SECTION 9(1)(a)(ii) PRICE DISCRIMINATION ENFORCEMENT GUIDELINES

10 OCTOBER 2019
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 new price discrimination provision under section 9, namely subsection (1)(a)(ii). In terms of this subsection, an action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if it is likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively.

The amendments to section 9 also include a provision for the Minister to make regulations in respect of a) the benchmarks for the application of subsection (1)(a)(ii) to Historically Disadvantaged Persons (“HDP”) firms and b) the relevant factors and benchmarks for determining whether a dominant firm’s conduct is price discrimination within the meaning of subsection (1)(a)(ii). Draft regulations were issued and these guidelines are consistent with such draft regulations.

These guidelines present the general principles that the Commission will follow in assessing whether alleged conduct contravenes section 9(1)(a)(ii) of the Act. These guidelines seek to provide guidance through outlining how the Commission intends to interpret the new price discrimination 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 “Price Discrimination Regulations” means the regulations issued by the Minister in terms of section 9(4) of the Act.
2. THE LEGISLATIVE FRAMEWORK

2.1 Section 9 of the Act has been amended by section 6 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 9, as amended, reads as follows:

9. Price discrimination by dominant firm as seller prohibited

(1) An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if –
   (a) it is likely to have the effect of—
      (i) substantially preventing or lessening competition; or
      (ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively;
   (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 the goods or services.

(1A) It is prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1)(a)(ii);

(2) Despite subsection (1), but subject to subsection (3), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of subsection (1) is not prohibited price discrimination if the dominant firm establishes that the differential treatment—
   (a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from—
      (i) the differing places to which goods or services are supplied to different purchasers;
      (ii) methods by which goods or services are supplied to different purchasers; or
      (iii) quantities in which 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, including—
      (i) any action in response to the actual or imminent deterioration of perishable goods;
      (ii) any action in response to the obsolescence of goods;
      (iii) a sale pursuant to a liquidation or sequestration procedure; or
      (iv) a sale in good faith in discontinuance of business in the goods or services concerned”; and

(3) If there is a prima facie case of a contravention of section (1)(a)(ii)—
   (a) subsection (2)(a)(iii) is not applicable; and
   (b) the dominant firm must, subject to regulations issued under section 9(4) show that its action did not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively.

(3A) If there is a prima facie case of a contravention of subsection (1A), the dominant firm alleged to be in contravention must show that it has not avoided selling, or refused to sell, goods or services to a purchaser referred to in subsection (1A) in order to circumvent the operation of subsection (1)(a)(ii).

(4) The Minister must make regulations in terms of section 78—
   (a) to give effect to this section, including the benchmarks for determining the application of this section to firms owned and controlled by historically disadvantaged persons; and
   (b) setting 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.
3. FACTORS IN CONSIDERING PRICE DISCRIMINATION ITO SECTION 9(1)(a)(ii)

3.1 Dominance: the firm against which a complaint is made must be a dominant seller;

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

3.3 Discriminatory treatment: there is discrimination between the sales to the SME or HDP firm purchaser and other purchasers that fall outside the class of SME or HDP firms in respect of the sales price; any discount, allowance, rebate or credit; the provision of services in respect of the sale; or payment for such services;

3.4 Like goods or services in equivalent transactions: in respect of equivalent transactions for goods or services of like grade and quality;

3.5 Impeding effective participation: the differential in price, relative to other purchasers, impedes the effective participation of a firm or firms in the designated class of purchasers; and

3.6 No justification for discrimination: the discrimination 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; or constitutes an act of good faith to meet a competitor's price; or is a legitimate response to changes in market conditions.

4. DOMINANCE

4.1 As part of its investigation the Commission will assess whether a seller is a dominant firm in line with the established principles and precedent of section 7 of the Act.
5. PURCHASER IS AN SME OR HDP FIRM

5.1 The Commission will investigate whether the complainant purchaser is an SME as defined. As such the purchaser that is subjected to the discrimination must fall within the definition of a small or medium firm as defined.

