



*competition***commission**  
*south africa*

**BUYER POWER  
ENFORCEMENT GUIDELINES**

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DRAFT FOR COMMENT

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## **PREFACE**

These guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) (“the Act”) which allows the Competition Commission (“Commission”) to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.

The Act has been amended to incorporate a buyer power provision under the abuse of dominance provisions of section 8, with the introduction of the new subsection (4). In terms of subsection (4)(a), it is prohibited for a dominant firm as buyer in designated sectors to require from or impose unfair prices or trading conditions on small and medium businesses or firms controlled or owned by historically disadvantaged persons.

The new section 8(4) also includes a provision for the Minister to make regulations in respect of a) the sectors to which subsection (4) applies, b) the benchmarks for the application of subsection (4) to HDP firms and c) the relevant factors and benchmarks for determining whether prices and trading conditions in those sectors are unfair. Draft regulations were issued and these guidelines are consistent with these regulations.

These guidelines present the general principles that the Commission will follow in assessing whether alleged conduct contravenes section 8(4) of the Act. These guidelines seek to provide guidance through outlining how the Commission intends to interpret the new buyer power provision for enforcement purposes, and further how it will seek to screen and assess complaints laid in terms of the new provision.

These guidelines may be subject to change in future based on the experience derived by the Commission in investigating and litigating complaints, as well as the decisions of the Competition Tribunal, Competition Appeal Court and Constitutional Court on these provisions.

## 1. DEFINITIONS

1.1 Unless the context indicates otherwise, the following terms are applicable to these guidelines –

1.1.1 “**The Act**” means the Competition Act No. 89 of 1998 (as amended) and includes the Regulations made under the Act;

1.1.2 “**The Commission**” means the Competition Commission, a juristic person established in terms of section 19 of the Act;

1.1.3 “**designated class of supplier**” and “**designated class of suppliers**” includes small and medium businesses as defined in section 1 of the Act and any regulations made by the Minister or alternatively a firm controlled or owned by historically disadvantaged persons within the meaning of the Act and within the benchmarks determined by the Minister;

1.1.4 “**SME**” means a small and medium business or business, as the context dictates and as defined by with section 1 of the Act;

1.1.5 “**HDP firm**” means a firm or firms controlled or owned by historically disadvantaged persons within the meaning of section 3(2) of the Act and within the benchmarks determined by the Minister in the Price Discrimination Regulations.

1.1.6 “**Buyer Power Regulations**” means the regulations issued by the Minister in terms of section 8(4)(d) of the Act

## 2. LEGAL FRAMEWORK

2.1 Section 8 of the Act has been amended by section 5 of the Competition Amendment Act 18 of 2018. The new provisions came into effect on 12 July

2019 as per proclamation in the Government Gazette. Section 8(4), as amended, reads as follows:

**8. Abuse of dominance prohibited.**

(4) (a) It is prohibited for a dominant *firm* in a sector designated by the *Minister* in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a *small and medium business* or a *firm* controlled or owned by historically disadvantaged persons, unfair—

(i) prices; or

(ii) other trading conditions.

(b) It is prohibited for a dominant *firm* in a sector designated by the *Minister* in terms of paragraph (d) to avoid purchasing, or refuse to purchase, *goods or services* from a supplier that is a *small and medium business* or a *firm* controlled or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a).

(c) If there is a *prima facie* case of a contravention of paragraph (a) or (b), the dominant *firm* alleged to be in contravention must show that—

(i) in the case of paragraph (a), the price or other trading condition is not unfair; and

(ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, *goods or services* from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).

(d) The *Minister* must, in terms of section 78, make regulations—

(i) designating the sectors, and in respect of *firms* owned or controlled by historically disadvantaged persons, the benchmarks for determining the *firms*, to which this subsection will apply; and

(ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair.

### **3. FACTORS IN CONSIDERING UNFAIR PRICE OR TRADING CONDITIONS ITO SECTION 8(4)(a)**

3.1 Dominance: the firm against which a complaint is made must be a dominant purchaser within a sector designated by the Minister;

3.2 Supplier is a SME/HDP: the purchaser must fall within the category of either an SME or HDP firm;

3.3 Imposition: The price or trading condition must be required from or imposed on the supplier by the buyer firm; and

3.4 Unfairness: The price or trading condition must be unfair.

### **4. DOMINANCE IN A DESIGNATED SECTOR**

4.1 The Commission will first establish if the purchasing firm operates within a sector designated by the Minister.

4.1.1 These sectors have been specified in draft regulations and include agro-processing, grocery retail and online intermediation services.

