

**GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS****ECONOMIC DEVELOPMENT DEPARTMENT****NO. 168****13 FEBRUARY 2020****COMPETITION ACT, 1998 (ACT NO. 89 OF 1998)****REGULATIONS ON BUYER POWER MADE BY THE MINISTER UNDER  
COMPETITION ACT, 1998**

I, Ebrahim Patel, Minister of Trade and Industry, after consultation with the Competition Commission, hereby in terms of section 8(4) read with section 78 of the Competition Act, 1998 (Act No. 89 of 1998), make the regulations as set out in the Schedule hereto.

The regulations will come into effect on the date of publication hereof in the *Gazette*.

  
**MR EBRAHIM PATEL**  
**MINISTER OF TRADE AND INDUSTRY**  
**DATE: 2020/02/12**

## SCHEDULE

### BUYER POWER REGULATIONS

#### Interpretation

1. In these Regulations—

- (a) a word or expression to which a meaning has been assigned in the Act, has the meaning so assigned;;
- (b) a reference to a section by number refers to the corresponding section of the Act;
- (c) a reference to a regulation by number refers to the corresponding item of these Regulations, and

unless the context indicates otherwise,

**"agro-processing sector"** constitutes the processing of raw materials and intermediate products derived from the agricultural sector, including agriculture, forestry and fisheries;

**"designated class of supplier"** means small business or medium sized business as defined in section 1 of the Act and any regulations made by the Minister; or alternatively a firm controlled and 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 and household goods;

**"ecommerce"** includes the sale, or facilitation of sale, of goods supplied by third party businesses;

**"ecommerce and online services sector"** constitutes the online sale of goods or services to businesses or consumers;

"online services" include—

- (a) the provision or facilitation of a service using contracted individuals or other businesses to supply the service that forms the basis for an online sale; and
- (b) online e-commerce market places, online application stores and so-called 'gig economy' 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; and

"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 from requiring or imposing unfair prices or other trading conditions on a supplier;
- (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.

### Factors of buyer power to be satisfied to establish a contravention

3. The factors that must be considered in the establishment of a contravention of section 8(4)(a) include whether—

- (a) the buyer operates within a sector designated by the Minister in terms of regulation 6;
- (b) the buyer is dominant within the meaning of section 7;
- (c) the supplier falls within the designated class of suppliers;

- (d) the price or trading condition is required from or imposed on the supplier by the buyer; or
- (e) the price or trading condition is unfair.

#### **Determination of unfair price**

4. Factors and benchmarks for determining the unfairness of the price include the following:

- (a) The prices 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 existing purchasing price are directly or indirectly required from, or imposed on, the supplier;
- (d) whether reductions to an existing purchasing price are retrospective, unilateral or unreasonable;
- (e) whether costs are directly or indirectly imposed on or required from the supplier which reduce the net price received by the supplier; or
- (f) whether the direct or indirect imposition or requirement of costs is retrospective, unilateral or unreasonable.

#### **Trading conditions**

5. Factors and benchmarks for determining whether a trading condition may be deemed unfair include the following:

- (a) The trading condition unreasonably transfers risks or costs onto a firm in the designated class of suppliers;
- (b) the trading condition is one-sided, onerous or not proportionate to the objective of the clause (such as unduly long payment terms); or
- (c) the trading condition bears no reasonable relation to the objective of the supply agreement.

**Designated sectors**

6. The Regulations apply to the following sectors:

- (a) Grocery wholesale and retail sector;
- (b) agro-processing sector; and
- (c) ecommerce and online services sector.

**Application to firms controlled or owned by historically disadvantaged persons**

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

**Guidelines**

8. The Competition Commission may, in terms of section 79, 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, 2020.

**ECONOMIC DEVELOPMENT DEPARTMENT****NO. 169****13 FEBRUARY 2020****COMPETITION ACT, 1998 (ACT NO. 89 OF 1989)****REGULATIONS ON PRICE DISCRIMINATION MADE BY THE MINISTER UNDER  
COMPETITION ACT, 1998**

I, Ebrahim Patel, Minister of Trade and Industry, after consultation with the Competition Commission, hereby in terms of section 9(4) read with section 78 of the Competition Act, 1998 (Act No. 89 of 1998), make the regulations as set out in the Schedule hereto.

The regulations will come into effect on the date of publication hereof in the *Gazette*.



**MR EBRAHIM PATEL**  
**MINISTER OF TRADE AND INDUSTRY**  
**DATE: ..2020./02./12.....**

## SCHEDULE

### 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 purchaser"** means a small business or medium-sized business as defined in section 1 of the Act or any regulations made by the Minister; or alternatively a firm controlled and owned by historically disadvantaged persons within the meaning of the Act and within the benchmarks determined by these Regulations;

**"Regulations"** means the Price discrimination Regulations; and

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

#### Purpose

2. The purpose of these Regulations are—

- (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 and owned by historically disadvantaged persons.

### **Factors of Price Discrimination to satisfy to establish a contravention**

3. The factors that should each be considered in the establishment of a price discrimination contravention, includes:

- (a) The selling firm must be dominant within the meaning of section 7 of the Act;
- (b) there is differential treatment between the purchaser in the designated class of purchaser and other purchasers outside that class of the form of discrimination 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); and

- (d) the differential treatment in price relative to other purchasers is likely to impede the effective participation of a firm or firms in the designated class of purchasers.

## Price Discrimination

4. Factors and benchmarks that may be relevant as to whether the price discrimination by a dominant firm is likely to impede effective participation by a designated class of purchaser includes:

- (a) The extent of the difference in respect of price or other factors outlined in section 9(1)(c) of the Act relative to other purchasers in the same market or in markets in which the purchaser in the designated class is a potential competitor;
- (b) the significance of the input in the cost structure of the purchaser in the designated class of purchaser or as a driver of sales in the downstream market for the purchaser in the designated class of purchaser;
- (c) the duration and timing of the price differential;
- (d) the likelihood that the differential treatment would result in the purchaser in the designated class of purchaser facing decreased demand for its goods or services in the downstream market; and
- (e) the likelihood that the differential treatment would result in decreased investment by the purchaser in the designated class.

## **Application to firms controlled and owned by historically disadvantaged persons**

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

## **Guidelines**

6. The Competition Commission may issue guidelines in terms of section 79 of the Act 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, 2020.