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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

ECONOMIC DEVELOPMENT DEPARTMENT

NO. 1316

10 OCTOBER 2019

**NOTICE IN TERMS OF SECTION 78 OF THE COMPETITION ACT, 1998
(ACT NO. 89 OF 1998)****PRICE DISCRIMINATION REGULATIONS AND BUYER POWER REGULATIONS**

By virtue of the powers vested in me in terms of section 78 of the Competition Act, 1998 (Act No. 89 of 1998), I Ebrahim Patel, Minister of Trade and Industry, hereby –

- (a) publish the regulations in Schedule 1 and 2 hereto for public comment; and
- (b) request that any comments in this regard be submitted to: Ms Linda Herbst on competitionregulations@economic.gov.za, within twenty eight (28) days from the date of publication of this Notice.



MR EBRAHIM PATEL
MINISTER OF TRADE AND INDUSTRY
DATE: 8 OCTOBER 2019

SCHEDULE 1

PRICE DISCRIMINATION REGULATIONS

Interpretation

1. In these Regulations a word or expression to which a meaning has been assigned in the Act, has the meaning so assigned and, unless the context indicates otherwise:

“**designated class of supplier**” includes a small business or a medium-sized business as defined in section 1 of the Act or 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 these Regulations;

“**the Act**” means the Competition Act, 1998 (Act No. 89 of 1998).

Purpose

2. The purpose of these Regulations is—
 - (a) to give effect to section 9(1)(a)(ii) of the Act and to provide for the benchmarks for determining the application of section 9(1)(a)(ii) to *firms* owned and controlled by historically disadvantaged persons; and
 - (b) to set out the relevant factors and benchmarks for determining whether a dominant *firm's* action is price discrimination that impedes the *participation* of *small and medium businesses* and *firms* controlled or owned by historically disadvantaged persons.

Elements of Price Discrimination to be satisfied to establish a contravention

3. The factors that should each be satisfied in order to establish a price discrimination contravention are as follows:
 - (a) The selling firm must be dominant or shown to have market power within the meaning of section 7 of the Act;
 - (b) There is different treatment between the purchaser in the designated class and other purchasers outside that class of the form set out in section 9(1)(c) in respect of equivalent transactions for goods or services of like grade and quality as set out in section 9(1)(b) of the Act;
 - (c) The differential treatment—

- (i) does not make reasonable allowance for differences in the cost or likely cost of supplying the good or service based on differing places or methods of supply as set out in section 9(2)(a)(i) or (ii);
 - (ii) does not constitute an act of good faith to meet a competitor's price as set out in section 9(2)(b); or
 - (iii) is not a legitimate response to changes in market conditions as set out in section 9(2)(c);
- (d) The differential in price relative to other purchasers impedes the effective participation of a firm or firms in the designated class of purchasers.

Price Discrimination

4. Factors and benchmarks for determining whether the price discrimination is likely to impede effective participation by the designated class include, but are not limited to, the following:
- (a) The extent of the difference in respect of price or other factors outlined in section 9(1)(c) relative to other purchasers in the same or adjacent downstream markets;
 - (b) The significance of the input in the cost structure of production or as a driver of sales in the downstream market;
 - (c) The duration and timing of the price differential;
 - (d) The likelihood that the elimination of the differential would result in the firm in the designated class facing increased demand for its goods or services in the downstream market; and
 - (e) The likelihood that the elimination of the differential would improve profitability and investment for the firm in the designated class.

Application to firms controlled or owned by historically disadvantaged persons

5. These Regulations apply to firms controlled or owned by historically disadvantaged persons that purchase less than 20% of the relevant good or service supplied by the dominant seller.

Guidelines

6. The Competition Commission may issue guidelines in respect of its enforcement approach to section 9(1)(a)(ii) in light of these Regulations.

