

# Call for Comment: Draft Guidelines on Collaboration between Competitors on Localisation Initiatives

17 August 2021

On 13 August 2021, the Competition Commission (“Commission”) published for comment, draft guidelines (“Guidelines”) in relation to collaboration between competitors in relation to promoting or stimulating local procurement.

The Commission published these Guidelines as part of Government’s Economic Reconstruction and Recovery Plan (“ERRP”) which has as a primary objective, increasing localisation - i.e. promoting an identified input from local suppliers and decreasing imports of that product.

## The Legal Prohibition

In terms of section 4(1)(b) of South Africa’s Competition Act, 89 of 1998 (the “Act”), arrangements or agreements between competitors which directly or indirectly fixes a purchase price or divides markets by allocating customers or suppliers amounts to a *per se* contravention of the Act (i.e. no pro-competitive or efficiency based defence may be raised as justification for such conduct).

A contravention of section 4(1)(b) of the Act constitutes both an administrative and criminal offence and firms found in contravention of this provisions are typically liable to the maximum administrative penalty which is capped at 10% of the firm’s total South African specific turnover. Firms could also be held civilly liable for any follow-on damages.

The Guidelines are non-binding but provide guidance to the public as to what forms of collaboration the Commission considers as a contravention of the Act.



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## Unpacking the Guidelines

The crux of the Guidelines is that any form of localisation initiative, whether initiated by Government (such as the DTIC's CEO Localisation Initiative or the DTIC's Master Plan) or by the private sector itself, will not be considered by the Commission to amount to a contravention of the Act if such initiatives are pursued in accordance with the Guidelines.

The process for pursuing a localisation initiative essentially entails the following:

Once a firm has identified a potential localisation opportunity with a particular supplier and has been ascertained, a "facilitator" must be appointed to assist in ascertaining the aggregate level of localisation (or supply) required across the industry.

The facilitator may engage competitors on a bi-lateral basis to obtain competitively sensitive information but may not share that information as between competitors.

Firms may collaborate, such discussions being led by the facilitator, to ascertain whether the localisation initiative is feasible. Only aggregated volumes and percentages may be discussed as between competitors and not any other competitively sensitive information.

The facilitator is responsible for finalising industry targets as well as individual firm targets. These targets could also be determined by taking into account forward looking demand forecasts to assist local suppliers with planning. Provided the facilitator obtains this information from firms on a bilateral and confidential basis, fixing these industry and individual firm targets will not be construed as a contravention of section 4(1)(b).

The localisation initiative is applicable to all industries and all forms of localisation although where practical be inclusive of SMMEs and/or firms controlled by historically disadvantaged persons.

All localisation initiatives must be notified to the Commission within a reasonable time and all discussions must be minuted.

You can access the Guidelines [here](#).

Should you have any comments or queries in relation to the Guidelines please get in touch with Primerio directors:

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The Commission has called for public comments by **27 September 2021**.

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