

ENERGY USERS BLOCK EXEMPTION, 2023

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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 users 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) secure backup or alternative energy supply; or
 - (ii) reduce energy costs; or
 - (iii) promote the optimisation and efficient use of energy supply; or
 - (iv) 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 Competition Act shall bear that meaning and, unless the context otherwise indicates-

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

'Energy Users' means firms that are users of energy supply, including all forms of energy supply;

'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 users 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) secure backup or alternative energy supply; or
 - (ii) reduce energy costs; or
 - (iii) promote the optimisation and efficient use of energy supply; or
 - (iv) 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 regulation 4, the Minister hereby exempts the following categories of agreements or practices among energy users 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 among energy users to secure backup or alternative energy supply only through:
 - (i) Joint procurement of backup or alternative energy supply, including power purchase agreements; or
 - (ii) Sharing of backup and energy generation capacity, including energy generation equipment.
- (b) Agreements or practices among energy users to reduce the cost or to promote the efficient use of energy supply only through:
 - (i) Joint negotiation and purchase of energy and related product and service supply, including power purchase agreements; or
 - (ii) Joint financing of backup and alternative energy supply; or
 - (iii) Joint purchasing of shared backup and alternative energy generation capacity.
- (c) Agreements or practices among energy users to alleviate, contain and minimise the effects of the electricity supply constraint on operations only through:
 - (i) Energy use, saving and optimisation initiatives to limit operational downtime and reduce energy demand; or
 - (ii) Joint procurement and the sharing of the provision of security services for purposes of securing shared or adjacent sites, infrastructure, equipment and facilities; or
 - (iii) Planning, coordination, maintenance and monitoring the performance of energy-related installations.

Exclusions

- (4) These Regulations exclude:

- (a) The 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.

Scope of the exemption

(6) 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.

(7) 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.

Amendments to regulations

(8) 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.

Monitoring

(9) Energy users 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.

(10) Energy users may request clarification from the Commission on whether any proposed agreements or practices fall within the scope of these Regulations.

(11) Energy users 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.

(12) 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.

Short title

(13) These Regulations shall be called the Energy Users Block Exemption, 2023.

Commencement and duration

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

(15) 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

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