

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 1624

17 December 2021

**MEMORANDUM OF AGREEMENT
("MOA")**

Entered into between

**THE COMPETITION COMMISSION OF SOUTH AFRICA
("the Commission")**

a juristic person established in terms of section 19 of the Competition Act No. 89 of 1998 as amended, ("the Competition Act"), herein duly represented by Mr. Tembinkosi Bonakele, in his capacity as the Commissioner of the Competition Commission of South Africa

And

**THE INFORMATION REGULATOR OF SOUTH AFRICA
(Hereinafter referred to as "the Information Regulator")**

a juristic person established in terms of section 39 of the Protection of Personal Information Act ("POPIA"), herein duly represented by Advocate Pansy Tlakula in her capacity as the Chairperson of the Information Regulator.

Page 1 of 16

SP. Tlakula 

Table of Contents

PREAMBLE	3
1. INTERPRETATION	4
2. OBJECT OF THE AGREEMENT	4
3. LEGISLATIVE FRAMEWORK	5
4. GUIDELINES FOR INTERACTION BETWEEN THE COMMISSION AND THE INFORMATION REGULATOR UNDER THIS AGREEMENT	5
5. PRINCIPLES GOVERNING COOPERATION BETWEEN THE PARTIES	6
7. APPLICATION FOR APPROVAL IN RESPECT OF MERGER TRANSACTIONS	7
8. COMPLAINTS	8
9. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE	10
10. INSTITUTIONAL CONTACT PERSONS	11
11. EXCHANGE OF INFORMATION	12
12. CONFIDENTIALITY	12
13. GENERAL PROVISIONS	13
14. NON-VARIATION	13
15. EFFECTIVE DATE OF THE AGREEMENT	14
16. DURATION OF THE AGREEMENT	14
17. REVIEW OF THE AGREEMENT	14
18. DISPUTE RESOLUTION	14
19. LEGAL EFFECT	14
20. DOMICILIUM CITANDI ET EXECUTANDI	15

CONTINUES ON PAGE 258 OF BOOK 3

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001
Contact Centre Tel: 012-748 6200. eMail: info.egazette@gpw.gov.za
Publications: Tel: (012) 748 6053, 748 6061, 748 6065



Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID AFRIKA

Vol. 678

17 December 2021
Desember

No. 45649

PART 3 OF 3

N.B. The Government Printing Works will not be held responsible for the quality of "Hard Copies" or "Electronic Files" submitted for publication purposes

ISSN 1682-5845



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PREAMBLE

WHEREAS, the Commission is mandated to, inter alia, investigate and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, as well as conducting market inquiries;

AND WHEREAS, the Commission, in terms of the provisions of section 21(1) (h) read with sections 3(1A)(b) and 82(1) and (2) of the Competition Act 89 of 1998 as amended (“the Competition Act”), has to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act;

WHEREAS the Information Regulator is established in terms of the Protection of Personal Information Act 4 of 2013 (“POPIA”) and is empowered to monitor and enforce compliance by public and private bodies with the provisions of the POPI Act and the Promotion of Access to Information Act 2 of 2000 (PAIA).

WHEREAS the key functions of the Information Regulator are, amongst others, to issue codes of conduct for different sectors and to make guidelines to assist bodies with the development and application of codes of conduct; to receive complaints lodged by persons regarding any interference with the protection of their personal information and to investigate such complaints accordingly.

AND WHEREAS, the Commission and the Information Regulator recognise that their respective mandates are mutually reinforcing and should thus encourage the optimal utilisation of the most effective remedies available between the two institutions, as the case may be;

AND WHEREAS, it is recorded that this Agreement shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the two statutory bodies in relation to the protection and processing of personal information. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be; and

THEREFORE, the Commission and the Information Regulator agree as follows:

Page 3 of 16
SP. Nkomo

1. INTERPRETATION

In the interpretation of any terminology used in this Agreement, any word or expression to which a meaning is assigned in the Competition Act, POPIA and PAIA, has the meaning assigned to it unless otherwise specified.