5.2 In respect of an HDP firm, the Commission will investigate whether the complainant purchaser is an HDP firm as defined. As such the purchaser that is subjected to the discrimination must fall within the definition of an HDP firm as defined.

6. DISCRIMINATORY TREATMENT

6.1 In assessing the alleged discriminatory treatment, the Commission may consider the existence and extent of discrimination in respect of the individual complainant relative to other purchasers that do not fall within the designated class of suppliers, but operate in the same or adjacent markets.

6.2 The Commission will consider discrimination against the SME and/or HDP purchaser in respect of the price or service related to the aspects identified by section 9(1)(c) of the Act.

6.3 If relevant to the assessment, the above information may be viewed cumulatively rather than individually. For instance, the Commission may consider the lower net difference in price if a higher price is charged but a greater rebate is provided. Similarly, if a higher price is charged and a lower rebate provided, then the Commission may consider the higher net difference in price.

6.4 In its investigation the Commission may consider the terms received by firms that fall outside of the designated class of suppliers (i.e. non-SME or non-HDP firms) but operate in the same or adjacent product market segments as the SME or HDP purchaser. In this respect adjacent product markets will be considered given that any discrimination may hinder effective participation in markets within which the particular class currently participates but also the class’ ability to enter and participate in adjacent markets or market segments.
6.5 In measuring the extent of discrimination against the complainant, the Commission may seek information on:

6.5.1 The most favourable terms offered by the dominant supplier as the firm receiving such terms would still participate in the same markets as the complainant and impact on their participation; and

6.5.2 Whether the extent of the difference in relation to other non-SME or non-HDP firms is aggravating or mitigating in relation to the discrimination against SMEs or HDP firms.

6.6 The Commission will also seek to determine whether the discrimination faced by the individual complainant is representative of the discrimination faced by other similar firms within the designated class, or if it is specific to the individual firm.

6.6.1 In doing so, the Commission will consider whether the pricing conduct applies to categories of purchasers that are similar to the complainant. For instance, if the complainant is a small firm, the Commission will determine if other small firms face similar treatment or not. The same would apply to a medium firm or an HDP firm.

6.6.2 In the course of its investigation, the Commission may also consider whether the pricing conduct discriminates against other categories of firms that fall within the designated class. For instance, if the complainant is a small firm, the Commission will also examine the pricing conduct to see if it discriminates against medium or HDP firms too.
7. LIKE GOODS OR SERVICES IN EQUIVALENT TRANSACTIONS

7.1 In relation to this factor, the Commission's may in its investigation consider two aspects:

7.1.1 First, that the good or service being purchased by SME or HDP complainant be of the same or largely similar grade and quality than the good or service purchased by non-SME or non-HDP firms.

7.1.2 Second, that the transaction for that good or service be equivalent. The Commission will be guided by local and international precedent in respect of the assessment of whether transactions may be considered equivalent or not.

7.2 The Commission may consider whether a complainant is denied the opportunity to purchase goods or services of like grade and quality, or transact in an equivalent fashion as others outside the designated class. If that is the case, the Commission may consider whether such a denial itself constitutes discriminatory behaviour.

7.3 The Commission will draw on established local and international case precedent in respect of its assessment of like grade or quality, and equivalent transactions.

8. IMPEDING EFFECTIVE PARTICIPATION

8.1 Section 9(1)(a)(ii) states that discriminatory selling behaviour by the dominant firm is prohibited price discrimination if “it is likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively.” Section 1 of the Act, as amended, defines "participate" as "the ability of or opportunity for firms to sustain themselves in the market".