4.1.2 In addition, the Commission will seek to establish if the good or service that is the subject of the complaint is not an ancillary service (such as security services) which will typically be of broad application to firms across many sectors.

4.2 The Commission will then establish the relevant purchasing market for the purpose of assessing dominance. In defining the relevant purchasing market, the Commission will have reference to:

4.2.1 First, the approach to defining such markets in other jurisdictions. For instance, the US Horizontal Merger Guidelines (2010) indicates that when the DoJ and FTC define markets in respect of a merger of powerful buyers, they will focus on the alternatives available to

sellers in the face of a decrease in the price paid by a hypothetical monopsonist. In other cases, a decrease in purchase volumes is used instead of price. For the geographic market, the consideration would be similar, only based on alternatives available to suppliers in other locations.

4.2.2 Second, different types of sellers which form the focal point for the analysis used in market definition. In particular, the Commission will consider the alternatives available to sellers in the designated class which may be distinguished from sellers that may be multinationals or large domestic firms.

4.3 When investigating dominance within the relevant purchasing market, the Commission is likely to consider the following factors to determine whether the buyer has buyer power:

4.3.1 *Suppliers dependency on the buyer.*

4.3.1.1 If suppliers are financially dependent on a buyer then they may not be able to replace those sales quickly or easily if the buyer threatens to not purchase in future. This position would provide the buyer with a strong negotiating position to extract favourable terms from the supplier.

4.3.1.2 Suppliers may also be dependent on a particular buyer as a route to market or building their brand. Whilst this is not a financial dependency, it is still a form of dependency which confers negotiating power to the buyer and therefore will remain a consideration for the Commission.

4.3.2 *The importance of the buyer in the market segment.*

4.3.2.1 This includes the portion of the buyer's purchases through a distribution channel and whether suppliers can replicate the scale of sales to alternatives.

4.3.2.2 Suppliers are likely to have limited outside options to replace sales to the buyer if that buyer accounted for a large portion of purchases through specific distribution channels. Even where suppliers may have alternatives with a specific channel, these suppliers may not be able to replicate the scale of sales to the buyer in question and therefore see the supplier lose scale and face adverse commercial consequences.

4.3.3 *The level of concentration and alternatives available to a supplier within a specific distribution channel.*

4.3.3.1 Where specific channels are concentrated then typically there are only a few limited options for a supplier. In those circumstances, the loss of sales to one large buyer poses high risk to the supplier as they may not easily be able to replace these sales.

4.3.3.2 Where the supplier does not supply the other large buyers, it may be unable to secure contracts given these buyers will already have their own suppliers. Alternatively, if the supplier already supplies a few of the buyers, then it is even less likely to be able to replace lost sales unless it can substantially increase sales to one of the other buyers.



4.3.4 *Whether credible alternative sales channels exist for the supplier to replace the lost sales or customers.*

4.3.4.1 A focus on a distribution channel rather than a broader set of alternatives is typically appropriate where such alternatives are inferior or require market development by the supplier in order to establish a sales presence in those other channels. In those circumstances, a supplier will remain in a weak negotiating position as they have no credible short-term alternative to replace lost sales.

4.3.4.2 The Commission will consider the alternative channels for supply of the good or service. Where the supplier is already active in those channels, the Commission will consider if it is able to raise volumes sufficiently to offset the potential loss of sales to the respondent buyer. Where the supplier is not active in those channels, the Commission will consider if there are at least short-term frictions in achieving a presence in those channels and/or whether they are inferior routes to market.

4.3.5 *The alternative suppliers available to the buyer.*

4.3.5.1 Bargaining power is determined not just by the outside options available to suppliers, but also the outside options available to the buyer.

4.3.5.2 The Commission will determine what are the credible alternatives available to the buyer for the supply of the relevant good or service. This will include the existing suppliers already utilised, those previously utilised, other suppliers that exist which have not been utilised but which meet the requirements for supply, and lastly the possibility to develop suppliers. In addition, where

relevant the Commission will determine if there is also a credible threat of self-supply.

4.3.5.3 The Commission will also consider the importance of the supplier to the buyer in terms of the proportion of the buyer's purchases. In the event that the supplier accounts for a large proportion of the buyer's purchases, the buyer may be less able to divert sales to other suppliers which weakens its bargaining position. This is unless there are numerous other suppliers or the alternative suppliers are able to gear up volumes to replace the supplier in question.

4.3.6 *The nature of the supply negotiations.*

4.3.6.1 In the assessment of dominance, the Commission will also have regard to the nature of supply negotiations between the buyer and suppliers insofar as whether they are informative of the bargaining dynamics and whether these reflect bargaining power by the buyer or not.

