

Competition Law

ALERT

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Many hands make 'light' work: Draft block exemptions for energy suppliers and users published

With (another) national state of disaster in place since 9 February 2023, on 8 March 2023 the Department of Trade, Industry and Competition (DTIC) published for public comment draft block exemption regulations for energy suppliers and energy users (exemptions). "*Suppliers*" are any person or firm that supplies energy and related products and services. These include all forms of energy supply, related products (such as inverters or generators), inputs (such as coal) or services (such as storage or installation) in the supply of energy to users. "*Users*" are any person or firm that uses any form of energy supply.



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The provisions of the Competition Act 89 of 1998 (Competition Act) outlaw any agreements between competitors that might fix a purchase or selling price, or trading terms. For competitors to agree on the allocation of suppliers, customers, products or geographic areas of service is also prohibited. The prohibitions on such agreements are "per se" – in other words, even if intended to achieve a laudable outcome, the contravention is inherent in the agreement. The exemptions apparently recognise the desperate times South Africa is facing, and thus make allowances for some co-operation between users or suppliers to act jointly to ensure efficient energy procurement, use and supply.

What is exempted?

The exemptions cover certain categories of collaborative agreements or practices aimed at responding to electricity supply constraints from the national grid. The exemptions only apply where the agreements have the "sole purpose" of securing backup supply, reducing energy costs, or promoting optimal use and supply of energy. Users and suppliers are also allowed to jointly weigh in on regulatory matters. The following categories of agreements or practices are exempted:

SUPPLIERS	USERS
Joint investment in shared energy infrastructure	Joint procurement of energy supply and sharing of backup and energy generation capacity, in order to secure backup or alternative energy supply.
Joint financing and risk sharing in energy projects	Joint negotiation and purchasing of energy and related products, joint financing of energy supply, and joint purchasing of shared backup and generation capacity, in order to reduce the cost or to promote the efficient use of energy supply.
Joint training and skills development	Initiatives to use, save and optimise energy to limit downtime, and joint procurement and sharing of security services for purposes of securing shared sites.
Collaboration on optimising the level and timing of energy supply to the national grid	

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The exemptions will not apply to any discussions or agreements on fixing the selling prices of goods or services to customers or consumers (for instance landlord users could not agree on a surcharge to levy on tenants for backup power and suppliers could not harmonise their pricing). Nor will the exemptions be applicable to any tenders for the supply or procurement of energy.

To avoid arrangements that only benefit large players, the exemptions provide that firms controlled by historically disadvantaged persons and small, medium and micro enterprises must be afforded an opportunity to opt-in to agreements or practices entered into in terms of the exemptions.

How is approval obtained?

Although the exemptions are intended to expedite measures to address the energy crisis, unfortunately, but hardly surprising coming from a state department, there is red tape to contend with.

Suppliers that wish to proceed in terms of the exemptions must first apply in writing to the Competition Commission (Commission) for approval of the agreement or practice. The Commission then has 30 days to grant or decline the application. Interestingly, users need not obtain the Commission's prior approval, but must notify the Commission and the DTIC of the agreement or practice within 30 business days of "implementation" (which may be hard to pin down if an ongoing process is envisaged).

Suppliers and users must also retain minutes of meetings held and written records of any agreements or practices entered into in terms of these exemptions, since the Commission may request these records at any time.

It remains to be seen whether users and suppliers will be willing to clear these hurdles, or prefer to go it alone or in a concerted manner that does not on the face of it fall foul of the Competition Act (not all competitor collaborations infringe the law and require exemption).

Conclusion

While these efforts reflect the fact that the energy crisis may require some creative problem solving from the private sector, it remains to be seen whether the exemptions will result in any electrifying impetus.

Once the exemptions come into effect, suppliers and users should still be alive to other anti-competitive conduct and will need to tread carefully, knowing that their interactions may be scrutinised. The exemptions will be lifted once the state of disaster ends, which raises the question of how parties can untangle themselves from an arrangement that suddenly becomes illegal.

Stakeholders and interested parties have until 30 March 2023 to submit comments in writing to the DTIC.

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