8.2 In determining whether a dominant firm’s discrimination is likely to impede the effective participation by a designated class of suppliers, the Commission will apply the following principles, amongst others:
8.2.1 The inquiry does not in the Commission’s view require an assessment of the effects on consumers but rather on the designated class of supplier;

8.2.2 The test required by this section is not the same as “a substantial preventing or lessening of competition” (which test rather applies to section 9(1)(a)(i) of the Act);

8.2.3 The phrasing of “likely to have the effect” requires that the assessment be a probabilistic one. As such, actual effects need not necessarily be demonstrated to establish a contravention when such effects are probable or likely given the conduct. However, where actual effects can also be demonstrated then it would necessarily enhance the assessment;

8.2.4 The Commission may consider the discrimination against the SME or HDP firm relative to other purchasers that operate in the same or adjacent downstream product market segments, as otherwise the difference in price (or other terms) would itself be unlikely to causally impact on the complainant;

8.2.5 The consideration of adjacent downstream product market segments is undertaken to determine if entry into a market segment is hindered by the discriminatory pricing;

8.2.6 In assessing the conduct, the Commission may consider whether the designated class of supplier would likely have participated more effectively in the market, but for the pricing differential. The Commission will be mindful that the effect should not be trivial if it is to impede the class in their effective participation;

8.2.7 Whether other factors also impede the effective participation of the designated class of supplier, or even if the class in question could be more efficient, will therefore not be a relevant factor in the Commission’s assessment. The test is rather whether there is an incremental effect due to the pricing differential.
8.3 In considering the extent to which a differential impedes the effective participation of a designated class of suppliers, the Commission may consider the following factors as set out in the Ministerial Regulations, amongst others:

8.3.1 The extent of the difference in respect of price or other factors outlined in section 9(1)(c) of the Act;

8.3.2 The significance of the input in the cost structure of production or as a driver of sales in the downstream market;

8.3.3 The duration of the price differential; and/or

8.3.4 The likelihood that 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;

8.4 In assessing the extent of difference in respect of price or other factors, the Commission will approach that assessment and measurement as outlined above in the discussion of discrimination.

8.5 In assessing the significance of the input in the cost structure of production or as a driver of sales in the downstream market, the Commission may consider, amongst others:

8.5.1 The input in terms of its share of variable costs of production in the downstream market. The Commission is mindful that variable cost levels generally are an important focus for many firms in terms of setting prices of incremental volumes whilst still ensuring a contribution to fixed costs; and/or

8.5.2 Assess whether a differential in price or other trading term specified in section 9(1)(c) of the Act directly impacts on demand from the final consumer. For instance, if competitive pricing of the product in question represents one of the notable drivers of final consumer footfall to the purchaser.

8.6 In assessing the duration of the price differential, the Commission may consider whether differences that emerged for shorter periods or were
temporary in nature indicate a lesser effect than differentials that existed for longer periods.

8.7 In assessing whether the differential 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, the Commission holds the view that:

8.7.1 A price differential that has a trivial impact on the costs of the purchaser is unlikely to influence pricing decisions and therefore unlikely to impact on demand for the purchaser’s services;

8.7.2 Similarly, such a differential is unlikely to materially impact on the profitability and performance of the purchaser, and therefore unlikely to impact on the funds available for investment;

8.7.3 Larger price differentials, especially on important inputs, are likely to affect pricing decisions especially for incremental sales and therefore the likely quantity sold;

8.8 The Commission will utilise the following benchmarks to screen complaints and decide on whether to initiate an investigation.

8.8.1 A price differential of less than 5%, relative to the firm receiving the lowest price or most favourable term, is unlikely to meet the threshold for impeding participation in a market regardless of the input's importance; and

8.8.2 For inputs of less importance to the downstream market, a price differential of less than 10%, relative to the firm receiving the lowest price or most favourable term, is unlikely to meet the threshold for impeding participation.

8.8.3 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.

8.9 Whilst the assessment is a probabilistic one and does not require the demonstration of actual effects, where actual effects can be demonstrated
then these will be given additional consideration by the Commission. Such effects may include, amongst others:

8.9.1 Specific instances where sales in the downstream market were lost due to a higher price from the complainant and/or others within the designated class, and where the input price differential contributed materially to the lost sales.

