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## GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

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### ECONOMIC DEVELOPMENT DEPARTMENT

NO. 126

12 FEBRUARY 2019

#### COMPETITION COMMISSION

#### NOTICE IN TERMS OF SECTION 10(7) OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED): THE ABALONE FARMERS ASSOCIATION OF SOUTH AFRICA GRANTED CONDITIONAL EXEMPTION

On 13 June 2016, the Abalone Farmers Association of South Africa ("AFASA") and its members, hereafter jointly referred to as ("**the Applicants**") filed an application for exemption ("**the application**") in terms of section 10(1)(b) of the Competition Act No 89 of 1998, as amended ("the Act") to be exempted from certain provisions of Chapter 2 of the Act for a period of ten (10) years commencing on the date of approval of the application by the Commission.

The Exemption application concerns the Applicants' intentions to engage in meetings and communicate on prices and market conditions as competitors in the abalone industry. The engagements will involve the Applicants coordinating their efforts in respect of sales into certain international markets through sharing information on prevailing prices, feedback regarding information received from agents on prices, estimates of abalone stock available, volumes of abalone product exported and the volumes of abalone stockholding of the international competitors.

The Exemption was sought for a period of ten (10) years and was based on the premise that the proposed exemption is required in order to obtain the objective contained in sub-section 10(3)(b)(i), namely the maintenance or promotion of exports.

The Commission found that the conduct of AFASA members would result in a contravention of Section 4 of the Act, as the application relates to information exchange agreements and/or practices between parties in a horizontal relationship. The Commission also found that the sought exemption may enable the South African stakeholders to overcome the problem of information asymmetries that exist in the South African abalone market, thereby enabling the industry to achieve favorable and stable prices leading to the promotion and maintenance of exports.

Further, the Commission found that there is no transformation in the abalone industry. To address this concern, the Applicant has committed to develop an industry plan that will facilitate transformation in the industry, through partnering with government and other relevant stakeholders. This industry plan will be developed within a period of six months, from the date of approval.

Notice is hereby given in terms of section 10(7) of the Act that the Commission has in response to the aforesaid application, granted the exemption to the Applicants for a period of six (6) months with the following conditions:

### **Definitions**

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- i. **"AEC"** means the Abalone Export Council.
- ii. **"AFASA"** means the Abalone Farmers Association of South Africa;
- iii. **"Applicants"** mean AFASA;
- iv. **"Approval Date"** means the date referred to in the Competition Commission's Clearance Certificate;
- v. **"Commission"** means the Competition Commission of South Africa a statutory body established in terms of section 19 of the Competition Act 89 of 1998 (as amended) with its principal place of business at Block C, Mulayo Building, the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria;

- vi. **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- vii. **"Exemption Application"** means the application submitted by AFASA on 14 June 2016 in terms of section 10(3)(b)(i) of the Competition Act, 89 of 1998, for the "*maintenance or promotion of exports*";
- viii. **"Exemption Period"** means a 6 (six) months period for which the Exemption Application will be granted;
- ix. **"Exemption"** means to exempt conduct otherwise prohibited in terms of Chapter 2 of the Competition Act if it is required to achieve identified socio-economic aims;
- x. **"HDIs"** means historically disadvantaged individuals;
- xi. **"Stakeholders"** collectively means AFASA, Suppliers, divers, processors, Applicants and any other rights holder in the abalone industry;
- xii. **"Suppliers"** mean South African abalone farmers and South African exporters of any abalone product

## PREAMBLE

- (i) **WHEREAS** the Conditions stipulated below only apply to the proposed scope of the Exemption Application filed by the Applicants and for the duration of the Exemption granted by the Commission;
- (ii) **AND WHEREAS** the proposed sharing of competitively sensitive market information shall fall under two broad types of conduct described as: (i) the exchange of pricing and volume information, and (ii) the formal management of an exchange of information, relating to both local and international information, implemented through the distribution of pricing and quantity indices, industry reports and regular, minuted meetings between participants in the industry;
- (iii) **AND WHEREAS** the proposed sharing of competitively sensitive market information comprises of the following:
  - Cross-checking and verifying information provided by international agents with other South African farmers and exporters of abalone;

- Current export order requests, stock availability, production and capacity constraints;
  - Pricing of particular product forms of abalone in export markets;
  - Pricing and quantity information relating to international competitors; and
  - International market conditions;
- (iv) **AND WHEREAS** AFASA agrees to notify the Commission in writing of any material changes to their proposed practices in relation to abalone farming, processing and marketing activities within South Africa. Any new arrangement which affects the practices described in the Exemption Application, or any material changes to the practices contained in the Exemption Application shall not be of force or effect until approved in writing by the Commission;
- (v) **AND WHEREAS** the Exemption granted herein to AFASA shall only be applicable to practices falling within the jurisdiction of the Commission; and