4.3.6.2 Similarly, the Commission will also have regard to the supplier's negotiated outcomes with the respondent relative to other buyers in the market insofar as it is informative of the relative bargaining power of the respondent.

## **5. SUPPLIER IS AN SME OR HDP**

5.1 The Commission will investigate whether the complainant supplier is an SME as defined or in respect of an HDP firm, the Commission will investigate whether the complainant purchaser is an HDP firm as defined. These are the subject of regulations by the Minister.

## **6. IMPOSING OR REQUIRING AN UNFAIR PRICE**

6.1 In determining whether the price imposed or required of a supplier in the designated class by a dominant buyer is unfair, the Commission will apply the following principles, amongst others:

6.1.1 The focus of an inquiry is on the equitable treatment and welfare of a supplier in the designated class. The inquiry does not in the Commission's view require an assessment of the effects on final consumers. Therefore, it is immaterial to the assessment whether a low price is passed through to consumers or not.

6.1.2 The Commission will also be focused on the treatment and whether it is unfair, not whether a supplier within the designated class faces other challenges or not.

6.1.3 Unfairness may present itself through the inequitable treatment of a supplier within the designated class relative to a favoured class of suppliers which may stem from its inferior bargaining position, smaller quantities supplied, or historical exclusion relative to other suppliers that are favoured.

6.1.4 Unfairness may also present itself through unreasonable treatment whereby the dominant buyer is able to impose costs or risks onto a supplier within the designated class unilaterally and which otherwise should have been borne equally or by the dominant buyer.

6.1.5 In assessing the conduct, the Commission will consider the magnitude of the unfair treatment, mindful to avoid unfairness of a trivial nature and only capture unfair treatment that is likely to have a material impact on the complainant in a designated class in order to establish a contravention.

6.2 The factors the Commission will consider when determining whether a price is unfair or not are:

6.2.1 the price to be assessed;

6.2.2 comparison of inferior prices relative to suppliers outside the designated class;

6.2.3 unilateral unfair adjustments to existing prices.

***What price is assessed***

6.3 The price assessed for the purposes of subsection (4)(a)(i) is the price per unit paid to the supplier, inclusive of any rebates or discounts provided to the purchaser. Price may also consist of a commission paid to a supplier where relevant.

6.4 The Commission will also consider the price net of additional costs imposed or required of the supplier where the buyer imposes or requires of the supplier to incur those costs.

***Lower relative price***

6.5 The Commission's first category of unfairness is where lower prices are paid to a supplier in the designated class relative to other suppliers for like products or services.

6.6 The first step in the assessing this category of unfairness is to determine the price paid to the supplier in the designated class for the product or service that is the subject of the complaint. That price will be net of any discounts or rebates provided to the buyer.

6.7 The second step is to determine like products or services supplied to the buyer that is the subject of the complaint. The following aspects will frame this assessment by the Commission.

6.7.1 Like products or services is a concept used in other legal circumstances. For instance, the General Agreement on Tariffs and Trade (GATT) uses concepts of 'like products'. In this context, the assessment of like products includes having regard to a) physical

characteristics, b) functional use, and c) substitutability from a consumer or buyer perspective.

- 6.7.2 The Commission will also consider the purchasing context, namely whether the products or services are supplied to the buyer for the same purpose and whether the products or services are categorised the same by the buyer.
- 6.7.3 In undertaking this assessment, minor differences would not prevent a positive finding given that the test is 'like' and not 'identical'.
- 6.8 The third step is to determine the net price paid by the buyer for the like products or services to the complainant's product or service.
- 6.9 Finally the Commission will make a comparison of the net price to paid to the complainant and that of other suppliers of like products or services to determine if the price to the complainant is unfair or not.
  - 6.9.1 The Commission will have particular reference to prices paid to suppliers outside of the designated class given that the buyer may pay similarly unfair prices to other suppliers in the designated class.
  - 6.9.2 The Commission will also apply thresholds to the relative price difference in order to exclude immaterial differences or differences that might reflect minor differences in the like products or services. For screening and enforcement purposes, the Commission currently takes the view that price differences of less than five percent (5%) are insufficiently large to warrant a finding of unfairness.
- 6.10 If the Commission establishes a *prima facie* case on this basis then the buyer bears the onus to demonstrate that the price is not unfair.

