

ENFORCEMENT GUIDELINES ON THE BUYER POWER PROVISIONS

PROVISIONAL LIST OF UNFAIR TRADING CONDITIONS

Amendments to the Competition Act have introduced a new provision which prohibits a firm with buyer power from imposing an unfair price or trading condition on suppliers that fall within a designated class of supplier, namely small and medium-sized businesses (SMEs) or suppliers owned and controlled by historically disadvantaged persons (HDP firms) which supply less than 20% of the buyer's purchases of a particular product. This provision only applies to designated sectors, which includes agro-processing, grocery wholesale and retail, eCommerce and online services¹.

The Competition Commission has issued Enforcement Guidelines on these Amendments in order to provide clear guidance to firms with buyer power as to their contractual obligations under the law, and to their suppliers in terms of their rights to contractual fairness. This summary sheet sets out the provisional list of trading conditions which the Commission considers to be unfair and likely in contravention of the buyer power provisions in the Act.

AGRO-PROCESSING AND GROCERY WHOLESALE & RETAIL

1. The following trading practices are considered unfair:
 - 1.1. The buyer pays the supplier later than 30 days from delivery.
 - 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 eCommerce and 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.

- 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.

ECOMMERCE AND ONLINE SERVICES

1. The following trading practices by providers of ecommerce and online services in respect of the suppliers operating on that service are considered unfair:
 - 1.1. The provider fails to provide the terms and conditions of operating on its service in plain and intelligible language, especially in respect of:
 - 1.1.1. The grounds for decisions to suspend or terminate or impose any other kind of restriction upon the suppliers on their service;
 - 1.1.2. The effects of the terms and conditions on the ownership and control of intellectual property rights and personal data of suppliers; and
 - 1.1.3. The main parameters determining the ranking and display of suppliers on their service.
 - 1.1.4. 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.
 - 1.2. The ecommerce and online services provider exclusively, or primarily, ranks suppliers based on direct or indirect remuneration paid by suppliers to the intermediation service.
 - 1.3. Differential and favourable treatment to goods or services supplied by the ecommerce or online service provider itself or companies in which it has an ownership stake.

- 1.4. Restrictions on the ability of suppliers to offer the same goods and services to consumers through means other than the provider's ecommerce or online service.
- 1.5. Restrictions on suppliers from offering their own ancillary goods and services (this refers to products that typically depend on, and are directly related to, the primary good or service in order to function), including through the ecommerce or online service.
- 1.6. The use of data and information gathered by the ecommerce or online service provider on the supplier's sales (incl. pricing, volume, customer sales) to enter in competition with the supplier.
- 1.7. 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 ecommerce or online service.

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