

ENERGY SUPPLIERS BLOCK EXEMPTION, 2023

Published under

GN 3446 in GG 48650 of 24 May 2023

NOTICE IN TERMS OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

(1) I, Ebrahim Patel, Minister of Trade, Industry and Competition, after consultation with the Competition Commission, hereby in terms of section 10(10) read with section 78(1) of the Competition Act, 1998 (Act 89 of 1998) as amended (the Competition Act), make the regulations as set out in the Schedule hereto.

(2) The purpose of these Regulations is to give effect to the purposes of the Competition Act as set out in section 2 of the Competition Act by exempting a category of agreements or practices by energy and related product and service suppliers from the application of sections 4(1)(a), 4(1)(b)(i) (excluding the fixing of the selling prices of goods and services to customers or consumers), 4(1)(b)(ii) and 5(1) of the Competition Act in response to the electricity supply constraint:

- (a) solely with the purpose of enabling collaboration to:
 - (i) increase and optimise the supply of energy in the market; or
 - (ii) reduce costs of energy supply; or
 - (iii) secure shared or adjacent sites, infrastructure, equipment and facilities.
- (b) in order to contribute to regulatory measures aimed at the prevention of the escalation of the electricity supply constraint.

(3) These Regulations will come into effect on the date of publication hereof in the *Gazette*.

(Signed)

EBRAHIM PATEL

Minister of Trade, Industry and Competition

DATE: 23 MAY 2023

SCHEDULE

Definition

(1) In these Regulations any word or expression to which a meaning has been assigned in the Act shall bear that meaning and, unless the context otherwise indicates-

'Act' means the Competition Act 89 of 1998, as amended;

'Energy and Related Products and Services Suppliers' means firms that are suppliers of Energy and Related Products and Services, including all forms of energy supply;

'Energy and Related Products and Services' means all forms of energy supply (including electricity, natural gas, liquified petroleum gas, diesel, liquified natural gas, paraffin), related products (eg inverters, batteries, solar panels, wind turbines, generators), inputs (eg coal) or services (eg storage, installation) in the supply of the energy to energy users;

'Electricity Supply Constraint' means constraints in the supply of national energy requirements through the national grid;

'HDP Firms' means firms owned and controlled by historically disadvantaged persons in terms of section 3(2) of the Act;

'SMMEs' means small business, micro business or medium-sized business as defined by the Minister in *Government Gazette* 987 of 12 July 2019 or its successor in title, or business, as the context dictates and as defined by section 1 of the Act;

'the Commission' means the Competition Commission, a juristic person established in terms of section 19 of the Act; and

'the dtic' means the Department of Trade, Industry and Competition.

Purpose

(2) The purpose of these Regulations is to give effect to the purposes of the Act as set out in section 2 of the Act by exempting a category of agreements or practices by energy and related product and service suppliers from the application of sections 4(1)(a), 4(1)(b)(i) (excluding the fixing of the selling prices of goods and services to customers or consumers), 4(1)(b)(ii) and 5(1) of the Act in response to the electricity supply constraint:

- (a) solely with the purpose of enabling collaboration to:
 - (i) increase and optimise the supply of energy in the market; or
 - (ii) reduce costs of energy supply; or
 - (iii) secure shared or adjacent sites, infrastructure, equipment and facilities.
- (b) in order to contribute to regulatory measures aimed at the prevention of the escalation of the electricity supply constraint.

Category of agreements or practices exempted

(3) Subject to regulations 4 and 6, the Minister hereby exempts the following categories of agreements or practices among energy and related product and service suppliers from the application of sections 4(1)(a), 4(1)(b)(i) (excluding the fixing of the selling prices of goods and services to customers or consumers), 4(1)(b)(ii) and 5(1) of the Act:

- (a) Agreements or practices concluded among energy and related product and service suppliers with the sole purpose of increasing supply capacity in the market and optimising energy supply only through:
 - (i) Joint investment in shared energy infrastructure; or
 - (ii) Joint financing and risk-sharing in energy projects; or
 - (iii) Joint training and skills development; or
 - (iv) Collaboration on optimising the level and timing of energy supply.
- (b) Agreements or practices concluded among energy and related product and service suppliers with the sole purpose of reducing the cost or improving the efficiency of energy supply only through:
 - (i) Joint negotiation and purchasing of energy supply inputs and related products or services; or
 - (ii) Joint procurement and the sharing of security services for purposes of securing infrastructure.