## **ILLUSTRATIVE EXAMPLES**

1. A Milling company purchases maize from farmers in the surrounding areas. It purchases from all farmers at the ruling SAFEX price less R20 given its location. However, because small farmers are unable to deliver the maize to the mill, it pays these farmers R60 a ton less to cover the cost of transporting the maize. In this example there may be a difference in price paid but there is an objective rationale for the difference, namely the additional costs of transport. If these transport costs are of a similar order of magnitude to the R60 a ton then the Commission would not consider this a violation of section 8(4). If the transport costs were significantly less than the R60 a ton then the Commission would consider this a violation as the difference is not reasonably related to the justification provided by the mill.
2. Another milling company purchases from the larger farmers at the ruling SAFEX price less R10 given its location, but only pays small emerging farmers SAFEX less R80. This is despite the fact that small emerging farmers in that area do deliver their maize to the mill along with the larger farmers. In this example there is no objective justification for the difference, and it can only be attributed to the exercise of buyer power over the small emerging farmers.

### ***Unfair adjustment to existing prices***

- 6.11 The Commission's second category of unfairness is where the existing price paid to a supplier in the designated class is unilaterally reduced. This may be directly or indirectly through imposing costs or risks on the supplier which reduces the effective price.
- 6.12 In undertaking this assessment, the Commission will consider the circumstances to the adjustment to supplier prices.
  - 6.12.1 The Commission will consider whether the price adjustment or cost was imposed on the supplier or required of them through the exercise of buyer power.

- 6.12.2 The Commission is more likely to conclude an adjustment or cost is unfair where it is unilateral and not subject to any form of negotiation.
- 6.12.3 The Commission will be more likely to conclude that the adjustment is unfair in circumstances where it is retrospective regardless of whether it is written into a supply contract.
- 6.12.4 The Commission is less likely to conclude that the adjustment is unfair in circumstances where the scope to reduce price or impose costs is contained in a negotiated supply contract, if the basis for determining the magnitude of adjustment is also included in that supply contract, and that adjustment involves a reasonable distribution of the costs or risks that resulted in a necessary adjustment between the buyer and supplier.
- 6.13 If the Commission establishes a *prima facie* case on this basis then the buyer bears the onus to demonstrate that the price is not unfair.

#### **ILLUSTRATIVE EXAMPLES**

1. A food company owned by historically disadvantaged persons supplies jam to a large retailer. The supplier sets the wholesale price and negotiates a set of rebates with the large retailer. After the first quarter, the retailer informs the supplier that the retailer had failed to achieve its budgeted 25% margin on the jam supplied and therefore required an additional 10% margin degradation rebate for the quarter's volume. In this example there is a unilateral and retrospective imposition of an additional rebate which effectively lowers the wholesale price received by the supplier. This reduction in price also has no objective and fair justification other than simply transferring a risk or cost more fairly faced by the retailer onto the supplier. The Commission would consider this a violation of section 8(4), even if the additional rebate was forward-looking rather than retrospective and even if it was included in the supply contract (without a specified size).

2. Another large retailer that is supplied by the same jam producer offers to expand distribution of the product nationwide if the jam producer reduces the price by 10% and accepts an additional advertising rebate of 2% to support promotional efforts by the retailer. In this example the reduction in price and additional rebates are linked to clear reciprocal benefits to the jam producer in terms of larger volumes and promotional effort. The Commission would not consider this to be a violation of section 8(4).
3. A large processor contracts with large and small dairy farmers in the surrounding areas to supply fresh milk daily. These contracts include a provision to adjust the purchase price in response to changes in market conditions, but no formula for adjustment is specified in the contract. There is a downturn in the economy and demand for milk products reduces. The large processor invokes the contract provision and announces a 20% reduction in the purchase price to the small dairy farmers. In this example the 20% reduction would be investigated given it was unilaterally imposed absent a fair and negotiated formula. The reduction would be considered a violation if it was higher for smaller farmers relative to larger farmers as that difference could only be explained by inequitable bargaining power. It would also be considered a violation if the dairy farmers shouldered the primary burden of the reduction in demand with the large processor using its buyer power to retain its own margins during the downturn.

## **7. IMPOSING OR REQUIRING AN UNFAIR TRADING CONDITION**

7.1 The Commission acknowledges that fairness of trading conditions has been the subject of codes of practice in other jurisdictions and these have often focused on the same designated sectors as the draft regulations. Furthermore, these have often used principles such as the unfair transfer of risks and costs or imposing costs unrelated to the supply agreement as a basis to determine specific terms that are deemed unfair.