8.9.2 Specific instances where investments by the complainant and/or others within the designated class were not achievable and where the input price differential contributed materially to the investments not going ahead.

9. **ESTABLISHING A PRIMA FACIE CASE**

9.1 The Commission will be guided by existing local and international case precedent in respect of the assessment of what constitutes a *prima facie* case. In short, the Commission will have established a *prima facie* case when sufficient evidence exists to create a duty to rebut such evidence.

9.2 Where the respondent invokes one of the defences provided for in section 9(2), the Commission will be guided by existing local and international case precedent in respect of the assessment of these defences. In addition, the Commission will adopt the following two principles in assessing such defences for discriminatory conduct:

9.2.1 Firstly, the Commission may seek to not only consider whether a differential in pricing is legitimate based on any one of the justifications provided by section 9(2), but will also consider whether those factors justify the extent of the differential.

9.2.1.1 For example, using the justification of cost differences (section 9(2)(a)), the Commission will not only consider whether a difference in the place/location supplied influenced distribution costs, but also whether the extent of the cost difference reasonably justifies the price difference.
9.2.1.2 This test suggests that there need not be an exact accounting for the price differences based on cost differences, but cost and price differences should be of a similar order of magnitude.

9.2.1.3 Where the factors cited under section 9(2) fail to make reasonable allowance for the extent of the price differentials (either individually or collectively), the Commission may consider that the defence has not been successfully discharged by the dominant firm.

9.2.2 Secondly, the Commission may also determine if a dominant firm has altered its business practices in response to the elimination of the quantity defence (by section 9(3)(a) of the Act). As such, the Commission will be conscious of attempts by discriminating dominant firms to camouflage the quantity defence under alternative defences provided for in section 9(2).

10. THE AVOIDANCE PROVISION IN SECTION 9(1A)

10.1 Section 9(1A) prohibits dominant firms from seeking to circumvent section 9(1)(a)(ii) by avoiding or refusing to sell to a supplier that is an SME or HDP firm. Section 9(3A) 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 sell as well as the rationale for such conduct.

10.2 The Commission will first establish whether the firm against which a complaint is made is a dominant seller and whether the complainant is falls within the category of either an SME or HDP firm.

10.3 Second, the Commission will then determine whether there has been a refusal or avoidance to sell to the complainant.
10.4 Third, the Commission will seek to determine if there is a rebuttable presumption that the rationale for the refusal to sell is to circumvent section 9(1)(a)(ii). In doing so, the Commission will consider, amongst others:

10.4.1 Whether there is a consistent pattern of refusing or avoiding to sell over time or if the facts present sporadic instances only;

10.4.2 Whether the firm avoids or refuses to supply all SME or HDP purchasers, or only a particular subset of these firms (such as very small firms), for the relevant good or service that is the subject of the complaint;

10.4.3 Whether the firm avoids or refuses to supply other goods or services to SME or HDP purchasers, or only a particular subset of these firms (such as very small firms);

10.4.4 Whether the terms of sale themselves represent a constructive refusal to supply SME or HDP purchasers. For instance, whether terms include qualification criteria or minimum order sizes aimed only at excluding SME or HDP purchasers;

10.4.5 Whether the firm previously supplied SME or HDP firms (or a subset thereof) and the pricing differentials that existed between these firms and other customers. For example, evidence that the firm ceased supplying following the announcement of the amendments could be suggestive of a strategy of avoidance.

**Prima Facie Case**

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

10.6 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 9(1)(a)(ii).

11. **PENALTIES**

11.1 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.

12. **INVESTIGATORY DISCRETION**

12.1 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 ABOUT SECTION 9(1)(a)(ii)

1. Which firms fall within the category of SMEs
   1.1. 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 an annex to these guidelines for convenience.

