



*competition***commission**
south africa

**BUYER POWER
ENFORCEMENT GUIDELINES**

12 May 2020

Contents

PREFACE	2
1. DEFINITIONS	3
2. LEGAL FRAMEWORK	4
3. FACTORS IN CONSIDERING UNFAIR PRICE OR TRADING CONDITIONS ITO SECTION 8(4)(a)	5
4. DOMINANCE IN A DESIGNATED SECTOR	6
5. SUPPLIER IS AN SME OR HDP	11
6. IMPOSING OR REQUIRING AN UNFAIR PRICE	Error! Bookmark not defined.
7. IMPOSING OR REQUIRING AN UNFAIR TRADING CONDITION	25
8. ESTABLISHING A <i>PRIMA FACIE</i> CASE	30
9. AVOIDANCE PROVISION (SECTIONS 8(4)(B))	29
10. PENALTIES	33
11. INVESTIGATORY DISCRETION	33
FREQUENTLY ASKED QUESTIONS	34
ANNEX 1: SME QUALIFICATION CRITERIA	39
ANNEX 2: PROVISIONAL LIST OF UNFAIR TRADING CONDITIONS IN GROCERY RETAIL AND AGRO-PROCESSING	40
ANNEX 3: PROVISIONAL LIST OF UNFAIR TRADING CONDITIONS IN ONLINE INTERMEDIATION SERVICES	42

PREFACE

These guidelines have been prepared in terms of section 79(1) of the Competition Act 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. Regulations were issued on 13 February 2020 (Govt. Gazette no. 43018) 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 by 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 In these Guidelines, words and phrases which are defined in the Act have the same meaning herein unless otherwise indicated.
- 1.2 Unless the context indicates otherwise, the following words and phrases in these Guidelines have the meaning attributed to them as follows –
- 1.2.1 “**Act**” means the Competition Act No. 89 of 1998 (as amended) and includes regulations;
- 1.2.2 “**Buyer Power Regulations**” means the regulations issued by the Minister in terms of section 8(4)(d) of the Act (Government Gazette no. 43018);
- 1.2.3 “**Commission**” means the Competition Commission, a juristic person established in terms of section 19 of the Act;
- 1.2.4 “**designated class**”, “**designated class of supplier**” and “**designated class of suppliers**” means a small or medium-sized businesses or businesses as defined in section 1 of the Act and any regulations made by the Minister, or alternatively a firm or firms controlled and owned by historically disadvantaged persons within the meaning of the Act and within the benchmarks prescribed by the Buyer Power Regulations;
- 1.2.5 “**HDP firm**” means a firm or firms controlled and 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 Buyer Power Regulations;
- 1.2.6 “**SME**” means a small business or businesses or a medium-sized business or business, as the context dictates.

2. LEGAL FRAMEWORK

2.1 Section 8 of the Act has been amended by section 5 of the Competition Amendment Act 18 of 2018 and 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.

2.2 In implementing the legal framework, the Commission will adopt the following guiding principles in its investigation and assessment of contraventions of section 8(4), amongst others:

2.2.1 An inquiry under section 8(4) is whether the prices and trading conditions imposed on suppliers in the designated class by a dominant firm are unfair or not. The focus of the inquiry is therefore on the treatment and welfare of suppliers in the designated class, and the application of a fairness principle to that treatment.

2.2.2 The inquiry does not, in the Commission's view, require an assessment of the effects on final consumers. For instance, it is not relevant whether an unfairly low price achieved through the exercise of buyer power is passed through to consumers or not. The legislation does not require any weighing up of the welfare of suppliers in the designated class against final consumers.

2.2.3 The inquiry does not, in the Commission's view, require an assessment of whether a supplier within the designated class faces other challenges or not, or is efficient or not, to determine if a price or trading condition imposed is unfair. Unfairness in trading relations is broadly determined by whether such terms are one-sided, onerous or disproportionate to the stated objective, and whether they unreasonably transfer risks or costs onto suppliers which should have been borne by the buyer.