7.1.1 *Agro-processing and Grocery Retail: Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on*



unfair trading practices in business-to-business relationships in the agricultural and food supply chain.<sup>1</sup> The Directive specifically prohibits certain practices including, a) payments over 30 days for perishable products, b) cancelling orders at short notice (where no alternative market is likely), c) payments for wastage not caused by the supplier and d) unilateral changes to the terms of supply. The Directive then prohibits a range of other practices unless specified in the supply agreement, including payments for the promotion, marketing and listing of products. The UK Groceries Supply Code of Practice identifies fair and lawful dealing in recognition of a supplier's need for certainty as regards the risks and costs of trading. Specific areas covered include retrospective changes to contracts, delayed payment, unreasonably long payment terms and imposing costs or risks unreasonably.<sup>2</sup>

7.1.2 *Online intermediation services:* Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.<sup>3</sup> This regulation primarily considers transparency and certainty in how business users of an online intermediation platform are treated given their dependency on the platform. It also covers the data and customer data of the business users.

7.1.3 *General buyer power provisions.* Kenya has introduced legislative change to incorporate an Abuse of Buyer Power Act which is overseen by the Competition Authority of Kenya. This is of broader application than just grocery retailing but which clearly builds on a similar framework. The types of abuse identified include the transfer

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<sup>1</sup> Accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0633&from=EN>

<sup>2</sup> Accessible at <https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice>

<sup>3</sup> Accessible at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN>

of risks and costs to the supplier where such risks or costs should lie with the buyer, delays in payments and unilateral termination.<sup>4</sup>

7.2 The Commission will approach the assessment of unfair trading conditions using the same framework. Specifically, the Commission's assessment standard for determining whether a trading condition is deemed to be unfair is the following:

7.2.1 If it unreasonably transfers risks and/or costs onto the firm in the designated class of suppliers;

7.2.2 If it is one-sided, onerous and/or not proportionate to the objective of the clause;

7.2.3 If it bears no reasonable relation to the objective of the supply agreement.

7.3 This assessment will also be informed by, amongst others:

7.3.1 Specific types of practices identified as unfair trading practices in other jurisdictions.

7.3.2 Instances where a trading condition is imposed on an SME or HDP firm but not on other suppliers, and in particular suppliers falling outside of the designated class.

7.3.3 Instances where the same trading condition is imposed on SME or HDP firm as other suppliers falling outside the designated class, but where the impact on SME or HDP firms is considerably greater.

7.4 The provisional list of trading terms and conditions that the Commission will consider likely to be in contravention of section 8(4) is contained in Annex 2 (Grocery Retail and Agro-processing) and Annex 3 (Online Intermediation Services).

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<sup>4</sup> Accessible at <https://www.cak.go.ke/buyer-power>

## **8. ESTABLISHING A *PRIMA FACIE* CASE**

8.1 The Commission will be guided by existing local and international case precedent in respect of the assessment of what constitutes a *prima facie* case.

8.2 In short, the Commission will have established a *prima facie* case when sufficient evidence exists to create a duty to rebut such evidence.

8.3 Where a *prima facie* case has been established using the approaches outlined above, the onus falls on the buyer against whom the complaint has been lodged to demonstrate that the price or trading condition is not unfair.

8.4 The Commission will use the following assessment criteria in considering the submissions made by the buyer in this regard:

8.4.1 Whether there is an objective justification for the difference or reduction in price and that the difference or reduction is not reasonably related or proportionate to the stated justification.

8.4.2 Whether the trading condition is not offset by other benefits afforded to the complainant (and not others without the offending condition) and that offset is proportionate to the risk or cost imposed by the offending trading condition.

## **9. AVOIDANCE PROVISION (SECTIONS 8(4)(B))**

9.1 Section 8(4)(b) prohibits dominant firms from seeking to circumvent section 8(4)(a) by avoiding or refusing to purchase from a supplier that is an SME or HDP firm. Section 8(4)(c)(ii) places the onus on the dominant firm to show it has not done so when presented with a *prima facie* case. Below we provide the Commission's approach to investigating such avoidance or refusal to purchase as well as the rationale for such conduct.

9.2 The Commission will first establish whether the firm against which a complaint is made is a dominant purchaser within a sector designated by the Minister

and whether the complainant falls within the category of either an SME or HDP firm.

9.3 Second, the Commission will then determine whether there has been a refusal or avoidance to purchase from the complainant.

