

# COMPETITION LAW

## ALERT

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**KIETI LAW LLP, KENYA**

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The Department of Trade, Industry and Competition (DTIC) recently published an invitation for the public to comment on the Draft Block Exemption Regulations for Small, Micro and Medium-Sized Businesses (Draft Exemption Regulations).



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## CCC notes concern with visa processing conditions: A possible win for travellers as the CCC flexes its consumer welfare mandate

In a press release on 8 September 2022 (Notice), the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) raised concern that the visa processing companies acting on behalf of embassies and diplomatic missions in COMESA member states are imposing stringent conditions on visa applicants

Including but not limited to:

- holding passports of applicants for long periods, sometimes up to 45 days, and thereby curtailing applicants' movements to other countries;
- processing visas in a longer period than the time indicated on the visa forms and at times going beyond the expected time of travel, thereby causing applicants to miss out on planned activities;
- scheduling appointments for visa applicants on dates that are very close to or past the time of travel; and
- asking applicants to pay visa fees as high as USD 179 before allowing them access to select dates for interviews which may not be available before their travel dates.

A link to the Notice can be found [here](#).

In the Notice, the Registrar of the CCC iterates that the scope of the COMESA Competition Regulations, 2004 (Regulations) as provided for under Article 3, covers all economic activities whether by private or public persons, within or having an effect within the common market and conduct that has an appreciable effect on trade between member states.

In addition, the CCC has differentiated between the administrative services and corresponding fees charged by the visa processing companies and highlighted that these fees may be considered costs for services, however, the courier services charged for by the visa processing companies is an economic activity conducted as a business to make profits and therefore the visa

processing companies are considered to be "*undertakings*" for purposes of the Regulations and COMESA Competition Rules.

Consequently, the visa processing companies acting on behalf of the embassies and diplomatic missions are attributed to COMESA, undertake economic activities in the COMESA region, are under the purview of the CCC, and are subject to the Regulations.

Furthermore, Part 5 of the Regulations mandates the CCC to monitor and investigate unfair business practices against consumers with regard to false or misleading representation, and unconscionable conduct, among other prohibited practices.

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The CCC, therefore, notes with concern that the highlighted conduct of the visa processing companies may be deemed as misleading or unconscionable and a possible violation of the Regulations.

In the Notice, the CCC *“requests embassies and diplomatic missions to review the practices of their service providers given that the stringent conditions imposed violate the Regulations and increase the costs of securing visas making travel expensive which ultimately erodes the welfare of consumers”*.

It will be interesting to see what measures the embassies and diplomatic missions will employ with respect to their service providers and whether the CCC will, in light of the Notice and recent rumblings by travellers in respect of the inordinate delays in visa processing, see an increase in consumer complaints cases.

Separately, attention should be paid to the response from embassies and diplomatic missions which typically enjoy a form of immunity, following the CCC’s Notice, which seems to intimate that the Regulations have in fact already been violated.

**DOREEN KIOGORA AND  
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SOUTH AFRICA

## What the DTIC's Draft Block Exemption Regulations mean for joint purchasing agreements and buyer groups amongst SMMEs

The Department of Trade, Industry and Competition (DTIC) recently published an invitation for the public to comment on the Draft Block Exemption Regulations for Small, Micro and Medium-Sized Businesses (Draft Exemption Regulations).

The purpose of the Draft Exemption Regulations is to exempt certain categories of agreements or practices of small, micro and medium-sized businesses (SMMEs) from the application of sections 4(1) and 5(1) of the Competition Act 89 of 1998 (Competition Act) to enable collaboration between SMMEs that would otherwise contravene the Competition Act.

Section 4(1)(b) of the Competition Act prohibits outright (*per se*) competing firms from (i) colluding to fix a purchasing or selling price or other trading condition, (ii) dividing markets by allocating customers, suppliers, territories or specific types of goods and services or (iii) collusive tendering. Section 5(1) of the Competition Act prohibits agreements between parties in a vertical relationship which may have the effect of substantially preventing or lessening competition

in a market unless the agreement can be justified by technological, efficiency or pro-competitive gains that outweigh the effect.

