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Sparking Entry into the Electricity Market

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Solar energy remains a desirable source of electricity for businesses even "after" loadshedding, but high costs can be prohibitive. The **DTIC**'s Block Exemptions for Energy Suppliers and for Energy Users want to facilitate access to solar power by permitting collaboration between competitors. They do, however, not seem to have drawn much attention. Is there still a role to play for these Block Exemptions and, if so, what can be done to make them more attractive?

Introduction

Loadshedding ended in March 2024 (for now) but at their Blue-Bag Media Information Session on 28 August 2024 ("**Blue-Bag Session**"), the Competition Commission ("**Commission**") and the Department of Trade, Industry and Competition ("**DTIC**") said policy pressure (locally and internationally) should continue the solar power infrastructure drive. The Blue-Bag Session follows the Commission's Survey Findings on Renewable Energy Products of November 2023[1] ("**Renewables Survey**") and the twin Energy Supplier Block Exemption regulations and Energy User Block Exemption regulations (**"the Block Exemptions**"), published 24 May 2023[2] under the Competition Act no. 89 of 1998 ("**the Competition Act**").

The Block Exemptions encourage collaboration between competing energy suppliers or users to stabilise the constrained energy grid by protecting them against prosecution for participating in certain agreements otherwise outlawed by the Competition Act. This is in the hope to increase and optimise the supply of energy; reduce costs of energy; and secure sharing of sites and infrastructure. However, despite loadshedding continuing for nine months after the Block Exemptions came into force, there have been no announcements indicating that energy suppliers or users are taking up the invitation.

Two questions arise: Are the Block Exemptions still relevant? If so, why the limited appetite to invoke them?

The Block Exemptions Remain Relevant

Even without loadshedding or policy pressure, the Block Exemptions can still benefit businesses.

The Renewables Survey established that businesses acquiring solar energy infrastructure purchased the equipment from an importing local supplier almost 50% of the time and in an additional 13% of instances imported the equipment themselves[3]. Scale matters when negotiating prices with large overseas manufacturers. Helpfully, the Block Exceptions sanction agreements amongst energy user or suppliers with the sole purpose of reducing the cost or improving the efficiency of energy supply through joint negotiation and purchasing of power and of energy supply inputs[4]. Thus the Block Exemptions offer a tool to negotiate better discounts with foreign suppliers.

The Renewables Survey also found that 45% of businesses regard the cost of renewable energy products as very high[5], with 23% having paid "*more than R501 000*" for a bundle of solar PV panels, inverter and/or storage batteries[6]. The Commission thus concluded that there is a "*potential affordability barrier for small and medium enterprises*", recommending policy interventions to "*(f)acilitate financial mechanisms aimed at lowering any economic barriers for … small businesses, expanding access to renewable energy solutions*"[7]. Again, the Block Exemptions are relevant to this concern as they promote the interests of SMMEs, expressly requiring SMMEs to be afforded an opportunity to opt-in to exempted agreements at all levels of the value chain[8].

Lastly, the Renewables Survey points out that although there are many competitors supplying renewable energy products, businesses expressed a view that there "*is a widespread practice of uniform pricing strategies by suppliers in the market which results in similar prices*"[9]. As a result, one of the policy interventions articulated in the Renewables Survey is the investigation of "*collusion amongst competing suppliers*"**[10]**. Indeed, Business Day reports that at the Blue-Bag Session the Commission warned that "*(e)nergy related*

*complaints are being prioritized. We also hope that the results of our Survey will create more awareness and encourage the public to bring us any complaints they have on… collusion in the market for renewable products"***[11]**. That this is no idle threat is evident from the Commission's settlement with Victron Energy BV, approved by the Competition Tribunal on 26 July 2024[12], in a complaint referral for alleged minimum resale price maintenance in contravention Section 5(2) of the Competition Act. This manufacturer of solar power equipment stood accused of requiring its distributors to honour its prescribed maximum discount of 10% to 15% off its published recommended retail price list. Although settling without admitting a contravention of the Competition Act, Victron agreed to a hefty penalty of R14 232 581. Energy suppliers and users would therefore be well advised to utilise the safe harbour offered by the Block Exemptions to avoid the real risk of prosecution.