9.4 Third, the Commission will seek to determine if there is a rebuttable presumption that the rationale for the refusal to deal is to circumvent section 8(4)(a). In doing so, the Commission will consider, amongst others:

9.4.1 Whether the firm avoids or refuses to purchase from other SMEs or HDP firms, or a particular subset of these firms, for the relevant good or service in question;

9.4.2 Whether the firm avoids or refuses to purchase from SMEs or HDP firms, or a particular subset of these firms, for other goods and services;

9.4.3 Whether the requirements set by the purchaser for its suppliers include requirements which themselves represent a constructive refusal to deal with SMEs and/or HDP firms; and

9.4.4 Whether the firm previously purchased from SME or HDP firms (or a subset thereof) and if there is evidence that the firm ceased supplying following the announcement of the amendments. This includes whether the buyer has not previously purchased from SMEs and/or HDPs, at least for a reasonable period prior to the process of amending the Act.

***Prima Facie case***

9.5 The Commission will have established a *prima facie* case when sufficient evidence exists to create a duty to rebut such evidence.

9.6 Where a *prima facie* case has been established using the approaches outlined above, the onus falls on the buyer against whom the complaint has been

lodged to demonstrate that they have not refused to supply a firm in the designated class to avoid the implications of the provisions in section 8(4)(a).

## **10. PENALTIES**

- 10.1 As stipulated in section 59(1)(a) of the Act (as amended), a contravention of section 8(4) carries with it an administrative penalty for a first time offence. As per section 59(2), this penalty may be up to 10% of turnover for a first time offence and 25% of turnover for a repeat offence. Section 59(3A) also provides for the administrative penalty to include the turnover of any controlling firms where such controlling firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct.

## **11. INVESTIGATORY DISCRETION**

- 11.1 These guidelines will not preclude the Commission from exercising its investigatory discretion on a case-by-case basis to factor for the individual circumstances of a matter.

## **FREQUENTLY ASKED QUESTIONS**

### **Which firms fall within the category of SMEs**

1. Small and Medium businesses are determined in terms of the Minister by notice in Gazette. Government Notice No. 987 12 July 2019 (Government Gazette No. 42578) sets out these criteria in terms of sector-specific employment and turnover thresholds which both need to be met in order to qualify. These are replicated as annex 1 to these guidelines for convenience.

### **Does this provision apply to all firms owned or controlled by historically disadvantaged persons?**

2. No. This provision only applies to HDP firms in terms of the benchmarks set by the Minister. These benchmarks have been gazetted and include only HDP firms that supply less than 20% of the dominant buyer's purchases of the good or service that is the subject of the complaint.

### **Do the new buyer power provisions apply to all sectors and firms?**

3. No. The buyer power provisions only apply to certain sectors of the economy as designated by the Minister in terms of section 8(4)(d)(i). These sectors have been placed in draft regulations and include agro-processing, grocery retail and online intermediation services.
4. In addition, the buyer power provisions only apply to firms that are dominant purchasers in these sectors.

### **Does the avoidance provision create an obligation to purchase from all SME and HDP suppliers?**

5. No. The provision does not create an obligation to purchase from any SME or HDP supplier that approaches a dominant purchaser.

6. The provision only seeks to outlaw those instances where a dominant buyer has refused or avoided purchasing from the supplier in order to avoid the obligations not to impose unfair pricing or trading terms on these suppliers. There is no violation where a dominant buyer has other reasons for not purchasing from an SME or HDP supplier.
7. However, if the dominant purchaser does not purchase from any SME or HDP suppliers then there may be a rebuttable presumption that it is engaging in an avoidance strategy. It would then be for the dominant purchaser to provide evidence that there is no avoidance strategy.

**Do programmes designed to develop SME or HDP suppliers risk falling foul of the buyer power provision?**

8. Highly unlikely. The provision is designed to prevent the exploitation of SME or HDP suppliers by a dominant firm, and hence the relevant test is whether the dominant firm has imposed unfair prices or trading conditions on SME or HDP suppliers. If the dominant firm has supplier development programmes in place which are designed to support the ability of the SMEs or HDP firms to supply the purchaser, then this contracting relationship is highly unlikely to be exploitative and contain contracting terms that would be considered unfair. This is even in the case of those SMEs or HDP firms that do not form part of the supplier development programme.

**Is it required that SMEs and HDP firms are paid a higher price or given preferential trading terms in order to comply with section 8(4)?**

9. No. The purpose of the provision is to prevent the use of buyer power to exploit SMEs and HDP firms which lack any countervailing negotiating power by imposing unfair prices and trading conditions relative to larger suppliers. The implication is that a violation will predominately occur where the SMEs or HDP firms typically receive inferior trading terms or prices.