**WHEREFORE** the Commission will grant the Exemption in terms of section 10(2)(a) of the Competition Act subject to the following conditions:

#### **LIST OF CONDITIONS**

1. The Exemption shall be granted for a period of six months commencing from the Approval Date. The Exemption shall allow Stakeholders to engage in the sharing of competitively sensitive information for a limited period of time in order to assist the Applicants in developing and submitting to the Commission an industry plan that will facilitate new entry, particularly of historically disadvantaged individuals ("HDI"), into the abalone industry by way of a Government Stakeholder Partnership ("Industry Plan"). Once such Industry Plan has been agreed upon by the Applicants and the Commission, the Commission will consider a long term Exemption.
2. Membership to AFASA will not be a prerequisite for the ability to share and obtain competitively sensitive market information. The benefits which accrue from the Exemption

as well as the competitively sensitive market information shared will be available to all Stakeholders.

3. The AEC will be an independent and objective body through which the facilitation of the information sharing takes place, as per the Exemption. The AEC will facilitate all formal meetings to be held in relation to these Conditions and will be the body to which Stakeholders report when they have shared competitively sensitive market information outside of the formal meetings. Participation through the AEC must include all Stakeholders.
4. The Exemption applied for and granted by the Commission relates to the coordination of efforts in respect of sales into certain international markets through the sharing of information on prevailing prices, feedback from information received from agents on prices, estimates of abalone stock available, volumes of abalone product exported and the volumes of abalone stockholding of the international competitors.
5. There will be no undocumented contact between any Stakeholders in the industry with regard to the sharing of competitively sensitive market information. Any competitively sensitive market information that needs to be shared relating to marketing and export of abalone between and amongst Stakeholders must be shared with the AEC before the next formal Stakeholder meeting. Further, all telephonic information must be shared in writing.
6. Formal Stakeholder meetings to discuss the competitively sensitive market information will be held through the AEC on a monthly basis until such practice has become established. A minimum of four meetings \ will be required for the duration of the Exemption. If necessary, additional meetings may be scheduled.
7. The information to be shared at the meetings will comprise of data on export pricing, order and stocks in order to allow for the collation and dissemination of historical and current export trends and analysis of the international market. Discussions at meetings will concern wider export strategies around pricing and volume information that has been provided in the monthly pricing and quantity indices. Stakeholders will be permitted to impart experience, knowledge and general market intelligence obtained from their respective operations.
8. The AEC will be responsible for the distribution of the documented exchanges of competitively sensitive market information, as well as the pricing and quantity indices. The

AEC will constantly update the contact list so as to ensure that the indices and all accounts of competitively sensitive market information exchanged are delivered to all Stakeholders..

9. Where a Stakeholder contacts the AEC directly, such communication shall be reported to all Stakeholders via an email or by means of the distribution of an industry report on an ad hoc basis.
10. The Exemption shall be applicable solely to the wholesale price of abalone. All other costs, such as packaging costs and processing cost, shall be specific to the respective Stakeholder's operating costs. All other relevant costs shall continue to be set independently.
11. Stakeholders will use the information given above in respect of their own independent business decisions including abalone prices and inventory.
12. Any discussions or information exchange that takes place through the AEC for the purposes of complying with the Exemption granted will be limited to activities as described above.

#### **MONITORING MECHANISM**

13. The AEC must report back to the Commission every three months from the approval of the Exemption with an update of the development of the Industry Plan.
14. The AEC, together with AFASA, must jointly submit a report to the Commission at the end of the 5th (fifth) month of the Exemption, detailing the extent to which they have complied with these Conditions. The report must inter alia consist of the formulation and constitution of the AEC and the prices and volumes of abalone. The report must also indicate the increased volumes and value of abalone exported as a result of the Exemption. The report must also include the final submission of the Industry Plan for the Commission's approval (if such Industry Plan has not already been submitted to the Commission).
15. All the Suppliers will need to depose to an affidavit by the final day of the Exemption period confirming that they have not had undocumented exchanges of competitively sensitive market information with another Supplier, and provide such affidavits to the Commission.
16. The applicants can apply to extend, on good cause shown, and the Commission can extend the Exemption if so required.

AFASA or any other person with substantial financial interest affected by this decision may appeal it to the Competition Tribunal in the prescribed manner in terms of Section 10(8) of the Act.

Further queries should be directed to either:

Miss Nonjabulo Sambo / Ms Selelo Ramohlola  
Competition Commission of SA  
Enforcement and Exemptions Division,  
Private Bag X23,  
Lynnwood Ridge, 0040

Email: [NonjabuloS@compcom.co.za](mailto:NonjabuloS@compcom.co.za) / [SeleloR@compcom.co.za](mailto:SeleloR@compcom.co.za)

**In correspondence kindly refer to the following case number: 2016Jun0286**