2.2.4 The inquiry does not, in the Commission's view, need to pass a specific materiality threshold in terms of quantum of harm to the supplier in the designated class in order to establish a contravention. The test is simply whether the treatment is fair or not. However, the Commission is mindful of the need to prioritise its work in the context of scarce resources and in so doing it is likely to focus on more material cases, including those that impact on a larger number of suppliers.

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

3.1 The factors that will be considered by the Commission in assessing a complaint in respect of section 8(4)(a) are as follows:

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

3.1.2 Supplier is an SME or HDP firm: the supplier must either be an SME or HDP firm;

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

3.1.4 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 the Buyer Power Regulations and include agro-processing, grocery wholesale & retail and the ecommerce & online services sector. 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.

4.1.2 Ancillary goods or services that are not directly relevant to the output of the designated sectors (such as security services or property rental) will not be the subject of enforcement by the Commission.

4.2 The Commission will then establish the relevant purchasing market for the purpose of assessing dominance in terms of section 7 of the Act. In defining the relevant purchasing market, the Commission will have reference to generally accepted principles and approaches to defining buyer markets based on the hypothetical monopsonist test. This has both a product/channel and geographic dimension:

4.2.1 For the product market, the test starts with the narrowest buyer market and considers whether the hypothetical monopsonist can impose a small but significant and non-transitory decrease in price on suppliers. Such an exercise considers the alternative outlets available to suppliers to whom they may be able to turn to sell their goods or services in the face of a price decrease. This test may also be undertaken by considering a decrease in purchase volumes instead of price, and the ability of suppliers to replace those volumes with alternative outlets. If this test is answered in the affirmative, then that constitutes the buyer market. Where the hypothetical monopsonist is unable to impose a decrease in price or volumes, then the market is broadened to include closest alternatives to which suppliers could turn, and the test repeated.

4.2.2 In the context of purchasing markets, the product market dimension includes both the characteristics of the good or service supplied and the market or distributional channel through which it is sold. For instance, in relation to the food chain, consideration will not only be given as to the food commodity but also the channel through which it is sold, such as processing, retail, wholesale, food services, restaurants and export channels. The starting point for the hypothetical monopsonist test would be the channel in which the respondent operates, and the product purchased. For instance, in the event of a complaint by an individual quick freezing (“IQF”) chicken supplier against a retailer, the narrowest purchasing market will be the retail purchases of IQF chicken. A market or distribution channel dimension is appropriate because the various

channels are differentiated and typically require market development by suppliers in order to establish a sales presence in those other channels. In those circumstances, a supplier within one channel will remain in a weak negotiating position as they have no credible short-term alternative to replace lost sales.

4.2.3 For the geographic market, the consideration would be similar, but starting with the narrowest geographic market and considering whether the alternative buyers available to suppliers in other locations enable them to resist a price decrease or reduction in volume by a hypothetical monopsonist in the narrow location.

4.2.4 The test is applied in respect of suppliers more generally. Even if some suppliers may be able to resist a price decrease due to their size or diversification, this may not be the case with suppliers more generally. As a result, a hypothetical monopsonist may still be in a position to sustain a price decrease across the supply base. The Commission may also specifically consider buyer power in respect of firms in the designated class.

4.3 Dominance within the buyer market delineated will be subject to section 7 of the Act.

4.3.1 In terms of section 7, there is a rebuttable presumption of dominance for market shares above 35% (non-rebuttable above 45%), but a rebuttable presumption of no dominance below 35% unless the firm can be shown to have market (buyer) power.

4.3.2 Based on economic theory and experience in other jurisdictions, buyers with less than 35%, but still a material share, frequently have buyer power and would therefore be considered dominant under section 7. This is because buyer power is strongly impacted by the outside options available to both the supplier and the buyer.