2. OBJECT OF THE AGREEMENT

2.1 This Memorandum of Agreement (“the Agreement”) is entered into to establish the manner in which the Commission and the Information Regulator will interact with each other to enable them to, inter alia:

2.1.1 effectively coordinate the exercise of jurisdictional powers when taking decisions;

2.1.2 apply a consistent interpretation and application of the principles of competition law and personal information or privacy law when exercising their powers and their respective functions in terms of their enabling legislation;

2.1.3 promote co-operation between the Commission and the Information Regulator in general, including in respect of setting of standards or conditions that affect matters of common interest, any joint investigations, market inquiries and or research studies that the parties may agree to undertake; and

2.1.4 consult each other and timeously provide each other with necessary information in respect of the investigation of anti-competitive practices, regulation of mergers and acquisitions, as well as investigation of non-compliance with the provisions of the POPIA and PAIA research developments or studies relating to the protection and processing of personal information.

2.2 The Commission and the Information Regulator may inform each other of any previous decision/judgement that either of them has previously taken in respect of the anticompetitive practice or conduct or matters relating to the access of information and the promotion of personal information involving the same respondent.

Page 4 of 16
SP. Nkomo 

3. LEGISLATIVE FRAMEWORK

- 3.1 Before the exercise of and performance of any powers and duties, the Information Regulator and Commission must consider whether or not, in terms of any agreement concluded between the Information Regulator and the Commission, it would be appropriate to refer an inquiry to the Commission or to the Information Regulator ;
- 3.2 The terms and conditions of any agreement concluded between the Information Regulator and the Commission, the Information Regulator must bear in mind that the Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act and the Commission must similarly bear in mind that the Information Regulator has the legislative mandate to detect and investigate all matters that fall within the ambit of PAIA and POPIA.;
- 3.3 The Information Regulator may ask for and receive from the Commission, assistance or advice on relevant proceedings of the Commission including competition related inquiries and similarly, the Commission may ask for and receive from the Information Regulator, assistance or advice on relevant proceedings of the Information Regulator including information related inquiries.
- 3.4 This Agreement shall in no way affect the independence and exercise of statutory powers by the two regulatory bodies in terms of enabling legislation.

4. GUIDELINES FOR INTERACTION BETWEEN THE COMMISSION AND THE INFORMATION REGULATOR UNDER THIS AGREEMENT

- 4.1 This Agreement is entered to establish the manner in which the Commission and the Information Regulator will interact with each other to, among other things, enable them to, *inter alia*:
- 4.1.1 effectively coordinate the exercise of their mandate and powers when taking decisions; and

4.1.2 apply a consistent interpretation and application of the principles of competition, principles of lawful processing of personal information and principles around the promotion of access to information when exercising their powers, and their respective functions in terms of their enabling legislation;

4.2 The Parties may collaborate on and participate in each other's advocacy and outreach initiatives to educate and raise awareness to the public.

5. PRINCIPLES GOVERNING COOPERATION BETWEEN THE PARTIES

5.1 The primary principles that shall govern the Agreement are as follows:

5.1.1 Each Party recognises and respects the independence, governance structures and internal processes of the other;

5.1.2 Each Party shall be transparent regarding planned activities that might potentially impact the work of the other Party and the Parties shall seek ways to complement each other in the performance of their respective functions;

5.1.3 The Parties shall cooperate with each other in mutual trust and good faith;

5.1.4 The Parties shall inform each other of, and consult each other on, matters of common interest;

5.1.5 The Parties shall assist and support each other in respect of agreed upon services and commitments between them in terms of this Agreement; and

5.1.6 The Parties shall avail to each other the necessary support for the successful performance of the tasks and programmes envisaged in this Agreement.