**Is it likely that the negotiation of a lower price in exchange for more volume (i.e. a volume discount) would fall foul of the unfair price provision?**

10. Highly unlikely. It is usually mutually beneficial to the supplier and purchaser to negotiate a lower price in exchange for greater volumes. The purchaser benefits from the lower price and the supplier from the increased volumes, which may also reduce their unit costs of production making the lower price achievable. Therefore, whilst the price negotiated may be lower, that is unlikely to be considered exploitative in this context due to the off-setting volume gain.

11. It is only in the case where the dominant buyer has used the façade of a volume discount negotiation to impose deep price cuts in exchange for limited volume gains that such behaviour would potentially attract further scrutiny to determine if it was exploitative.

**Is it required for the complainant to demonstrate that the price or trading condition applies to the entire class of firms and not just itself?**

12. No. A single firm that falls within the category of SME or HDP firm may lodge a complaint on the basis that they face an unfair price or trading condition. The Commission will then investigate as to whether this is the case or not.

**Is there a grace period for compliance?**

13. There is no grace period for compliance within which the Commission will not investigate and act on complaints. The amendments become binding once brought into law, and it is incumbent upon dominant firms to ensure that they comply with the provisions from the outset.

14. The Commission always has scope to consider cooperation by a respondent and efforts to resolve any complaints when determining an appropriate course of action. However, any leniency thus shown depends on the circumstances.



- 14.1. The Commission is likely to be more sympathetic to a respondent firm in the initial period following the amendment if that firm has made efforts to review its procurement conduct in light of the amendments. Such attempts at compliance, such as a review of contracts to ensure compliance with these guidelines, should also reduce the risks that firms will be in contravention of the provisions.
- 14.2. The Commission will also undertake a screening phase before passing complaints onto investigators for more detailed assessment and potential prosecution. Firms that remedy procurement conduct immediately upon receiving inquiries from the screening process in respect of a meritorious complaint will be considered to have cooperated more with the Commission than those which do not immediately address their behaviour.

**Can a dominant firm legitimately ask an SME or HDP supplier for its detailed cost information to assess its compliance with this provision?**

15. No. SME or HDP suppliers are not obliged to provide detailed cost structures to its customers purely for the assessment of whether that buyer complies with section 8(4). Given the tests outlined by the Commission in these enforcement guidelines, such information is not required by the buyer in order to assess its own compliance. If such information legitimately serves another purpose in the negotiation of a supply arrangement and has been exchanged in previous negotiations, then that consideration is distinct.
16. In fact, the Commission will take a dim view of dominant buyers that use compliance with section 8(4) as leverage in demanding detailed cost information from its suppliers as this may undermine healthy price negotiations.

## ANNEX 1: SME QUALIFICATION CRITERIA

STAATSKOERANT, 12 JULIE 2019

No. 42578

### SCHEDULE

Column 1	Column 2	Column 3	Column 4
Sectors or Subsectors in accordance with the Standard Industrial Classification	Size or Class of Business	Total full-time equivalent of paid employees	Total annual turnover (Rand)
Agriculture	Medium	51 – 250	≤ 35,0 million
	Small	11 – 50	≤ 17,0 million
	Micro	0 – 10	≤ 7,0 million
Mining & Quarrying	Medium	51 – 250	≤ 210,0 million
	Small	11 – 50	≤ 50,0 million
	Micro	0 – 10	≤ 15,0 million
Manufacturing	Medium	51 – 250	≤ 170,0 million
	Small	11 – 50	≤ 50,0 million
	Micro	0 – 10	≤ 10,0 million
Electricity, Gas & Water	Medium	51 – 250	≤ 180,0 million
	Small	11 – 50	≤ 60,0 million
	Micro	0 – 10	≤ 10,0 million
Construction	Medium	51 – 250	≤ 170,0 million
	Small	11 – 50	≤ 75,0 million
	Micro	0 – 10	≤ 10,0 million
Retail, Motor Trade & Repair Services	Medium	51 – 250	≤ 80,0 million
	Small	11 – 50	≤ 25,0 million
	Micro	0 – 10	≤ 7,5 million
Wholesale	Medium	51 – 250	≤ 220,0 million
	Small	11 – 50	≤ 80,0 million
	Micro	0 – 10	≤ 20,0 million
Catering, Accommodation & Other Trade	Medium	51 – 250	≤ 40,0 million
	Small	11 – 50	≤ 15,0 million
	Micro	0 – 10	≤ 5,0 million
Transport, Storage & Communication	Medium	51 – 250	≤ 140,0 million
	Small	11 – 50	≤ 45,0 million
	Micro	0 – 10	≤ 7,5 million
Finance & Business Services	Medium	51 – 250	≤ 85,0 million
	Small	11 – 50	≤ 35,0 million
	Micro	0 – 10	≤ 7,5 million
Community, Social & Personal Services	Medium	51 – 250	≤ 70,0 million
	Small	11 – 50	≤ 22,0 million
	Micro	0 – 10	≤ 5,0 million