- 4.3.3 For this reason, the assessment of dominance will include both market share thresholds and an assessment of buyer power where firms that have less than 35% buyer market share but still a material share, typically 15% or more.
- 4.4 When investigating dominance within the relevant purchasing market, the Commission is likely to consider the following factors, where relevant:
- 4.4.1 *The share of the buyer in the relevant market and the buyer market structure.*
- 4.4.1.1 Market share thresholds form part of the dominance assessment under section 7 and presumptions exist in terms of shares of over 35%.
- 4.4.1.2 Market share is relevant insofar as suppliers are likely to have limited outside options to replace sales to the buyer if that buyer accounts for a large portion of purchases in the relevant market. Even where suppliers may have alternatives with the market, these suppliers may not be able to replicate the scale of sales to the buyer in question and therefore would be subject to buyer power.
- 4.4.1.3 Independent of the share of the buyer in the overall market, the market structure may also impact on the ability to exercise market power.
- 4.4.2 *Supplier dependency and outside options.*
- 4.4.2.1 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.

4.4.2.2 Suppliers may also be dependent on a particular buyer as a route to market or building their brand or reaching a particular customer base. 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.

4.4.2.3 In undertaking this assessment, the Commission will consider the position of different types of suppliers, including that of the designated class of suppliers, to determine if there is a high average level of dependency. The mere fact that some suppliers may be less dependent on the buyer or have more outside options, does not mean that the buyer is unable to exercise buyer power over other groups of suppliers in the market.

4.4.3 *The alternative suppliers available to the buyer.*

4.4.3.1 Bargaining power is determined not just by the outside options available to suppliers, but also the outside options available to the buyer. Outside options refers to the alternative sources of supply other than those already utilised.

4.4.3.2 The Commission may determine what are the credible alternatives available to the buyer for the supply of the relevant good or service. This will include suppliers previously utilised and other suppliers which meet the requirements for supply. In addition, where relevant the Commission will determine if there is also a credible

threat of sponsoring entry or self-supply. These outside options may be temporary or permanent.

4.4.4 *The nature of the supply negotiations.*

4.4.4.1 In the assessment of dominance, the Commission may 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.

4.4.4.2 Similarly, the Commission may also have regard to the suppliers' 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.

4.4.4.3 In undertaking this assessment, the Commission may have regard to different types of suppliers, including that of the designated class of suppliers. The mere fact that some suppliers may be able to exercise some countervailing power does not mean that the buyer is unable to exercise buyer power over other groups of suppliers in the market.

5. SUPPLIER IS AN SME OR HDP

5.1 Where a complaint is received by the Commission, it will determine whether the supplier that is the subject of alleged unfair treatment by the dominant buyer falls within the definition of an SME and/or an HDP firm.

5.2 Where the Commission initiates a complaint, it will focus its assessment on those suppliers that fall within the definition of an SME and/or HDP firm.

6. IMPOSING OR REQUIRING AN UNFAIR PRICE

6.1 The Buyer Power Regulations set out the following factors and benchmarks for determining whether a price may be deemed unfair:

6.1.1 The prices paid to other suppliers of like goods or services, in particular those outside the designated class, and whether such prices are higher;

6.1.2 the magnitude of any differences in prices to other suppliers of like goods or services;

6.1.3 whether reductions in the existing purchasing price are directly or indirectly required from, or imposed on, the supplier;

6.1.4 whether reductions to an existing purchasing price are retrospective, unilateral or unreasonable;

6.1.5 whether costs are directly or indirectly imposed on or required from the supplier which reduce the net price received by the supplier; or

6.1.6 whether the direct or indirect imposition or requirement of costs is retrospective, unilateral or unreasonable.

6.2 The Buyer Power Regulations essentially set out two broad benchmarks for determining if prices are unfair, namely if the price is lower than the price paid to other suppliers of like products and the price previously paid to the same supplier for their product. The imposition of costs is a variant on the latter insofar as it reduces the net price received by the supplier. The Commission's approach to both benchmarks is set out below.

6.3 The Commission further notes that the regulations do not provide an exhaustive list of unfair pricing conditions and more factors and benchmarks determinative of unfair prices may be identified in future as a result of complaints made and investigations undertaken.