5.2 The Information Regulator and Commission may request and receive advice from each other, in respect of the regulatory aspects in the Competition Act, POPIA and PAIA as set out in clauses 5,6 and 7 below;

5.3 All requests for advice or information by either Party will be submitted in writing.

- 5.4 The Party seeking advice or information must indicate a deadline before or upon which such advice or information should be given by the other Party.
- 5.5 When the Commission and the Information Regulator consult each other under this Agreement, they shall do so at no cost to each other and with an acknowledgement of their respective areas of expertise.
- 5.6 Should either Party consider a matter before it, in terms of a timeline, such Party would share with the other, its expected process, and the other Party would cooperate to the best of its ability, towards achieving the targets set out in the project timelines.

6. COOPERATION BETWEEN PARTIES

- 6.1 The areas of cooperation between the parties shall include the following:
- 6.1.1 Collaboration and cooperation on matters encountered by either Party that affect the mandate and functions of the other;
- 6.1.2 Strategic collaboration on measures to promote and enhance the protection of personal information and the access to information;
- 6.1.3 Collaboration on advocacy and outreach initiatives to better facilitate access to public service and become more visibly involved in education and promotional campaigns;
- 6.1.4 Any other areas of interest may be identified from time to time.

7. APPLICATION FOR APPROVAL IN RESPECT OF MERGER TRANSACTIONS

- 7.1 The Commission and the Information Regulator shall make independent determinations on the basis of the criteria and mandates of their respective legislative and regulatory frameworks. In arriving at these determinations, the Commission and the Information Regulator may consult each other in as far as competition matters are concerned.
- 7.2 When consulting each other in terms of sub-clause 5.2 above, the Commission and the Information Regulator must have regard to the principle that:



Page 7 of 16

S.P. Nkomo

- 7.2.1 the Commission is to exercise primary authority in the review of mergers in any industry as required to give effect to the Competition Act; and
- 7.2.2 the Information Regulator is to exercise primary authority to establish conditions relating to the protection and processing of personal information by public and private persons and the promotion of access to information as required by its applicable statutes.
- 7.3 Where a transaction requires the approval of either the Commission or the Information Regulator, but not of both, the Information Regulator and the Commission may consult each other so as to ensure the consistent application of competition principles to the transaction in question.

8. COMPLAINTS

- 8.1 Where a complaint is lodged regarding a practice or conduct in respect of which the Commission and the Information Regulator have concurrent jurisdiction, the following process will be followed to the extent possible:
- 8.1.1 The Party that receives the complaint (“the Recipient Regulator”) must notify the other Party in terms of this Agreement;
- 8.1.2 The Commission and Information Regulator may consult with each other in respect of the complaint;
- 8.1.3 The Recipient Regulator may notify the complainant(s) that the Commission and Information Regulator will consult each other in terms of this Agreement;
- 8.1.4 In consulting each other in respect of the complaint, the Parties must have regard to the principle that –
- 8.1.4.1 The Commission is to exercise primary authority to detect and investigate alleged prohibited practices to give effect to the Competition Act;



S.P. Ndlovu

- 8.1.4.2 The Recipient Regulator may, in its discretion, advise the complainant(s) as soon as reasonably possible of the outcome of the consultation between the Commission and Information Regulator;
- 8.1.4.3 The Recipient Regulator may give the complainant(s) further directions regarding the investigation of the complaint in question;
- 8.1.4.4 In the event that the matter is dealt with by the Commission, representatives from the Information Regulator may, at the request of the Commission, participate in the matter through inter alia attending meetings when required; providing inputs during the case investigation and making representations at the Competition Tribunal hearing if necessary; and
- 8.1.4.5 In the event that the matter is dealt with by the Authority, representatives from the Commission may, at the request of the Information Regulator, participate in the matter through inter alia attending meetings, providing inputs during the case investigation and making representations at the Information Regulator's proceedings if necessary.
- 8.2 If it is decided in the consultation process, contemplated above, that the Information Regulator will deal with the matter, the Commission may, in its discretion, issue a notice of non-referral, in terms of Section 50(2)(b) of the Competition Act, and in instances where the Commission is the Recipient Regulator, the complainant(s) shall not be precluded from pursuing the matter with the Competition Tribunal (established in terms of Section 26 of the Competition Act).
- 8.3 Nothing in the consultation procedures contemplated herein, shall detract from the jurisdiction of the Commission or the jurisdiction of the Information Regulator to receive and deal with complaints in terms of their enabling statutes as they deem fit, or preclude the public from lodging complaints with both the Commission and the Information Regulator concurrently.