2. Does this provision apply to all firms owned or controlled by historically disadvantaged persons?
   2.1. 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 purchase less than 20% of the sales of the dominant seller of the product or service that is the subject of the complaint.

3. Does the new provision effectively outlaw volume discounts?
   3.1. The new provision does place restrictions on the use and size of volume discounts for intermediate products sold by a dominant seller.
   3.2. This is because cost differences as a result of supplying different volumes may no longer be used as a defence to price discrimination against SMEs and HDP firms. As a result, price differences that may have previously been premised on differences in volumes purchased, will now be subject to a probabilistic inquiry as to whether they are likely to have the effect of impeding SME or HDP firms.
   3.3. However, from an enforcement perspective, the Commission is of the view that a volume discount spread of less than 5% for inputs of importance to downstream firms are unlikely to meet this threshold, and a spread of less than 10% for inputs of less importance to downstream firms similarly so. Importance is determined as 20% or more of variable
costs or a notable driver of consumer traffic and sales demand. A volume
discount of more than this spread thus risks being found in contravention
of this provision.

3.4. These provisions do not impact on the use of volume discounts in the
following contexts:

3.4.1. Goods or services sold to final consumers;

3.4.2. Goods or services sold by firms that are not dominant.

3.5. In addition, price differences may still be warranted based on other
factors listed in section 9(2), such as cost differences due to differences
in place or method of delivery, meeting a competitor’s price or changing
market conditions. However, the firm will still need to demonstrate that
these factors are relevant and fully justify the differential in price.

4. Does section 9(1)(a)(ii) require that the discriminatory behaviour by a
dominant firm should impede the entire class of firms and not just the
complainant itself?

4.1. A single firm that falls within the category of SME or HDP firm may lodge
a complaint on the basis that they face price discrimination which
impedes their ability to compete. The Commission will then assess
whether the discrimination faced by the individual complainant, as a
representative of the designated class, is likely impeded from effective
participation.

4.2. It is only in cases where the discrimination is only faced by that individual
firm and not others within the designated class that their treatment, and
likely impact of that treatment, might not be representative of the class.
For that assessment, the Commission will consider firms that are similar
to the complainant within the designated class and not just all firms within
the designated class. For instance, small firms only, or medium sized
firms only or HDP firms.

4.3. In the case of individual discrimination, the Commission will still seek to
understand the rationale for such discrimination and where no such
objective justification exists, seek to eliminate that treatment through a dispute resolution process. However, the prioritisation of cases for prosecution will be based on where the discriminatory behaviour impacts on other firms within the designated class.

5. **How is the dominant firm able to comply if it does not know the costs or performance of the downstream purchasers?**

5.1. A price discrimination provision has existed since the inception of the Act and therefore the alleged challenge of understanding how price differentials impact on the performance of downstream purchasers has always existed for dominant firms. The new provision does not change that.

5.2. In the Commission’s experience, dominant firms generally have a good understanding of the rough order of magnitude that their product contributes to the cost structure of its purchasers across different industries. Furthermore, this is all that is required to assess the impact of its pricing behaviour as the individual contribution of all other cost items is not necessary for the assessment.

5.3. These guidelines also provide clear thresholds that the Commission will use for screening complaints based on a general requirement of whether the good or service sold is important to the downstream firm or less so (5% price difference for important inputs and 10% for less important inputs). This general knowledge of their downstream purchaser’s cost structure is therefore sufficient to determine whether to comply with the lower or higher threshold for a price differential.

5.4. The dominant firm has an important insight into the performance of its downstream customers through its own sales volumes of the input. If a downstream firm is performing well then sales volumes to that firm may increase. Similarly, relative performance across different categories of downstream firms may be inferred based on trends in sales volumes to these customers over time.
5.5. Finally, the provision is also a probabilistic one whereby large price differentials for important inputs to the downstream industry can be expected to impede more effective participation. As this pricing structure is determined by the dominant firm, it can also undertake such a probabilistic inquiry.