Unjustified lower price relative to other suppliers of like goods or services

- 6.4 The first category of unfair pricing that the Commission will consider is whether the price paid to a supplier in the designated class is materially lower than the price paid to other suppliers of like products, especially those suppliers who fall outside the designated class. Any material differences in price are likely to be deemed unfair unless the respondent can show an objective justification for the extent of difference in price paid.
- 6.5 In undertaking this assessment, the Commission investigation will typically involve the following elements:
- 6.5.1 First, determine the price paid to the complainant, or in the case of a Commission initiation, to suppliers that fall within the designated class.
 - 6.5.2 Second, determine those suppliers of like goods or services to the dominant buyer, in particular those suppliers that fall outside of the designated class.
 - 6.5.3 Third, determine the price paid to other suppliers of like goods or services.
 - 6.5.4 Fourth, determine whether the price paid to other suppliers of like goods or services, in particular those which fall outside the designated class, are higher than that paid to the complainant or other suppliers in the designated class, and if so, the extent of any difference. If there is no material difference or if the price paid to the complainant or suppliers in the designated class are higher than that paid to other suppliers, then the inquiry is likely to end there.
 - 6.5.5 Fifth, if the price paid to the complainant or suppliers in the designated class are indeed materially lower than other suppliers of like goods and services, then the respondent bears the onus of proving that an objective justification exists for the difference and

providing evidence to substantiate that justification. If no objective justification exists for the difference or if it does not bear a reasonable relationship to that difference, then the Commission will establish that a *prima facie* case of unfair pricing exists.

- 6.6 In terms of the first step, the price assessed for the purposes of section 8(4)(a)(i) is the price per unit paid to the supplier, inclusive of any rebates or discounts provided to the buyer and net of relationship-specific costs imposed on or required of the supplier by the buyer. Price may also consist of a commission paid to a supplier where relevant.
- 6.7 In terms of the second step, the Commission may consider the following factors in determining whether other suppliers are offering 'like goods or services' to the dominant buyer, where relevant and amongst others:
- 6.7.1 The intrinsic factors of the goods or services, including the physical characteristics and functional use.
 - 6.7.2 Extrinsic factors of the goods or services that are material and relevant to the consumer or buyer, including the quality, brand, point of origin, and substitutability from a consumer or buyer perspective.
 - 6.7.3 In a resale context, such as a distributor, wholesaler or retailer as buyer (including ecommerce and online services), whether the goods have a similar resale price to customers or are considered substitutes by customers.
 - 6.7.4 In a manufacturing context, such as supply to a processor as buyer, whether the goods or services serve the same purpose in the production process, without major adjustments, and are categorised the same by the buyer.

- 6.8 In undertaking this assessment, minor differences would not prevent a positive finding given that the test is for 'like' goods and services, and not 'identical' goods or services. The Commission will typically take forward to the assessment of price those suppliers which do have like goods or services to the complainant.
- 6.8.1 In doing so, the Commission will still consider suppliers that fall within the designated class, albeit that the emphasis of the analysis will be on those that fall outside of the designated class. This is because the designated class itself contains a few categories, some of which may differ in their treatment (e.g. small vs medium vs historically disadvantaged owned firms).
- 6.8.2 Furthermore, where the Commission finds no suppliers with like goods or services, the Commission will then consider a set of suppliers with goods or services that are differentiated on factors that may be quantifiable through differences in costs. In such cases, the cost to add those factors can be determined and contrasted to the differences in price to determine if the price differences are fair or not. For instance, if the complainant supplies unfortified bread and other suppliers fortified bread, then the Commission would determine what the incremental costs of fortification are and use that as a basis for determining if the price differential is fair or not.
- 6.9 In terms of the third step, the Commission will use the same approach to measuring price as with the price of supply by the complainant to ensure consistency in the comparison.
- 6.10 In terms of the fourth step, the Commission may examine the prices and price differences across the following sets of suppliers, where relevant, including:

