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Guidelines on collaboration in the implementation of the South African Value Chain Sugarcane Master Plan to 2030

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Final

1. PREFACE

1.1. These Guidelines have been prepared in terms of section 79(1) of the Competition Act No. 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 these Guidelines into account.[1]

1.2. The purpose of these Guidelines is to provide guidance to the sugar industry on collaboration in the implementation of industry commitments to increasing sourcing of local sugar as contemplated in the South African Sugarcane Value Chain Master Plan to 2030 ("the Sugar Master Plan"). On 23 June 2020, the Minister of Trade, Industry and Competition, after consultation with the Minister of Agriculture, Land Reform and Rural Development, granted a designation to the sugar industry in terms of section 10(3)(b)(iv) of the Act for a period of 12 months, which may be extended, commencing on 1 July 2020. The designation is aimed at providing support to the economic development, growth, transformation, and stability of the sugar industry in line with the objectives of the Sugar Master Plan.

1.3. Subsequently, on 16 October 2020, the Commission granted an exemption to the South African Sugar Association ("SASA"), a statutory body established in terms of section 2(1) of the Sugar Act No.9 of 1978, as amended, to enable its members to collaborate in the implementation of the Sugar Master Plan, subject to certain conditions. SASA's members comprise of the South African Sugar Millers' Association, the South African Cane Growers Association and the South African Farmers Development

[1] Section 79(4) of the Act.

Association. As a result, the exemption granted by the Commission only covers the production and milling value chains of the sugar industry.

1.4. A key element of the social compact in respect of the commitment to restore the local market and off-take commitments in the Sugar Master Plan is that retail, wholesale and industrial sugar users, in support of the goals of stabilising and restructuring the sugar industry, will commit to increased sourcing of locally produced sugar for a period of 3 (three) years.

1.5. However, collaboration by retail, wholesale and industrial sugar users in the implementation of the Sugar Master Plan did not form part of SASA's exemption application to the Commission. Consequently, these Guidelines seek to provide guidance to the sugar industry on collaboration in delivering on industry commitments to increasing sourcing of locally produced sugar in the *implementation* of the Sugar Master Plan. 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 these Guidelines-

2.1. **"Act"** means the Competition Act No. 89 of 1998, as amended;

2.2. **"Aggregated information"** means information which does not identify an individual firm's competitively sensitive information;

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, investments;

2.4. **"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;

2.5. **“Disaggregated information”** means information which identifies an individual’s firm’s competitively sensitive information;

2.6. “**DTIC**” means the Department of Trade, Industry and Competition;

2.7. **“Firm”** includes a person (juristic or natural), partnership or a trust. This may include a combination of firms that form part of a single economic entity, a division and/or a business unit of a firm;

2.8. **“Guidelines”** mean these guidelines that have been prepared and issued in terms of section 79(1) of the Act;

2.9. “**Independent Facilitator**” means a person or firm with no direct or indirect commercial links or otherwise with the sugar industry or the concerned firm, appointed to facilitate the sharing of competitively sensitive information between the DTIC and the sugar industry or the concerned firm;

2.10. **“Minister”** means the Minister of Trade, Industry and Competition; and

2.11. **“Sugar industry”** includes sugar cane growers, farmers, millers, industrial sugar users, wholesalers, and retailers.

3. INTRODUCTION

3.1. According to the Sugar Master Plan, the sugar industry is presently in a crisis and is facing a “perfect storm” driving accelerated decline in the industry over the last few years as a result of a number of factors that have combined to reduce local demand in the Southern African Customs Union (“SACU”) for sugar from 1.65 million to 1.25 million tonnes per annum, forcing increased exports into a global market where prices are below the local cost of production. Increased exports now mean the sugar industry has to absorb losses of approximately 2 billion rand per year.

3.2. Due to the nature of the immediate crisis facing the sugar industry, which threatens significant job losses 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 in the industry including small scale growers and independent millers, the Sugar Master Plan was required to deliver a social compact aimed at, among other things, securing agreement amongst all stakeholders on a intervention plan to pull the industry back from the precipice of collapse.