Exclusions

(4) These Regulations exclude:

- (a) Any discussion and/or agreement on fixing of the selling prices of goods and services to customers or consumers;
- (b) Collusive tendering; and

- (c) Resale price maintenance.

HDP and SMME participation

(5) HDP firms and SMMEs at all levels of the value chain must be afforded an opportunity to opt-in to agreements or practices entered into in terms of these Regulations.

In-scope confirmation by the Commission

(6) Energy and related product and service suppliers that wish to enter into agreements or engage in practices covered by the exemption contained in these Regulations must first seek confirmation from the Commission in writing whether the agreement or practice falls within the scope of these Regulations before implementation.

(7) The Commission may:

- (a) confirm in writing that the agreement or practice falls within the scope of these Regulations with or without safeguards necessary to ensure that the collaboration among energy and related product and service suppliers is limited to the agreements or practices contemplated in regulation 3; or
- (b) if the agreement or practice does not fall within the scope of these Regulations, advise energy and related product and service suppliers accordingly.

(8) No agreement or practice contemplated in these Regulations may be implemented unless confirmation has been provided by the Commission in terms of regulation 7.

(9) The Commission must make the decision contemplated in regulation 7 within 30 business days of receipt of the request for confirmation.

(10) If the Commission has not made a decision within the period contemplated in regulation 7, the agreement or practice shall be regarded as having been confirmed as falling within the scope of these Regulations.

Revocation of confirmation

(11) The Commission may revoke the confirmation granted in terms of regulation 7 if:

- (a) there is a breach of safeguards made in terms of subregulation 7(a); or
- (b) the collaboration among the firms exceeds the exemption granted in terms of these Regulations; or
- (c) the confirmation was granted on the basis of false information; or
- (d) the reason for granting the confirmation no longer exists.

Scope of the exemption

(12) The scope of these Regulations is limited only to agreements or practices specified under regulation 3, and which have the sole purpose of responding to the electricity supply constraint as set out in regulation 2.

(13) The agreements or practices exempted in these Regulations include the exchange of information strictly necessary for the purposes of the conclusion and implementation of the agreements or practices.

Monitoring

(14) Energy and related product and service suppliers who participate in any agreements or practices falling within the scope of these exemptions must notify the Commission and the dtic of the agreement or practice within 7 business days of its implementation via the following:

- (a) Notification to the Commission should be sent to exemption.conditions@compcom.co.za.
- (b) Notification to the dtic should be sent to exemption.conditions@thedtic.gov.za.

(15) Energy and related product and service suppliers who participate in any agreements or practices falling within the scope of these exemptions must keep accurate written records of meetings held, correspondence related to the exempted agreements and practices, exchanges of competitively sensitive information strictly necessary for the purposes of the conclusion and implementation of the agreements or practices, and all agreements or practices entered into in terms of these Regulations.

(16) The Commission may, at any time, request the record of the minutes of meetings held, correspondence related to the exempted agreements and practices, exchanges of competitively sensitive information strictly necessary for the purposes of the conclusion and implementation of the agreements or practices, and all agreements or practices entered into in terms of these Regulations.

Amendments to regulations

(17) The areas of collaboration exempted in these Regulations may be expanded or reduced by the Minister by notice published in the *Government Gazette* in terms of these Regulations.

Short title

(18) These Regulations shall be called the Energy Suppliers Block Exemption, 2023.

Commencement and duration

(19) These Regulations come into effect on the date of publication in the *Government Gazette*.

(20) These Regulations remain in operation until withdrawn by the Minister taking into account the state of the electricity supply constraint.

Winding down of agreements and practices

(21) The Minister may, by notice in the *Government Gazette*, provide a reasonable period to energy and related product and service suppliers that have entered into agreements or practices contemplated in these Regulations, to wind down such agreements or practices before the withdrawal of these Regulations.