- 6.10.1 The price paid to the largest suppliers outside of the designated class, given that such suppliers may have more bargaining power than those in the designated class or even other suppliers.
 - 6.10.2 The average price paid across all suppliers outside of the designated class, given that the price paid to the largest suppliers may also reflect other extrinsic features.
 - 6.10.3 The price paid to suppliers outside of the designated class with the most similar goods or services.
 - 6.10.4 The quantum of the difference as against each of the categories above. The quantum will be considered in both percentage and Rand terms, but also the total revenue quantum considering the volume of sales. Less tolerance would be given on the quantum of the difference where it was found that the comparator like good or service was in fact identical, such as is the case with food commodities of the same grade.
- 6.11 A determination of a material price difference that would be considered unfair absent an objective justification is more likely in the following circumstances:
- 6.11.1 Where the complainant, and the category of the designated class within which the complainant falls, sees a consistently lower price relative to the different sets of suppliers that fall outside the designated class. This is not to say that the existence of a price difference to only the largest suppliers may not be deemed unfair;
 - 6.11.2 Where the price difference exceeds the 3% price difference that the Commission has determined for the purpose of initial screening. The higher the price difference, the more likely it may be considered unfair;

- 6.11.3 Where the price difference is as against identical goods or services such that no confidence interval is required for the price difference assessment.
 - 6.11.4 Where the price difference has persisted for a long duration.
 - 6.11.5 Where the price difference exists for other suppliers within the same sub-category of the designated class (i.e. small businesses or medium businesses or historically disadvantaged businesses).
- 6.12 If a material difference in the price paid in comparison to suppliers outside of the designated class exists, then the final step is to determine whether there is an objective justification for such a difference. In such cases the respondent bears the onus of putting up an objective justification as per section 8(4)(c)(i), and any evidence to support any objective justification. The Commission will consider a price unfair if the price paid is materially lower in the absence of an objective justification that is reasonably related to the difference.
- 6.13 As outlined in the discussion of the justifications under paragraph 8 below, the failure to put up a justification or provide sufficient evidence on a justification will result in a presumption that no justification exists or has not been proven. The Commission will also determine if the justification itself is a fair and valid rationale, and not one which simply institutionalises discrimination and inferior trading terms against the designated class.
- 6.14 Where a justification is provided alongside verifiable evidence, the Commission will determine whether the extent of difference in prices is warranted by the justification provided. In so doing, Commission may have regard to the following factors, amongst others:
- 6.14.1 The relative margin earned by the dominant buyer on goods or services supplied by the complainant (or other firms in the same sub-category of the designated class) relative to those suppliers of like products outside the designated class. Material differences in

the margins earned are likely to point to the lack of an objective justification for the price paid to the supplier. In a resale context this may be easily inferred from the gross margins, whereas in a manufacturing context it may be inferred from whether supplementary inputs or processes are required or not.

6.14.2 Any additional costs incurred by the buyer to source from the complainant (or other firms in the same sub-category of the designated class) relative to those suppliers of like products outside the designated class, and how those costs compare to the difference in price.

6.14.3 Differences in the supply relationship that may have implications for the price paid and whether these differences warrant the difference in price. Such differences in the supply relationship may include volumes supplied, contractual commitments, service levels or terms of payment. For instance, a lower price may be paid to the complainant if this is in exchange for more volumes purchased or immediate payment of the invoice.

ILLUSTRATIVE EXAMPLES

1. A dairy processor purchases fresh milk (with the same properties) from a historically disadvantaged farmer at a 10% discount to prices of other farmers that are not historically disadvantaged but at similar volumes. In the event the fresh milk has similar properties and the processor does not incur materially different costs to collect the milk, then the difference in price is likely to be deemed unfair. If the discount is because the dairy processor pays the historically disadvantaged farmer weekly rather than monthly for the other farmers, then the additional cost of paying weekly rather than monthly will be assessed. If these working capital costs are well below the 10% discount in price, then the justification is not proportionate to the price difference and the price will likely be deemed unfair. Where it is proportionate then the price difference may not be considered unfair.

2. An online ecommerce site sources T-shirts from different suppliers at different prices, with a much lower price paid for the T-shirts supplied by a small supplier relative to a large one. Where the T-shirt of the small supplier is sold at a lower price too and similar margins are earned by the ecommerce site on both T-shirts, then differences in purchase price may reflect differences in quality or consumer willingness to pay rather than one-sided and unfair outcomes. In contrast, if the T-shirts are sold at the same price on the ecommerce site and the site draws a much higher margin from the small supplier, then this may point to a more one-sided and unfair pricing outcome for the small supplier given that consumers consider the T-shirts of equal value.