6. Can a dominant firm legitimately ask an SME or HDP purchaser for its detailed cost information?

6.1. No. SME or HDP purchasers are not obliged to provide detailed cost structures to its suppliers as this information is not required for that firm to comply as discussed above. At most the purchaser can indicate if the input is important or not.

6.2. In fact, the Commission will take a dim view of dominant firms using this provision to demand detailed cost information from its purchasers as this may undermine healthy price negotiations. This is particularly the case where the dominant seller also competes downstream against the SME or HDP firms as this may create a strategic advantage for the dominant firm and may be considered an abuse of its upstream position.

7. Is there a grace period for compliance?

7.1. 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.

7.2. 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.

7.2.1. 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 pricing conduct in light of
the amendments. Such attempts at compliance, such as pricing within the thresholds set out in these guidelines, should also reduce the risks that firms will be in contravention of the provisions.

7.2.2. The Commission will also undertake a screening phase before passing complaints onto investigators for more detailed assessment and potential prosecution. Firms that remedy pricing 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.

8. **Would support of SMEs or HDPs by providing lower prices to them fall foul of the price discrimination provision?**

8.1. No. The relevant test is whether the price discrimination impedes the participation of SME or HDP firms. If these firms were getting a lower price relative to other firms outside this class, then that discrimination would be assisting the firms participate effectively and not impeding them.
## Annex: SME Qualification Criteria

### Schedule

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<td>Mining &amp; Quarrying</td>
<td>Medium</td>
<td>51 - 250</td>
<td>≤ 210,0 million</td>
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<tr>
<td></td>
<td>Small</td>
<td>11 - 50</td>
<td>≤ 50,0 million</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Micro</td>
<td>0 - 10</td>
<td>≤ 15,0 million</td>
<td></td>
</tr>
<tr>
<td>Manufacturing</td>
<td>Medium</td>
<td>51 - 250</td>
<td>≤ 170,0 million</td>
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</tr>
<tr>
<td></td>
<td>Small</td>
<td>11 - 50</td>
<td>≤ 50,0 million</td>
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<tr>
<td></td>
<td>Micro</td>
<td>0 - 10</td>
<td>≤ 10,0 million</td>
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<tr>
<td>Electricity, Gas &amp; Water</td>
<td>Medium</td>
<td>51 - 250</td>
<td>≤ 180,0 million</td>
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<tr>
<td></td>
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<td>11 - 50</td>
<td>≤ 60,0 million</td>
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</tr>
<tr>
<td></td>
<td>Micro</td>
<td>0 - 10</td>
<td>≤ 10,0 million</td>
<td></td>
</tr>
<tr>
<td>Construction</td>
<td>Medium</td>
<td>51 - 250</td>
<td>≤ 170,0 million</td>
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<tr>
<td></td>
<td>Small</td>
<td>11 - 50</td>
<td>≤ 75,0 million</td>
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<tr>
<td></td>
<td>Micro</td>
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</tr>
<tr>
<td>Retail, Motor Trade &amp; Repair Services</td>
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<td>51 - 250</td>
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<tr>
<td></td>
<td>Small</td>
<td>11 - 50</td>
<td>≤ 25,0 million</td>
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<tr>
<td></td>
<td>Micro</td>
<td>0 - 10</td>
<td>≤ 7,5 million</td>
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<tr>
<td>Wholesale</td>
<td>Medium</td>
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<td>≤ 220,0 million</td>
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<td>≤ 80,0 million</td>
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<tr>
<td></td>
<td>Micro</td>
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<tr>
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<tr>
<td></td>
<td>Micro</td>
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<td>≤ 5,0 million</td>
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<tr>
<td>Transport, Storage &amp; Communication</td>
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<tr>
<td></td>
<td>Micro</td>
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<td>≤ 7,5 million</td>
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</tr>
<tr>
<td></td>
<td>Micro</td>
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<td>≤ 5,0 million</td>
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</table>