3.3. The Sugar Master Plan has four main strategic objectives:

3.3.1. to stem the industry decline to preserve 2019 job numbers, an estimated 65 000 jobs, and over the long run to grow jobs again in a diversified industry based on sugarcane;

3.3.2. to restructure and rebalance industry capacity to reduce inefficiencies, reduce costs and restore competitiveness, reduce reliance on tariff protection and to set the foundations for diversification;

3.3.4. transformation through inclusive and broad-based participation in the value chain for workers, black and women farmers and black industrialists; and

3.3.5. to invest in globally competitive and sustainable diversified sugarcane-based value-chains.

3.4. The designation granted by the Minister in terms of section 10(3)(b)(iv) of the Act and the subsequent exemption granted by the Commission, is aimed at creating an enabling framework for the sugar industry to *implement the objectives* of the Sugar Master Plan. Although the designation granted by the Minister relates to the sugar industry broadly, only SASA, representing the interests of producers and millers, applied to the Commission for an exemption. As a result, the exemption granted by the Commission only applies to sugar producers and millers.

3.5. However, the Sugar Master Plan accords an important role to downstream players in the sugar industry in the initiative to turn-around the possible collapse of the South African sugar industry. In terms of *Action Commitment 1: restore the local market and off-take commitments*, retail, wholesale and industrial sugar customers, in support of the goals of stabilising and restructuring the sugar industry, committed to **increased sourcing of locally produced sugar** for a period of three years as follows:

3.5.1. In year 1, the goal is to restore back to the local market at least 150,000 tonnes of sugar demand to the local industry in support of which, users commit to sourcing at least 80% of all sugar requirements from the local sugar industry;

3.5.2. increased procurement of locally produced sugar will rise through years 2 and 3 such that by year 3, the goal is that at least 300,000 tonnes of sugar demand will have been restored to the local sugar industry, in support of which users commit to sourcing at least 95% of all sugar requirements from the local sugar industry; and

3.5.3. increased procurement of local sugar by users beyond year 1 is subject to fulfilment of the Sugar Master Plan commitments by the other social partners, and is further subject to (1) the threshold exemption level, (2) the rate, and (3) the scope of application of the Health Promotion Levy remaining unchanged from the status quo as at 28 February 2020.

3.6. The Sugar Master Plan details and sets out specific stakeholder commitments by retailers; wholesalers; industrial sugar users; the sugar industry; and government to achieve the objective of increasing local sugar procurement.

3.7. The achievement of commitments to increase the procurement of locally produced sugar as contemplated in the Sugar Master Plan may require industry collaboration.

4. PURPOSE

4.1 These Guidelines are aimed at providing guidance to the sugar industry and government on how the sugar industry can collaborate in implementing the local procurement commitments contained in the Sugar Master Plan in a manner that does not raise competition concerns.

4.2 In view of the fact that the process of implementation of the Sugar Master Plan is dynamic and iterative in nature, to the extent that other issues may arise in the implementation of the Sugar Master Plan which are not covered in these Guidelines, specific guidance on those issues may be sought from the Commission.

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 information exchange can prove efficiency benefits that arise from the information exchanged.

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.

6 FRAMEWORK FOR COLLABORATION ON LOCAL SUGAR PROCUREMENT

6.1 As discussed in section 3, the Sugar Master Plan sets out a three-year procurement plan for increasing the sourcing of local procurement of sugar with the object of securing the local procurement of at least 150 000 tonnes in year 1, increasing in year 2 and restoring at least 300 000 tonnes in year 3. In order to achieve the 150 000 tonnes in year 1, retailers, wholesalers and industrial sugar users have committed to sourcing at least 80% of all sugar requirements from the local sugar industry. Similarly, in order to achieve the 300 000 tonnes in year 3, retailers, wholesalers and industrial sugar users have committed to sourcing at least 95% of all sugar requirements from the local sugar industry.