- 8.4 Where a complaint relates to a practice or conduct where either the Commission or the Information Regulator has jurisdiction, but there is no concurrent jurisdiction, the following shall apply:
- 8.4.1 The complaint may be lodged with the regulator that has jurisdiction; and
- 8.4.2 If upon receiving a complaint, the Recipient Regulator is of a view that it does not have jurisdiction over the matter, the Recipient Regulator may advise the complainant(s) accordingly and recommend that the complainant refer the complaint to the relevant regulator.
- 8.5 If the Information Regulator is the Recipient Regulator that has jurisdiction, it may in its discretion liaise and consult with the Commission;
- 8.6 The Commission shall be entitled to do likewise when it is the Recipient Regulator with jurisdiction, and may, in its discretion liaise and consult with the Information Regulator;
- 8.7 The Commission and the Information Regulator may, upon request from each other, participate in each other's proceedings in an advisory capacity;
- 8.8 The decision by any of the Parties to consult the other Party shall be discretionary and voluntary, and either Party shall be entitled, with or without consultation, to make its independent decision in respect of the complaint in terms of its enabling legislation;
- 8.9 When the Commission and Information Regulator consult each other, as contemplated in this Agreement, they shall do so at no cost to each other and shall act as expeditiously as possible.

9. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE

- 9.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the Information Regulator, as nominated by the respective Parties, shall be established pursuant to this Agreement and shall function on an on-going basis.
- 9.2 The functions of the Committee shall be:

SP. Ndlovu 

- 9.2.1 To manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this Agreement;
- 9.2.2 To propose, when necessary, any amendment of or supplementation to this Agreement;
- 9.2.3 To advise the management of both the Commission and Information Regulator on issues relating to competition law and personal information or privacy law and access to information, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to the following:
- 9.2.3.1 Types of conduct or transactions affected by both the Competition Act, the POPI Act, and the PAIA in respect of which concurrent jurisdiction is to be exercised by the two regulators;
- 9.2.3.2 International approach to issues of overlap concerning jurisdiction between a Competition Authority and the Information Regulator, as the case may be;
- 9.2.3.3 Amendments to the relevant or applicable statutes that may be necessary from time to time; and
- 9.2.3.4 Any other related matter.
- 9.3 The Committee shall meet regularly, but no less than once per quarter, to ensure both regulatory authorities are aware of developments in areas of common interest.

10. INSTITUTIONAL CONTACT PERSONS

For purposes of this Agreement:

- 10.1 The Manager of the Advocacy Division will be the main contact person at the Commission.
- 10.2 The Executive heading Communications and Education will be the main contact person at the Information Regulator.

SP. Nkomo 

10.3 Should the Parties have to exchange information, as a result of discussions at the Committee, the processes set out in this Agreement shall be followed.

11. EXCHANGE OF INFORMATION

11.1 Subject to paragraph 11 below, the Commission and the Information Regulator may exchange information as may be necessary to give effect to this Agreement.

12. CONFIDENTIALITY

12.1 Any information shared by the Commission and the Information Regulator pursuant to this Agreement must be used only for lawful purposes in matters of concurrent jurisdiction.

12.2 Any request made by either of the parties for confidential information in possession of the other shall be dealt with in accordance with the procedures set out in the parties' respective enabling legislation or policies or procedures.

12.3 The Parties shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or wilful conduct on its behalf.

12.4 To the extent permitted by law, the Commission and the Information Regulator shall hold confidential information received from each other pursuant to this Agreement and shall not otherwise disclose such information except when required to do so by the law or an order of a Court or a Tribunal.

12.5 The Commission and the Information Regulator shall, prior to disclosing such confidential information or a part thereof when required to do so by the law or an order of a Court or a Tribunal, notify each other of the law or an order of a Court or Tribunal requiring such disclosure.

