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AGRICULTURE, AQUACULTURE & FISHING SECTOR AND COMPETITION LAW **ALERT**

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Competition Commission's guidelines on collaboration for the South African Value Chain Sugarcane Master Plan

The South African sugar industry sustains an estimated one million livelihoods through direct and indirect employment. However, this important agricultural sector is also an industry in crisis due to factors such as global prices below South Africa's cost of production; increasing volumes of low-priced tariff-free exports from Eswatini into the Southern African Customs Union; and the Health Promotion Levy, a tax on sugar-containing drinks. This *"perfect storm"* resulted in many South African sugarcane farmers and millers incurring unsustainable losses, with potentially devastating consequences for rural unemployment and poverty.

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Competition Commission's guidelines on collaboration for the South African Value Chain Sugarcane Master Plan

The Sugar Masterplan requires a detailed set of collaborative actions by stakeholders in the industry aimed, firstly, at urgent action to prevent the unmanaged decline of the industry and preserve jobs, followed by bold plans for future growth.

The South African sugar industry sustains an estimated one million livelihoods through direct and indirect employment. However, this important agricultural sector is also an industry in crisis due to factors such as global prices below South Africa's cost of production; increasing volumes of low-priced tariff-free exports from Eswatini into the Southern African Customs Union; and the Health Promotion Levy, a tax on sugar-containing drinks. This "*perfect storm*" resulted in many South African sugarcane farmers and millers incurring unsustainable losses, with potentially devastating consequences for rural unemployment and poverty.

To aid this situation the Government, after extensive consultation with industry stakeholders, on 16 November 2020, published the South African Sugarcane Value Chain Master Plan to 2030 (Sugar Masterplan).

The Sugar Masterplan requires a detailed set of collaborative actions by stakeholders in the industry aimed, firstly, at urgent action to prevent the unmanaged decline of the industry and preserve jobs, followed by bold plans for future growth (for example, the social partners to the Sugar Masterplan have identified significant opportunity for diversification of sugarcane in the likes of biojet fuel, biogas, and bioethanol for industrial and pharmaceutical use etc).

Considering that collaboration among competitors is not ordinarily allowed in terms of the Competition Act 89 of 1998, as amended (Competition Act) and can have dire consequences, it requires an appropriate exemption from the collusion provisions of the Competition Act. The Department of Trade, Industry and Competition (DTIC), after consultation with the Department of Agriculture, Land Reform and Rural Development, granted a designation to the sugar industry, up to 30 June 2023, in terms of section 10(3)(b)(iv) of the Competition Act, which provides for the exemption of agreements and practices that contribute to the economic development, growth, transformation and stability of any industry designated by the DTIC, after consulting the minister responsible for that industry.

Pursuant to the designation of the industry, the Competition Commission (Commission) has granted an exemption to the South African Sugar Association (Exemption) until 30 June 2023 (unless extended further) to enable its members to collaborate in the implementation of the Sugar Masterplan, subject to certain conditions.

The Exemption only covers the production and milling value chains of the sugar industry and does not provide for collaboration by retail, wholesale and industrial sugar users. However, a key element of the Sugar Masterplan is that retail, wholesale and industrial sugar users, in support of the goals of stabilising and restructuring the sugar industry, commit to increased sourcing of locally produced sugar for a period of three years.

To bridge this gap, the Commission published guidelines on collaboration in the implementation of the Sugar Masterplan (Guidelines) on 16 July 2021.

Competition Commission's guidelines on collaboration for the South African Value Chain Sugarcane Master Plan*...continued*

The purpose of these non-binding Guidelines is to provide guidance to the sugar industry on collaboration in the implementation of industry commitments to increasing the sourcing of local sugar as contemplated in the Sugar Masterplan, in a manner that does not raise competition concerns.

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As a point of departure, the Guidelines note that to achieve an increase in the local procurement of sugar, the industry would have to have two procurement targets, namely, (i) industry local procurement targets and (ii) individual firm local procurement targets. The Guidelines broadly address the process of setting these targets as well as demand forecasting.

Setting industry local procurement targets

In setting industry local procurement targets, discussion among retailers, wholesalers and industrial sugar users must be led by the DTIC, or another independent facilitator appointed by the DTIC. No competitively sensitive information or disaggregated information may be shared or discussed. Only aggregated information on the percentage and volumes of industry targets on local procurement can be discussed. The final industry targets must be determined by the DTIC, or a facilitator appointed by the DTIC and based on competitively sensitive information obtained on a bilateral and confidential basis separately from each individual firm.

Retailers, wholesalers, and industrial sugar users must also not engage in collective procurement of sugar from suppliers (doing so may amount to a contravention of the Competition Act). Should collective procurement be necessary among a specific category of users, such as small retailers and small independent wholesalers, in order to optimise procurement efficiencies, an exemption in terms of the Competition Act must be sought.

Setting individual firm local procurement targets

Setting individual firm targets must only be conducted on a bilateral and confidential basis between the DTIC or an independent facilitator appointed by the DTIC and the individual firm. Competitively sensitive

Competition Commission's guidelines on collaboration for the South African Value Chain Sugarcane Master Plan*...continued*

Given that the safe harbour of the Exemption does not apply to retail, wholesale and industrial sugar users, these stakeholders must take particular care when furthering the goals of the Sugar Masterplan that they do not inadvertently also contravene the Competition Act.

information from an individual firm obtained by the DTIC or the independent facilitator for the purpose of reaching an agreement with the firm on its local procurement targets must not be shared with other market participants. Progress reports on the achievement of milestones set out in the individual firm's local procurement plan, in the implementation of the Sugar Masterplan, must also be submitted to the DTIC on a bilateral and confidential basis.

Demand forecasting

The Sugar Masterplan also includes industry commitments to provide timeous demand forecasting guidance to sugar suppliers to facilitate planning against local sugar availability and supply commitments. 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. Further, the demand forecasting guidance provided to suppliers must only contain aggregated information and must not contain firms' individual procurement plans and information.

While the Guidelines do not describe all the permutations of collaboration, it provides some guidance. The Guidelines do not fetter the Commission's discretion to consider other forms of collaboration on local procurement on a case-by-case basis. Should market participants be uncertain as to whether any other collaboration on increasing local procurement of sugar may potentially contravene the Competition Act, they can approach the Commission for further guidance.

Given that the safe harbour of the Exemption does not apply to retail, wholesale and industrial sugar users, these stakeholders must take particular care when furthering the goals of the Sugar Masterplan that they do not inadvertently also contravene the Competition Act.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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