6.2 In the implementation of the three-year procurement plan, the sugar industry commitments made in the Sugar Master Plan necessarily have to be translated in two categories of local procurement targets:

6.2.1 the first category is industry local procurement targets; and

6.2.2 the second category is individual firm local procurement targets.

6.3 The industry local procurement targets and the individual firm local procurement targets may include targets for product categories such as refined sugar and brown sugar.

The process of setting industry local procurement targets

6.4 The process of setting industry local procurement targets may require discussions among retailers, wholesalers, and industrial sugar users. These discussions must be led by the DTIC or an independent facilitator appointed by the DTIC. No competitively sensitive-information or disaggregated information must be shared or discussed among retailers, wholesalers, and industrial users in the collective discussions on industry local procurement targets. Only aggregated information on the percentage and volumes of industry targets on local procurement can be shared and discussed among retailers, wholesalers, and industrial sugar users. The participation by retailers, wholesalers, and industrial sugar users in the discussions on industry local procurement targets in the implementation of the Sugar Master Plan does not amount to a contravention of section 4(1) of the Act.

6.5 The final industry targets must be determined by the DTIC or a facilitator appointed by the DTIC. In determining the industry targets, the DTIC or a facilitator appointed by the DTIC may obtain competitively-sensitive information on a bilateral and confidential basis separately from each individual firm, and this individual firm's information may not be shared or discussed in the collective discussions among retailers, wholesalers, and industrial sugar users.

6.6 Retailers, wholesalers, and industrial sugar users must not engage in collective procurement of sugar from suppliers and such conduct may constitute a contravention of section 4(1) of the Act. To the extent that a need has been identified for collective procurement among a specific category of users such as small retailers and small independent wholesalers to optimise procurement efficiencies, an exemption must be sought from the Commission in terms of section 10 of the Act.

The process of setting individual firm local procurement targets

6.7 The process of setting individual firm local procurement targets in the implementation of the Sugar Master Plan must be conducted on a bilateral and confidential basis between the DTIC or an independent facilitator appointed by the DTIC and the individual firm.

6.8 The DTIC or an independent facilitator appointed by the DTIC may obtain competitively-sensitive information from an individual firm for the purpose of reaching an agreement with the firm on its local procurement target(s), and this information must not be shared with other market participants. An agreement between the DTIC and an individual firm on its individual local procurement target(s) does not amount to a contravention of section 4(1) of the Act.

6.9 Progress reports on the achievement of milestones set out in the individual firm's local procurement plan in the implementation of the Sugar Master Plan must be submitted to the DTIC on a bilateral and confidential basis.

Demand forecasting

6.10 The Sugar Master Plan also includes industry commitments to providing timeous demand forecasting guidance to sugar suppliers to facilitate sugar industry planning against local sugar availability and supply commitments.

6.11 Individual firm demand forecasts must be provided on a bilateral and confidential basis to the DTIC or an independent facilitator appointed by the DTIC. The DTIC or its appointed facilitator must aggregate the individual firm demand forecasts.

6.12 The demand forecasting guidance provided to suppliers by the DTIC or an independent facilitator appointed by the DTIC must only contain aggregated information and must not contain firms' individual procurement plans and information.

7 CONCLUSION

7.1. These Guidelines set out the Commission's approach to collaboration in the implementation of the sugar industry commitments to increasing local procurement of sugar in support of the objective of stabilising and restructuring the sugar industry within the context of the implementation of the Sugar Master Plan. In accordance with the provisions of section 79(4) of the Act, the Commission will not regard the collaboration on local sugar procurement that is conducted in accordance with these Guidelines as a contravention of section 4(1) of the Act.

7.2. These Guidelines do not set out all the permutations of collaboration that may be required to increase local procurement of sugar and do not fetter the discretion of the Commission to consider other forms of collaboration on local procurement on a case-by-case basis, considering the market context and the nature of the collaboration.

7.3. Should market participants be uncertain as to whether any other collaboration on increasing local procurement of sugar may potentially contravene the Act, they may approach the Commission for further guidance.

8. EFFECTIVE DATE AND UPDATES

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