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COMPETITION

Taking the Collusion out of Collaboration between Competitors

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The Competition Commission's 2022 'Guidelines on Collaboration Between Competitors on Localisation Initiatives' and avoiding cartel conduct

Pursuant to Section 79(1) of the Competition Act 89 of 1998 (**the Act**) the Competition Commission (**Commission**) this year[1] issued "*Guidelines on Collaboration Between Competitors on Localisation Initiatives*" (**the Guidelines**). The Guidelines were issued in response to the government's newly developed Economic Reconstruction and Recovery Plan (ERRP)[2]. The ERRP sets out interventions aimed at promoting inclusive growth, employment in the domestic economy, and increasing the level of local production or services under the umbrella of 'Localisation'[3]. Localisation being one of the ERRP's key objectives amidst the economic decline faced by South African industries because of the Covid-19 pandemic. Though the ERRP is a government initiative specifically involving the public sector, the Guidelines state that the Commission recognises that industry participants, market players and other entities in the private sector may also wish to engage in initiatives to increase Localisation in terms of the ERRP. The Guidelines provide guidance on permissible collaboration between competitors (whether government or industry-led) and the processes to follow to ensure compliance.

The Guidelines consist of four elements, compliance with which is stated[4] to ensure permissible collaboration between competitors –

1. the identification of opportunities for Localisation Initiatives;
2. the process of setting industry local procurement targets;
3. the process of setting individual firm local procurement targets; and
4. demand forecasting.

1. Identification of opportunities for Localisation Initiatives

Businesses, governments, trade unions, NGOs or industry associations may, on an individual or bilateral basis, identify opportunities for Localisation in a market through their own knowledge of the market. However, this process of identification must not result in competitors acquiring Competitively Sensitive Information[5] of others.

Following an identification of a candidate product or service, an Independent Facilitator[6] must be appointed to assess the scope for Localisation in aggregate across the relevant industry at the point of the projected collaboration between the competing firms.

Additionally, the Independent Facilitator must engage the collaborating firms on a bilateral basis to determine the aggregate level of Localisation across the relevant industry and delineate the scope for increasing such Localisation.

Where securing an agreement between competing firms on a specific product or service for a Localisation initiative requires a collective discussion between competing firms, such discussion must;

- be led by the Independent Facilitator who will only share Aggregated Information[7] on volumes and percentages of the identified product or service;

- not include firm-specific Competitively Sensitive Information such as prices on procurement or business plans; and
- be minuted.

2. The process of setting industry local procurement targets

According to the Commission, firms who participate in discussions on Localisation initiatives in compliance with Guidelines will not be engaging in prohibited collusion or contravene section 4(1) of the Act. As the process of setting industry Localisation targets may require discussions among competitors, such discussions must again be led by an Independent Facilitator.

This is to ensure that no Competitively Sensitive Information is shared or discussed among competitors – only Aggregated Information necessary and relevant to the Localisation initiative. Ultimately, it is for the Independent Facilitator to set the final industry targets by, *inter alia*, obtaining Competitively Sensitive Information on a bilateral basis separately from each participating competitor.

3. The process of setting individual firm local procurement targets

The setting of individual firm Localisation targets must be done on a bilateral basis between the individual participating competitor and the Independent Facilitator. The Independent Facilitator will obtain Competitively Sensitive Information from each such firm on a confidential basis, which information shall not be shared with competitors and/or market participants.

Each participating competitor shall agree a Localisation plan and Individual target with the Independent Facilitator. Thereafter, the participating competitor must submit progress reports on the achievement of its Localisation plan and target. The Independent Facilitator will collate and aggregate these reports before publishing the Aggregated Information to the relevant industry or market

4. Demand forecasting

The Guidelines allow for participants to a Localisation initiative to perform demand forecasting, i.e. to estimate the future demand for a product or service. This is because the Commission acknowledges that to facilitate industry planning against the availability of the input and supply commitments, a Localisation initiative may require industry commitments to provide guidance to individual input suppliers.

The Guidelines caution, however, that such industry planning does not imply that suppliers are permitted to collaborate to meet the forecasted demand.

Monitoring

Firms that wish to embark on a Localisation initiative must notify that Commission in writing to allow it assess whether the initiative may give rise to competition concerns. In exchange for the protection the Guidelines offer against prosecution, the Commission is given the right to request any information or records collected for a Localisation initiative.

This includes individual participants' Competitively Sensitive Information as provided to an Independent Facilitator, who is obliged to retain such information for at least five years after the Localisation initiative comes to an end.

Draft guidelines on collaboration between competitors on localisation initiatives. (2021)

Conclusion

The Guidelines are a commendable response to the government's ERR Plan. Time will tell, however, whether the advantages and protection offered outweigh the costs of the prescribed process and the exposure associated with the disclosure requirements. Given that the Guidelines are not binding on the Commission, the Tribunal, or the Competition Appeal Court, potential participants may also be wary about the actual extent of the protection offered by the Guidelines.

Having said that, the localisation imperatives contained in the government's various Sector Master Plans and in the SMME-Focused Localisation Policy Framework will require affected firms to give serious consideration to the opportunities presented by the Guidelines.

Hopefully, the Commission will not only monitor notified Localisation initiatives but also the success rate of its "Guidelines initiative", with a view to adjust the Guidelines in order to optimize its attractiveness to firms and impact on the economy.

[1] 18 March 2022.

[2] Economic Reconstruction and Recovery Plan

[3] Defined as "increasing the level of local production and services"

[4] Participation will not amount to a contravention of section 4(1) of the Act – paragraphs 6.13, 6.16 and 11.2

[5] Defined in the Guidelines as "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".

[6] Defined in the Guidelines as "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 aggregation of such Competitively Sensitive Information amongst firms in the industry".

[7] Defined in the Guidelines as "information which does not identify an individual firm's Competitively Sensitive Information or allow any individual firm's Competitively Sensitive Information to be inferred".



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