Short Title

7. These Regulations are called the Price Discrimination Regulations, 2019

SCHEDULE 2

BUYER POWER REGULATIONS

Interpretation

1. In these Regulations, a word or expression to which a meaning has been assigned in the Act, has the meaning so assigned and, unless the context indicates otherwise:

“Agro-processing sector” constitutes the subset of manufacturing that processes raw materials and intermediate products derived from the agricultural sector, including agriculture, forestry and fisheries;

“designated class of supplier” includes a small business or a medium-sized business as defined in section 1 of the Act or 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 these Regulations;

“Grocery wholesale and retail sector” constitutes the wholesale or retail of food, pet food, drinks, cleaning products, toiletries or household goods;

“Online intermediation services sector” constitutes information services that allow business users to offer goods or services to consumers with a view to facilitating the initiating of direct transactions between those business users and consumers, whether online or offline, and which are provided on the basis of a contractual relationship between the intermediation service and business user. These include online e-commerce market places, online software application stores, online matching services and online social media services;

“price” includes discounts, rebates, commissions, allowances or credit;

“trading conditions” include any explicit terms contained in contractual arrangements as well as any implied or actual trading terms implemented by the buyer outside of the supply contract;

“the Act” means the Competition Act, 1998 (Act No. 89 of 1998).

Purpose

2. The purpose of these Regulations is to:
 - (a) designate the sectors of dominant firms which are prohibited to require from or impose on a supplier unfair prices or other trading conditions;
 - (b) set out the relevant factors and benchmarks for determining whether prices and other trading conditions imposed are unfair; and
 - (c) in respect of firms owned or controlled by historically disadvantaged persons, set out the benchmarks for determining the firms to which section 8(4) applies.

Elements of a contravention

3. The factors that should be satisfied in order to establish a contravention of section 8(4)(a) include:
 - (a) The purchasing firm must lie within a sector designated by the Minister in terms of regulation 6;
 - (b) The buyer firm must be dominant or shown to have market power in a purchasing market within the meaning of section 7 of the Act;
 - (c) The supplier must fall within the designated class of suppliers;
 - (d) The price or trading condition must be required from or imposed on the supplier by the buyer firm; and
 - (e) The price or trading condition must be unfair.

Determination of unfair price

4. Factors and benchmarks for determining the unfairness of the price include, but are not limited to, the following:
 - (a) The price paid to other suppliers of like goods or services, in particular those outside the designated class, and whether such prices are higher;
 - (b) The magnitude of any differences in prices to other suppliers of like goods or services;
 - (c) Whether reductions in the purchasing price are directly or indirectly required from or imposed;
 - (d) Whether reductions are retrospective and/or unilateral and/or unreasonable;
 - (e) Whether costs are directly or indirectly imposed on or required from the supplier which reduce the net price received; or
 - (f) Whether the direct or indirect imposition or requirement of costs is retrospective and/or unilateral and/or unreasonable.

Determination of unfair trading conditions

5. Factors and benchmarks for determination of whether a trading condition may be deemed unfair include, but are not limited to, the following:
- (a) Whether the trading condition unreasonably transfers risks or costs onto a firm in the designated class of suppliers;
 - (b) Whether the trading condition is one-sided, onerous or not proportionate to the objective of the clause (such as unduly long payment terms); or
 - (c) Whether the trading condition bears no reasonable relation to the objective of the supply agreement.

Designated Sectors

6. The Regulations will apply to the following designated sectors:
- (a) Grocery retail sector;
 - (b) Agro-processing sector; and
 - (c) Online intermediation services sector.

Application to firms controlled or owned by historically disadvantaged persons

7. These Regulations apply to firms controlled or owned by historically disadvantaged persons that supply 20% or less of the purchases of the dominant buyer for the relevant good or service.

Guidelines

8. The Competition Commission may issue guidelines in respect of its enforcement approach to section 8(4) in light of these Regulations.

Short Title

9. These Regulations are called the Buyer Power Regulations, 2019.

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