12.6 The sharing of confidential information, in accordance with this Agreement, relies on the assurances given in 11.1; 11.2 and 11.3 above and shall not constitute a waiver of any legally recognizable grounds for refusing disclosure of information.

SP. Nkomo 

Page 12 of 16

12.7 Where confidential information is disclosed either by the Commission or Information Regulator in contravention of this Agreement, such disclosing party shall be solely liable in law for such disclosure.

12.8 Any of the parties may in its discretion decline a request for confidential information made in terms of this agreement.

13. GENERAL PROVISIONS

13.1 The provision of, or request for information under this Agreement may be denied:

13.1.1 where compliance would require the Commission or Information Regulator to act in a manner that would violate the applicable law;

13.1.2 under circumstances where there is an imminent risk to national security; or

13.1.3 when compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.

13.2 No provision of this Agreement shall give rise to a right on the part of any person, entity or organ of state other than the Commission and the Information Regulator, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this Agreement.

13.3 The provisions set forth under clauses 9 and 10 must prevail with respect to any information

13.4 provided or actions taken under this Agreement prior to its termination.

14. NON-VARIATION

14.1 This Agreement constitutes the whole of the agreement between the parties relating to the subject matter hereof.

J.P. Makula 

14.2 No amendment or consensual cancellation of this agreement or any term of this agreement, including this clause shall be binding unless recorded in a written document signed by duly authorised representatives of both regulators.

15. EFFECTIVE DATE OF THE AGREEMENT

This Agreement comes into force after:

15.1 it has been signed by persons authorised to act on behalf of both the Parties;
and

15.2 it has been published in the Government Gazette.

16. DURATION OF THE AGREEMENT

This Agreement must remain in force until it is amended or repealed by both regulators acting jointly.

17. REVIEW OF THE AGREEMENT

This Agreement shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the two Parties. The review shall take into account prevailing legal precedents, legislative amendments, promulgation of regulations, and policy reviews, as the case may be.

18. DISPUTE RESOLUTION

Should any dispute or difference arise between the Parties with regard to interpretation and/or implementation of any one or more of the provisions of this Agreement, such dispute or difference must be resolved in a manner other than through judicial proceedings.

19. LEGAL EFFECT

This Agreement is not intended to be a legally enforceable document and intends to describe the nature and co-operative intentions of the Parties involved, and to suggest

SP. Nkomo 

Page 14 of 16

guidelines for co-operation. Nothing therefore shall diminish the full autonomy of either Party nor may constrain either Party from discharging its statutory functions.

20. DOMICILIUM CITANDI ET EXECUTANDI

The Parties choose the following addresses as their respective domicilium citandi et executandi for purposes of this Agreement:

THE COMPETITION COMMISSION

The DTI Campus Mulayo (Block C), 77 Meintjies Street, Sunnyside, Pretoria

CONTACT PERSON: Mrs Khanyisa Qobo, Manager: Advocacy Division

THE INFORMATION REGULATOR OF SOUTH AFRICA

JD House, 27 Stiemens Street, Braamfontein, Johannesburg

CONTACT PERSON: The Executive heading Communications and Education

SIGNATURES

Signed at PRETORIA on this 21 day of OCTOBER 2021 by

Mr. **Tembinkosi Bonakele**, Commissioner of the Competition Commission South Africa.



COMPETITION COMMISSION

K Motaung

WITNESS 1

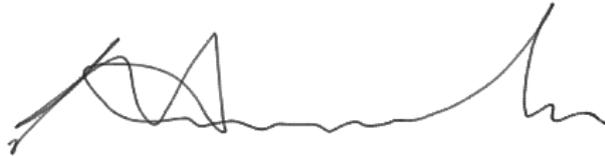
WITNESS 2

Signed at PRETORIA on this 21 day of October 2021 by

Advocate Pansy Tlakula, Chairperson of the Information Regulator of South Africa

SP. Tlakula

INFORMATION REGULATOR



WITNESS 1

WITNESS 2