Unfair downward adjustment to existing net prices

- 6.15 The second category of unfair pricing that the Commission will consider is whether there has been an unfair reduction in the price paid to a supplier in the designated class, either directly through reducing the price paid or indirectly through imposing costs on the supplier which reduces the effective price paid to an unfair level.
- 6.16 In undertaking this assessment, the Commission investigation will typically involve the following elements:
- 6.16.1 First, determine the existence and extent of reduction in the effective price paid to the complainant, or in the case of a Commission initiation, to suppliers that fall within the designated class.
- 6.16.2 Second, determine the circumstances to the reduction in the effective price paid, and whether on the face of it the reduction may be unfair. This would include whether the reduction was unilateral and/or retrospective and/or the rationale provided by the respondent to the complainant, or other suppliers in the designated class, seemed unreasonable.

- 6.16.3 Third, determine whether there is an objective justification for the reduction in effective price, and if the justification warrants the extent of the effective price reduction. The respondent bears the onus of proving that an objective justification exists and providing evidence to substantiate that justification. If no objective justification exists for the difference or if it does not bear a reasonable relationship to that difference, then the Commission will establish that a *prima facie* case of unfair pricing exists.
- 6.17 In terms of the first step, the Commission will determine the existence and magnitude of any reduction in the effective price paid.
- 6.17.1 The effective price assessed for the purposes of section 8(4)(a)(i) is the price per unit paid to the supplier, inclusive of any rebates or discounts provided to the buyer and net of relationship-specific costs imposed on or required of the supplier by the buyer. Price may also consist of a commission paid to a supplier where relevant.
- 6.17.2 The Commission will establish the effective price prior to any reduction in prices or increase in costs imposed on the complainant.
- 6.17.3 The Commission will determine if there have been reductions imposed on the invoiced price of the complainant, increases in the rebates required from the complainant or additional costs imposed on the complainant which would reduce the effective price paid. In doing so the Commission will determine if there have been any other changes to these elements that may offset reductions in the effective price. For instance, if the invoiced price is reduced but this is offset by reductions in rebates required, then there may be no net effect on the effective price.
- 6.17.4 The Commission will determine the effective price subsequent to any reduction in prices or imposition of costs and compare this to

the prior price to quantify the extent of the reduction in effective price on a per unit basis.

6.18 In terms of the second step, the Commission will consider the circumstances to the reduction in the effective price paid, and whether on the face of it the reduction may be unfair. In such cases, the respondent will then bear the onus of justifying why it is not unfair as per section 8(4)(c)i). In so doing, the Commission may consider the following factors, amongst others and where relevant:

6.18.1 Whether the reduction in price or imposition of costs was unilateral or the subject of negotiation. The Commission is more likely to presume that unilateral changes are not necessarily fair given that the lack of engagement with the complainant is typically reflective of the exercise of buyer power. In such cases the respondent will bear the onus of substantiating that the price adjustment was fair.

6.18.2 Whether the reduction in price or imposition of costs is retrospective in its application or not. Retrospective changes are highly likely to be considered unfair given that these are rarely justifiable in any context. Whether the changes are retrospective or not is also cited as one of the factors to consider in the Buyer Power Regulations. The respondent would still have the opportunity to offer a defence under section 8(4)(c)i).

6.18.3 Whether the reduction in price or imposition of costs is selectively applied to the complainant or suppliers within the designated class, or if it is uniformly applied. The fact that a change is uniformly applied does not imply that it is fair as the dominant buyer may have buyer power over all suppliers. However, a selective imposition may be evidence of the abuse of buyer power unless there is an objective rationale linked to those suppliers only.