Why the Seemingly Limited Interest in the Block Exemptions?

Online news website the Bulrushes[13] reports that at the Blue-Bag Session the **dtic** called for a collective effort to develop the renewable energy sector and unlock its potential while Business Tech quotes the Commission as saying "*the increasing demand by … businesses for renewable energy products in South Africa requires policymakers and regulators to facilitate policy interventions that can address their energy access needs"***[14]**.

As such, the apparent disinterest in the Block Exemptions suggests they should be reconsidered to render them more attractive.

Mr Fourie of the **dtic** informed the Blue-Bag Session that "*the Energy One Stop Shop, a presidential initiative established within the* ***dtic****, said that bottlenecks when attempting to get authorisation is inhibiting expansion".*

Although perhaps not referring to the Block Exemptions, this observation may, ironically, point to one reason for them being unattractive: the Block Exemptions require energy suppliers and energy users to notify the Commission and **dtic** when implementing exempted agreements. Even more onerous, energy users must first obtain written confirmation from the Commission that their proposed agreement is "*in-scope*". Lastly, participants "*must keep accurate written records of meetings held, correspondence to the exempted agreements…, exchanges of competitively sensitive information strictly necessary for the purposes of the conclusion and implementation of the agreements…"*, which records the Commission may request at any time.[15]

These notifications and authorisation obligations burden the Block Exemptions with red tape, potentially creating hesitation amongst prospective participants. Our Competition Act creates no general obligation on competitors to report agreements with each other, nor do the European Union's block exemptions require it. Why the Block Exemptions do so is unclear (the draft Block Exemptions, which went further and required "approval" from the Commission, did not give an explanation for this requirement[16]). Given the Commission's reputation for relentlessly prosecuting collusion complaints and extracting severe administrative penalties, it would not be surprising if potential participants were to shy away from the Commission's radar.

This begs the question: If the exempted agreement categories[17] are clearly formulated then why add oversight functions?

Conclusion

Even absent loadshedding, the Block Exemptions remain relevant to energy suppliers and users and an important policy intervention for the **dtic**. Their attractiveness may well be improved by removing the unnecessary red tape of authorisation and notification requirements.

Regardless, competitors in the renewable energy market intending to collaborate should carefully avoid conduct falling outside the Block Exemptions' protective scope and comply with all requirements imposed. It is indeed prudent to seek legal advice before entering into agreements intended to be exempted.

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[1] https://www.compcom.co.za/wp-content/uploads/2024/08/CC_Renewable-Energy-Findings_Proof4.pdf

[2] GnR 3446 in *Government Gazette* No. 48650 and GnR 3447 in *Government Gazette* No. 48651

[3] Page 9

[4] Paragraph 3(b)(i) in the Schedule to each of the Block Exemptions

[5] Paragraph 4.7, page 15

[6] Paragraph 4.4, page 10

[7] Page 16

[8] Paragraph 5 in the Schedule to each of the Block Exemptions

[9] Paragraph 4.7, page 15

[10] Page 16

[11] https://www.businesslive.co.za/bd/national/2024-08-28-competition-watchdog-wants-more-regulation-in-renewables-market/

[12] Tribunal case no. CR146Dec23/SA042Jun24

[13] https://thebulrushes.com/2024/08/29/sa-must-transition-toward-low-carbon-intensive-economy-to-avoid-serious consequences/

[14] https://businesstech.co.za/news/energy/788605/changes-coming-for-inverters-batteries-and-solar-in-south-africa/

[15] Paragraphs 6 to 10 and 14 to 16 in the Schedule to the Energy Suppliers Block Exemption and paragraphs 9, 11 and 12 in the Schedule to the Energy User Block Exemption

[16] GnR 3122 and GnR 3123 of *Government Gazette 48182*. See paragraphs 6 and 7 of GnR 3122

[17] Paragraph 3 in the Schedule to each Block Exemption

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