in aggregate across an industry must be assessed, at which point collaboration between competitors and collaboration by a trade union or a NGO would be required. In order to do this, an independent facilitator must be appointed, or the government entity itself may act as the facilitator.
- 6.6 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.
- 6.7 Securing agreement amongst firms on a specific product or service for a Localisation Initiative may require collective discussion between competing firms that must be led by the facilitator. Only aggregated information on volumes and percentages of the identified product or service 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 collective discussion is to reach agreement on whether there are prospects to increase localisation of the identified product or service and discussions must be minuted.
- 6.8 Following identification of the product or service, guidance on how targets may be agreed and achieved through collaboration are covered below.
The process of setting industry localisation targets
- 6.9 The process of setting industry-level localisation targets may require discussions among competitors. These discussions must be led by the facilitator.
- 6.10 No competitively sensitive information must be shared or discussed among firms in the collective discussions on localisation.
- 6.11 Only aggregated information necessary for purposes of the Localisation Initiative, on the percentage and volumes of industry data, may be shared and discussed among firms.
- 6.12 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.

- 6.13 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

- 6.14 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.
- 6.15 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.
- 6.16 An agreement between the facilitator and firms on individual localisation targets, facilitated by the facilitator, will not amount to a contravention of section 4(1) of the Act.
- 6.17 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, and the facilitator may aggregate the information for publication to the industry.

Demand forecasting

- 6.18 A Localisation Initiative may also include industry commitments to providing demand forecasting guidance to individual input suppliers to facilitate industry planning against the availability of the input and supply commitments. This industry planning should not imply that suppliers are permitted to collaborate to meet the forecasted demand.
- 6.19 In such cases, the demand forecasting guidance provided to suppliers must only contain aggregated information and must not contain firm's individual procurement plans and information.

7 The facilitator

Role of the Facilitator

- 7.1 The facilitator will, *inter alia*, assist firms to determine the content of the Localisation Initiative as per the framework for collaboration on identification and implementation of Localisation Initiatives set out in paragraph 6 above.
- 7.2 The facilitator will monitor the progress on industry targets and individual targets.
- 7.3 The facilitator will provide guidance to assist the industry to meet the proposed industry targets.
- 7.4 The facilitator must, *inter alia*, keep a record of the minutes of all meetings in respect of the Localisation Initiative, a record of all the competitively sensitive information received from firms, and a record of the aggregated competitively sensitive information including the manner in which the competitively sensitive information was aggregated.
- 7.5 The facilitator will share only aggregated information with firms involved in the Localisation Initiative.
- 7.6 The facilitator must submit the following information to the Commission, *before* sharing aggregated information with firms:
- 7.6.1 the disaggregated competitively sensitive information received from firms;
 - 7.6.2 the aggregated information which is intended to be shared with firms; and
 - 7.6.3 an explanation of the manner in which the disaggregated competitively sensitive information was collated to form the aggregated information which is intended to be shared with firms.

- 7.7 The facilitator will assist firms to resolve any disputes in relation to a Localisation Initiative amicably.

Appointment Process

- 7.8 In relation to a government-led Localisation Initiative, the relevant government department which initiates the Localisation Initiative will appoint the facilitator.
- 7.9 In relation to a Localisation Initiative led by industry, trade union or a NGO, the participating firms in the industry must appoint an independent facilitator.

Reporting

- 7.10 The facilitator shall report to the relevant government department if the Localisation Initiative is government-led.
- 7.11 The independent facilitator shall report to the participating firms in the industry if it is an industry-led, or any other, Localisation Initiative.

Costs and Fees

- 7.12 For a government-led Localisation Initiative, the costs must be agreed with government and the firms participating from industry.
- 7.13 For an industry-led Localisation Initiative, or a Localisation Initiative led by any other entity, the costs must be agreed between the firms, trade union or NGO participating from industry and the independent facilitator.

Publication

- 7.14 Any information in relation to industry targets may be published. However, this information must be aggregated information and must not contain competitively sensitive information.
- 7.15 The aggregated information contemplated in 7.14 may be provided to the DTIC.

8 Notification

- 8.1 Firms that wish to embark on a Localisation Initiative must notify, in writing, such Localisation Initiative to the Commission to allow for the assessment of whether the initiative may raise competition concerns.
- 8.2 Firms may discuss the proposed Localisation Initiative in line with these Guidelines before notifying the Commission with a proposed framework in respect of such Localisation Initiative.

9 Monitoring

- 9.1 The Commission shall be entitled, at any time, to request from the facilitator any information or records collected in terms of *inter alia* paragraph 7.4 above. This information includes but is not limited to:
- 9.1.1 minutes of meetings;
 - 9.1.2 all communications between the facilitator and firms;
 - 9.1.3 competitively sensitive information received by the facilitator; and
 - 9.1.4 the aggregation of competitively sensitive information received by the facilitator as well as the format of the aggregated information shared with firms.
- 9.2 The facilitator shall comply with the Commission's request for information within a reasonable time.
- 9.3 The facilitator shall retain competitively sensitive information for a period of at least 5 (five) years after the Localisation Initiative.

10 Winding down of the Localisation Initiatives

- 10.1 The Commission will provide a reasonable opportunity for firms to unwind the Localisation Initiative in the event of withdrawal and/or amendment of these Guidelines.

11 Conclusion

- 11.1 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, industry, trade union or a NGO.
- 11.2 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) of the Act.
- 11.3 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 on a case-by-case basis, considering the market context and the nature of the collaboration. Firms or other entities may write to the Commission for guidance on industry-specific queries related to Localisation Initiatives and on other forms of collaboration for localisation objectives not contemplated in these Guidelines which may require an exemption.
- 11.4 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.
- 11.5 Should firms be uncertain as to whether any other collaboration on increasing localisation may potentially contravene the Act, they may approach the Commission for further guidance.

12 Effective date and updates

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