- 6.18.4 Whether there are changes in the contractual relationship which warrant a downward adjustment to the price or the imposition of costs, and if so, whether these changes are proportionate to each other. For instance, if previously the supplier delivered the goods to the individual stores of a retailer and this changed to enable centralised delivery to a distribution centre, then the cost savings to the supplier from centralised delivery may warrant a lower price that lower price is proportionate to the cost savings.
- 6.18.5 Whether the contract with the buyer makes provision for changes in the price and/or imposition of costs in specific circumstances, and whether the contractual provision provides for a specific adjustment mechanism based on the movement of specific factors or not. Adjustments that are contractually agreed using specific factors that can be measured and applied to a specific formula are more likely to be considered reasonable. This is unless such negotiations were themselves one-sided and the contractual provisions also one-sided, onerous or reflect an unreasonable transfer of risk or cost onto the supplier. In the case of general provisions around price adjustments where the buyer still makes unilateral decisions as to the quantum of the adjustment, the outcomes cannot be presumed to be fair and hence the onus will lie on the respondent to prove otherwise.
- 6.18.6 Whether the dominant buyer provides a justification to the complainant for the reduction in price and/or imposition of costs, including a justification for the quantum of the adjustment, as well as any risks or costs borne by the buyer itself. Where the justification provided does not appear reasonable, then the Commission is likely to find that the price reduction is unfair. Even if the justification may have some merit, the Commission will still require the respondent to substantiate the justification where the justification to the complainant provides insufficient details of how the adjustment was calculated. Where details are provided, the

Commission will still determine if the extent of the reduction in price or imposition of cost is justified by the rationale.

- 6.19 The Commission further notes that simply because the dominant buyer may itself be subject to the realisation of risks or costs, such as those stemming from a deterioration in market or competitive conditions, does not in itself provide a blanket justification for transferring these costs and risks onto its suppliers. Market shocks and recessions will place burdens on all firms in a supply chain, and in the absence of buyer power it is expected that those burdens are fairly distributed throughout the supply chain. In such cases the Commission will consider whether the distribution of costs between the dominant buyer and its suppliers is justifiable or not. The Commission may consider how the margins of both the buyer and the supplier are adjusted in response to the market circumstance and any reduction in price imposed on the buyer as a factor in determining the fairness of the distribution of the change in market conditions.
- 6.20 Where the Commission finds that the reduction in price or imposition of costs is likely to be unfair on the face of it, then the final step is to determine whether there is an objective justification for such a difference. In such cases the respondent bears the onus of putting up an objective justification as per section 8(4)(c)(i), and any evidence to support any objective justification. The Commission will consider an effective price reduction unfair in the absence of an objective justification that is substantiated by evidence and which is reasonably related to the difference.
- 6.21 As outlined in the discussion of the justifications under paragraph 8 below, the failure to put up a justification or provide sufficient evidence on a justification will result in a presumption that no justification exists or has not been proven. The Commission will also determine if the justification itself is a fair and valid rationale, and not one which simply institutionalises the inequitable bargaining relationship.

6.22 Where a justification is provided alongside verifiable evidence, the Commission will determine whether the extent of reduction in effective prices is warranted by the justification provided. In so doing, Commission may have regard to the following factors in addition to those outlined in the second step of the investigation, amongst others and where relevant:

6.22.1 Whether the costs or risks that led to the reduction in effective price should be borne entirely by the supplier or the buyer, or there should be some distribution of that risk or cost between the two;

6.22.2 The actual distribution of any costs or risks that led to the reduction in effective price between the supplier and the buyer. This may include an assessment of how the margins of both the buyer and the supplier are adjusted in response to the market circumstance and any reduction in price imposed on the buyer as a factor in determining the fairness of the distribution of the change in market conditions.

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 necessarily 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 may be considered unfair 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. It would also be considered unfair if the reduction was higher for smaller farmers relative to larger farmers and if there was no objective justification for such a difference.