## **ANNEX 2: PROVISIONAL LIST OF UNFAIR TRADING CONDITIONS IN GROCERY RETAIL AND AGRO-PROCESSING**

1. The following trading practices are considered unfair:
  - 1.1. The buyer pays the supplier later than 30 days from delivery for perishable products and later than 60 days from delivery for other products.
  - 1.2. The buyer cancels orders of perishable products at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercialising or using those products.
  - 1.3. The buyer unilaterally changes the terms of a supply agreement that concern the terms of delivery (frequency, method, place, timing), volume of supply, quality standards, terms of payment, prices and provision of services.
  - 1.4. The buyer requires payments from the supplier that are not related to the sale of the products of the supplier.
  - 1.5. The buyer requires the supplier to pay for the deterioration or loss, or both, of products that occurs on the buyer's premises or after ownership has been transferred to the buyer, where such deterioration or loss is not caused by the negligence or fault of the supplier.
  - 1.6. The buyer refuses to confirm in writing the terms of a supply agreement between the buyer and the supplier for which the supplier has asked for written confirmation.
  - 1.7. The buyer unlawfully acquires, uses or discloses the trade secrets of the supplier.
  - 1.8. The buyer threatens to carry out, or carries out, acts of commercial retaliation against the supplier if the supplier exercises its contractual or legal rights, including by filing a complaint with enforcement authorities or by cooperating with enforcement authorities during an investigation.
  - 1.9. The buyer requires compensation from the supplier for the cost of examining customer complaints relating to the sale of the supplier's products despite the absence of negligence or fault on the part of the supplier.

2. The following trading practices are considered unfair unless they have been previously agreed in clear and unambiguous terms in the supply agreement and, where applicable, the costs thereof are quantified by the buyer and payments bear a reasonable relationship to these costs.
  - 2.1. The buyer returns unsold products to the supplier without paying for those unsold products or without paying for the disposal of those products, or both.
  - 2.2. The supplier is charged payment as a condition for stocking, displaying or listing its products, or of making such products available on the market.
  - 2.3. The buyer requires the supplier to bear all or part of the cost of any discounts on its products that are sold by the buyer as part of a promotion.
  - 2.4. The buyer requires the supplier to pay for the advertising by the buyer of its products
  - 2.5. The buyer requires the supplier to pay for the marketing by the buyer of its products.
  - 2.6. The buyer charges the supplier for staff for fitting-out premises used for the sale of the supplier's products.

## **ANNEX 3: PROVISIONAL LIST OF UNFAIR TRADING CONDITIONS IN ONLINE INTERMEDIATION SERVICES**

1. Online intermediation services are used by suppliers of goods and services as intermediaries to reach consumers or other business customers. The Commission is of the view that the intermediation service is in a buyer-supplier relationship for the good or service whether the online service purchases from the supplier directly or merely facilitates the transaction with the end customer.
2. The following trading practices by providers of online intermediation services in respect of the suppliers operating on that service are considered unfair:
  - 2.1. The provider fails to provide the terms and conditions of operating on its service in plain and intelligible language, especially in respect of:
    - 2.1.1. The grounds for decisions to suspend or terminate or impose any other kind of restriction upon the suppliers on their service;
    - 2.1.2. The effects of the terms and conditions on the ownership and control of intellectual property rights and personal data of suppliers; and
    - 2.1.3. The main parameters determining the ranking and display of suppliers on their service.
    - 2.1.4. Notice of changes to the terms and conditions that are reasonable and proportionate to the nature and extent of the envisaged changes and to their consequences for the suppliers.
  - 2.2. The online intermediation services provider exclusively or primarily ranks suppliers based on direct or indirect remuneration paid by suppliers to the intermediation service.
  - 2.3. 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.
  - 2.4. 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.

- 2.5. Restrictions on the supplier from offering its own ancillary goods and services, including through the online intermediation service.
- 2.6. The use of data and information gathered by the online intermediation service provider on the supplier's sales (incl. pricing, volume, customer sales) to enter in competition with the supplier.
- 2.7. A requirement for automatic waivers of rights of the supplier as a juristic person under the Protection of Personal Information Act, (Act No 4 of 2013) in order to supply on or through the online intermediation service.