

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. R. 2431

31 August 2022

**INVITATION FOR THE PUBLIC TO COMMENT ON THE DRAFT BLOCK
EXEMPTION REGULATIONS FOR SMALL, MICRO AND MEDIUM-SIZED
BUSINESSES, 2022**

1. By virtue of the powers vested in me in terms of section 10(10) of the Competition Act, 1998 (Act No. 89 of 1998) (the Act), I, Ebrahim Patel, Minister of Trade, Industry and Competition, after consultation with the Competition Commission, hereby intend to prescribe regulations in terms of section 78(1) of the Act as set out in the Schedule hereto.
2. Stakeholders and interested persons are invited to submit comments in writing on the proposed regulations within a period of 30 days of the publication of this notice to the Acting Director-General: Department of Trade, Industry and Competition, for the attention of Mrs Linda Herbst, email: lherbst@thedtic.gov.za or hand delivered at 3rd Floor, Block E, 77 Meintjies Street, Sunnyside, 0132.



EBRAHIM PATEL

MINISTER OF TRADE, INDUSTRY AND COMPETITION

DATE: 30 August 2022

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 –
 - 1.1. “**Act**” means the Competition Act No. 89 of 1998, as amended;
 - 1.2. “**Business customers**” means customers that purchase goods and services for purposes of reselling or as an input into production;
 - 1.3. “**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;
 - 1.4. “**Intermediaries**” means businesses who deliver or otherwise sell another firm’s products or services to customers;
 - 1.5. “**Minister**” has the same meaning as defined in the Act;
 - 1.6. “**SMMEs**” means small business, micro business or medium-sized business as defined by the Minister in Government Gazette No.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;
 - 1.7. “**the 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; and
 - 1.8. “**the dtic**” means the Department of Trade, Industry and Competition.

Background

2. The Covid-19 pandemic has affected many sectors in the economy, with some sectors showing gains whilst other shrinking. The consequent economic decline threatens job losses across the economy, 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.
3. SMMEs have also been negatively affected by the pandemic as value chains were severely disrupted and consumers shifting to online purchases. The Commission's study on *Measuring Concentration and Participation in the South African Economy: Levels and Trends* also shows that the share of SMMEs on the countries' aggregate income is comparatively low and declining.
4. In response to the economic consequences of the Covid-19 pandemic, government developed the Economic Reconstruction and Recovery Plan (ERRP) which maps out interventions aimed at promoting inclusive growth and employment in the domestic economy. These Regulations seek to complement the ERRP and other initiatives.

Purpose

5. The purpose of these Regulations is to exempt certain categories of agreements or practices of SMMEs from the application of sections 4 (1) and 5 (1) of the Act in order to enable collaboration between SMMEs that otherwise would contravene the Act.
6. These categories of agreements or practices are exempted for the sole purpose of stimulating the growth and participation of SMMEs in the economy.

Legal framework

7. The legal framework for assessing horizontal agreements between firms is section 4(1) of the Act, which 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.”

8. The legal framework for assessing vertical agreements between firms is section 5(1) of the Act, which states as follows:

“5. Restrictive vertical practices prohibited

(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.”

Categories of agreements or practices exempted

9. The Minister hereby exempts the following categories of agreements or practices of SMMEs from the application of sections 4(1) and 5(1) of the Act:
 - 9.1. Research and development (R&D) agreements which include outsourcing R&D to third parties or cooperation agreements to conduct R&D.
 - 9.2. Production agreements for production of a good or the provision of a service, or toll manufacturing by one firm for another (standalone or on a reciprocal basis) which do not result in the removal of a competitor from the market.
 - 9.3. Joint purchasing agreements which may include collective purchasing by a subset of firms in a market or any other similar arrangement.
 - 9.4. Joint selling prices of goods or services to and through intermediaries or other business customers by a subset of firms in a market or any other similar arrangement.
 - 9.5. Commercialisation agreements which include co-operation between firms relating to the selling, distribution or promotion of their products. Agreements may cover all commercial aspects or may be limited to one specific function, such as distribution, after-sales service, or advertising.
 - 9.6. Standardisation agreements which include setting the technical or quality requirements with which current or future products, production processes, services or methods may comply. These agreements may cover technical specifications, environmental performance, grades or sizes of products, or the terms of approval by a regulatory body.
 - 9.7. Collective negotiations with large buyers or suppliers on the terms and conditions for purchasing or supply of goods or services.

Exclusions

10. These Regulations exclude the fixing of the selling prices of goods or services to end consumers.

Scope of the exemption

11. The scope of these Regulations is limited only to agreements or practices specified under paragraph 9 and which have the sole purpose of promoting the activity of SMMEs as set out in paragraphs 5 and 6.
12. Agreements or practices in terms of these Regulations must be inclusive of the majority of SMMEs in a market, including those owned by historically disadvantaged persons.

Amendments to Regulations

13. 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

14. The firms applying these regulations must notify the Commission and **the dtic** of the agreement or practice within 30 business days of implementation.
 - 14.1. Notification to the Commission should be sent to exemption.conditions@compcom.co.za.
 - 14.2. Notification to **the dtic** should be sent to exemptions@thedtic.gov.za.
15. The firms applying these regulations must keep minutes of meetings held and written records of any agreements or practices falling within the scope of the exemptions set out in these Regulations.

Short Title

16. These Regulations shall be called the **Block Exemption Regulations for Small, Micro and Medium-Sized Businesses, 2022**.

Commencement and duration

17. These Regulations shall come into effect on the date of publication in the Government Gazette and shall endure for a period of five (5) years.