South Africa: Price Discrimination and Buyer Power Regulations and Draft Guidelines

1. In October 2019, the Minister of Trade and Industry and the Competition Commission published draft regulations and guidelines, respectively, which give further detail as to the content of the regulations and enforcement approach of the Commission to the new price discrimination and buyer power provisions contained in the Competition Amendment Act, 2018. Final versions of the regulations were issued when these provisions came into effect on 13 February 2020.

2. Although the guidelines are still in draft form and subject to public comment, the intention is for these to be finalised imminently and we expect that their substance will not change.

3. The regulations give additional content to the tests and standards set out in the relevant provisions in the Competition Act, for example by listing factors to be taken into account in making an assessment, and are binding on the Competition Tribunal and courts. The guidelines are not binding but set out the Commission’s intended enforcement approach in relation to the new provisions of the Competition Act, in order to create greater legal certainty and better facilitate compliance. While the documents therefore serve slightly different purposes, we highlight below some noteworthy implications of these read together.

3.1 Price Discrimination

3.1.1 The Competition Act prohibits price discrimination by a dominant firm as the seller of goods or services if:

(A) it is likely to have the effect of substantially preventing or lessening competition;

(B) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and

(C) it involves discriminating between those purchasers in terms of (i) the price charged for the goods or services; (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services; (iii) the provision of services in respect of the goods or services; or (iv) payment for services provided in respect of goods or services.

3.1.2 Different rebates, incentives or discounts are permissible if the difference:

(A) is justified by differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery as a result of the different places to which, methods by which, or quantities in which (i.e. volumes), goods or services are supplied to different purchasers;

(B) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or

(C) is in response to changing conditions affecting the market for the goods or services concerned.
3.1.3 The key amendment to the price discrimination prohibition is the introduction of a regime that applies only to (i) small and medium businesses (SMEs); or (ii) firms controlled or owned by historically disadvantaged persons (HDPs) as a designated class. In terms of the regulations, this special regime will not apply to an HDP that purchases 20% or more of the relevant good or service supplied by the dominant seller over the same period as the discrimination.

3.1.4 In relation to SMEs and HDPs, the Act now also prohibits price discrimination by a dominant firm as seller on the same basis as set out above save that:

(A) it is not necessary to demonstrate that the price difference is likely to have the effect of substantially preventing or lessening competition overall in a market; it is only necessary to show that it is likely to have the effect of impeding the ability of SMEs or HDPs to participate effectively;

(B) it is not possible to raise the defence that the difference in price (including any rebate, incentive or discount) is due to a difference in quantities/volumes supplied to the designated class. Although volume-based cost differences are not available as a justification, these would still be permissible if they fall within the safe harbours identified below.

3.1.5 In terms of the amended prohibition, read with the regulations, the primary focus will be on differential treatment of firms within the designated class as against those outside of the class (and which operate in the same or adjacent markets i.e. potential competitors are also covered). While the complainant firm need not prove that each and every firm within the relevant class receives adverse differential treatment, the Commission will consider whether the complainant (and its treatment) is representative of the designated class.

3.1.6 The differential treatment can relate to: selling price; any discount, allowance, rebate or credit; the provision of services in respect of the sale; or payment for such services. These will be viewed cumulatively rather than individually. The extent and duration of the differentials will be relevant factors, together with the significance of the input in the cost structure of production for the purchasing firm or as a driver of sales in the downstream market.

3.1.7 Differences in prices and trading terms for a complainant firm within the designated class will be assessed with reference to the lowest price or most favourable trading terms offered by the supplier to its customers.

3.1.8 The Commission has indicated that it will not seek to prosecute conduct that falls within certain ‘safe harbours’. These are where the above differences are less than 5%. There is a further safe harbour where the differences are less than 10% for an input that is of less importance to the downstream market. An ‘important’ input is one which accounts for at least 20% of variable costs or alternatively is considered one of the notable drivers of sales in the downstream market.

3.1.9 There is an anti-avoidance provision in the Competition Act, which is viewed by the Commission as a means to address the concern that firms might decide to avoid any potential exposure under the new price discrimination provisions by not dealing with SMEs or HDPs. The focus will be on firms that appear to have altered their behaviour or operating models in response to these provisions. The intention is not to compel firms to deal with SMEs and HDPs. The Commission may however seek to interrogate whether there is a legitimate business rationale for changes in operating models that have this effect or, where there has been such a change, if this has been brought about by an external factor.

3.1.10 The Commission will need to show that the discrimination is likely to impede the SME or HDP’s ability to effectively participate within the market. Although the Competition Act defines participation with reference to a firm’s ability to sustain itself in the market, the Commission’s view is that this goes beyond mere survival or the question of whether or not that firm would exit the market. ‘Effective participation’ will be assessed with reference to

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1 A small and medium business as determined in terms of Government Notice No. 987 12 July 2019 (Government Gazette No. 42578).
2 As defined in section 2 of the Act and in terms of the Draft Regulations published for comment in Government Notice No. 1316 10 October 2019 (Government Gazette 42760).
whether the elimination of the differential, given the input significance, would result in the firm in the designated class facing increased demand for its goods or services in the downstream market and/or improving the prospect of higher levels of investment.

3.2 Buyer power

3.2.1 The buyer power regulations designate only three sectors to which the buyer provisions will apply: grocery wholesale and retail, agro-processing, and ecommerce and online services. These provisions of the Competition Act and indeed the regulations do not apply to other sectors.

3.2.2 The Commission’s assessment of whether prices or trading conditions are unfair will focus on buyers imposing: (i) lower prices on a supplier in the designated class relative to other suppliers for like products or services (the Commission’s view is that price differences of 5% or less won’t warrant a finding of unfairness); (ii) unilateral, retrospective and unreasonable reductions to existing prices; or (iii) trading terms that unjustifiably transfer risk or costs to suppliers.

3.2.3 The guidelines identify a number of types of terms for each sector that might be considered to be unfair, many of which have been adapted from the manner in which similar issues have been dealt with in the European Union and United Kingdom. For example, the Commission’s provisional list of trading conditions that it considers would be unfair in the context of online intermediation services (which designated sector has subsequently been replaced in the final regulations by “ecommerce and online services”) include the following:

(A) ‘pay for ranking’ on platforms, where an online intermediation services provider exclusively or primarily ranks suppliers based on direct or indirect remuneration paid by suppliers to the intermediation service;

(B) differential and favourable treatment to goods or services supplied by the online intermediation service provider itself or companies in which it has an ownership stake;

(C) restrictions on the ability of suppliers to offer the same goods and services to consumers through means other than the provider’s online intermediation service;

(D) restrictions on the supplier from offering its own ancillary goods and services, including through the online intermediation service; and

(E) the use of data and information gathered by the online intermediation service provider on the supplier’s sales (including pricing, volume, customer sales) to enter in competition with the supplier.

3.2.4 The dominance of a buyer will be assessed primarily with reference to the market power that it holds as a result of suppliers being dependent on that buyer as a customer. The existing market share thresholds in the Competition Act that create presumptions of dominance will still apply, but the Commission anticipates that in the buyer space these will be less relevant and the focus will instead be on qualitative market power as a result of supplier dependency.

3.2.5 The buyer power provisions will not apply, and therefore will not afford protection to, HDPs that supply more than 20% of the purchases of the dominant buyer for the relevant good or service.

3.2.6 The Commission’s approach to the anti-avoidance provision in the buyer power context is similar to that in the price discrimination context (which is discussed in paragraph 3.1.9). The Commission’s intention is not to force firms to buy from SMEs and HDPs.