The COVID-19 pandemic has affected various sectors in the economy, with SMMEs in particular having been negatively affected, and the aim of the Draft Exemption Regulations is to reintegrate them into the market. The Competition Commission's (Commission) study measuring concentration and participation in the South African economy shows that SMMEs' share of the country's aggregate income is low and declining. In response to the economic effects of the COVID-19 pandemic, Government developed the Economic Reconstruction and Recovery Plan (ERRP) to promote inclusive growth and employment in the domestic economy. The Draft Exemption Regulations seek to complement the ERRP.

### EXEMPT CATEGORIES

The Draft Exemption Regulations propose the exemption of the following categories of agreements/practices from the application of the Competition Act:

- *“Research and development (R&D) agreements which include outsourcing R&D to third parties or co-operation agreements to conduct R&D.*
- *Production agreements for production of a good or the provision of a service, or toll manufacturing by one firm to another (standalone or on a reciprocal basis) which do not result in the removal of a competitor from the market.*
- *Joint purchasing agreements which may include collective purchasing by a subset of firms in a market or any other similar arrangement.*

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- *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.*
- *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.*
- *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.*
- *Collective negotiations with large buyers or suppliers on the terms and conditions for purchasing or supply of goods or services."*

The Draft Exemption Regulations assist in creating certainty that SMME firms will not be prosecuted for contraventions of the Competition Act in circumstances where broader economic considerations, such as their effective participation in the economy, are deemed more important.

### CHARACTERISATION OF AGREEMENTS

In relation to certain of the categories of agreements which are to be exempted, there may be room within our current jurisprudence to characterise such arrangements as conduct which does not contravene section 4 of the Competition Act. An example of the "characterisation" exercise is where joint procurement by small firms is not viewed as conduct which contravenes section 4 of the Competition Act because it does not fall within the scope and

purpose of that section. There are many examples of buyer groups operating in various sectors of the South African economy, where the competition authorities have not challenged the legality of such buyer groups.

The other agreements mentioned in the Draft Exemption Regulations are also treated under a so-called rule of reason analysis in other jurisdictions. In South African competition law, conduct may be characterised as conduct which falls outside section 4 of the Competition Act, although it may on a technical reading of the Competition Act fall within the prohibition. However, recently the Commission has been seeking to challenge the concept of characterisation, as developed by the Competition Appeal Court, which, if successful, may pose risks to the types of co-operation that may result in quite technical contraventions of the Competition Act.



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### JOINT PROCUREMENT ARRANGEMENTS

Buyer power groups afford firms the benefit of negotiating bulk price discounts and offering their products/services at a discounted rate that benefits consumers. However, in some instances this may constitute a contravention of section 4(1) of the Competition Act. The Draft Exemption Regulations provide some relief for SMMEs, but for firms that do not fall within the threshold requirements for SMMEs, the regulations accentuate the risks inherent in joint procurement arrangements or buyer groups. Furthermore, it is not clear to what extent the Draft Exemption Regulations imply that, without the exemption of the agreements listed therein, these agreements would necessarily contravene the Competition Act.

It is important to note that the fixing of the selling prices of goods or services to end consumers is specifically excluded from the practices which are to be exempted under the Draft Exemption Regulations. One of the theories of harm in relation to joint procurement is that it facilitates collusion in the downstream market. To the extent that the Draft Exemption Regulations come into effect and are relied upon by SMMEs, they will therefore need to exercise caution that their joint purchasing arrangements do not result in collusion in the downstream market.

Before the publication of the Draft Exemption Regulations, there was not much South African jurisprudence which shed light on the circumstance in which joint procurement would result in a contravention of the Competition Act. The fact that the

DTIC seeks to exempt the behaviour specified in the Draft Exemption Regulations suggests that the competition authorities may indeed prosecute firms, under section 4(1)(b) of the Competition Act, that enter into joint purchasing agreements or buyer groups which are not covered by these exemptions.

Firms applying these regulations must notify the Commission and the DTIC within 30 days of implementation and must keep minutes of meetings held and written records of any agreements or practices falling within the scope of the Draft Exemption Regulations. This may result in careful scrutiny by the competition authorities of the conduct of SMMEs relying on these provisions and it is important that the strict requirements of the Draft Exemption Regulations are adhered to.

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