7. IMPOSING OR REQUIRING AN UNFAIR TRADING CONDITION

7.1 The Buyer Power Regulations set out the following factors and benchmarks for determining whether a trading condition may be deemed unfair:

7.1.1 the trading condition unreasonably transfers risks or costs onto a firm in the designated class of suppliers;

7.1.2 the trading condition is one-sided, onerous or not proportionate to the objective of the clause (such as unduly long payment terms); or

- 7.1.3 the trading condition bears no reasonable relation to the objective of the supply agreement.
- 7.2 The Commission notes that the regulations do not provide an exhaustive list of factors and benchmarks which may determine whether a trading condition is unfair and more factors and benchmarks may be identified in future as a result of complaints made and investigations undertaken.
- 7.3 The Commission also acknowledges that fairness of trading conditions has been the subject of codes of practice in other jurisdictions as set out below and these have often focused on the same sectors as designated in the Buyer Power Regulations. Furthermore, these have typically used the same principles as set out in the Buyer Power Regulations, such as the unfair transfer or risks and costs or imposing costs unrelated to the supply agreement as a basis to determine specific terms that are deemed unfair.
- 7.3.1 *Agro-processing and Grocery Retail*: The 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 chain¹ 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

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

contracts, delayed payment, unreasonably long payment terms and imposing costs or risks unreasonably.²

7.3.2 *Online intermediation services:* The 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 services³ 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 treatment of own and customer data of the business users.

7.3.3 *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 of risks and costs to the supplier where such risks or costs should lie with the buyer, delays in payments and unilateral termination.⁴

7.4 The Commission will use the factors and benchmarks set out in the Buyer Power Regulations as the general assessment standard for determining whether a trading condition is unfair. This assessment of specific trading conditions will also be informed by, amongst others:

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

7.4.2 Instances where a trading condition is imposed on an SME or HDP firm but not on other suppliers, such as those falling outside of the designated class. The Commission notes that this does not imply

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

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

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

that trading conditions which are uniformly imposed across all suppliers may not be deemed unfair, as a dominant buyer may be able to impose unfair trading conditions on all suppliers.

7.4.3 Instances where a uniform trading condition may have a disproportionate burden on SME or HDP firms. For example, unduly long payment terms, even if uniformly applied, are particularly burdensome to smaller businesses which have limited working capital. Similarly, contractual terms which impose a cost that is fixed irrespective of volumes supplied will be more onerous, on a per unit basis, to SMEs supplying smaller volumes.

7.5 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 (Ecommerce and Online Services). The Commission notes that this list is not exhaustive and may be supplemented 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.

8. JUSTIFICATIONS UNDER SECTION 8(4)(c)(i)

8.1 The respondent bears the onus of putting up an objective justification as per section 8(4)(c)(i), and any evidence to support any objective justification. The failure to put up a justification will result in a presumption that no justification exists. Where the respondent fails to provide sufficient evidence to substantiate a claimed justification, the Commission will take the view that the justification has not been proven.

8.2 Where the respondent invokes defences provided for in section 8(4)(c)(i), the Commission will use the following assessment criteria in considering the submissions made by the buyer in this regard:

- 8.2.1 Whether the justification is a fair and valid reason for differentiation in pricing paid to suppliers. Justifications which institutionalise discrimination and inferior trading terms against the designated class will not be considered valid by the Commission.
- 8.2.2 Whether the extent of difference in prices or reduction in price is warranted by the justification provided.
- 8.2.3 The risks or costs borne by the dominant buyer.
- 8.2.4 Whether the trading condition is 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. SCREENING OF COMPLAINTS

- 9.1 The Commission will engage in an initial screening of complaints in order to filter out those which are unlikely to succeed even with a more detailed investigation or those which can be resolved quickly through changes in conduct.
- 9.2 For the screening of unfair pricing complaints, the Commission will apply a three percent (3%) threshold to the relative price difference for like goods or services and the reduction in net price paid in order to prioritise cases for a more detailed investigation. However, regard will be had to the typical margins for the supply industry, the cumulative history of price adjustments and the number of suppliers impacted. Where industry margins are low for suppliers of the relevant good or service or where the number of suppliers impacted is large, then smaller reductions may have a more material impact and warrant investigation. Similarly, where there is a history of numerous small incremental reductions which cumulatively amount to a material reduction in price and margin then these too may warrant investigation.

- 9.3 For the screening of unfair trading condition complaints, the Commission will make use of the provisional list of trading terms and conditions (contained in Annex 2 and Annex 3) as the primary filter for detailed investigation and potential referral. Trading conditions which fall outside this list may still be passed on for detailed investigation if they appear to be one-sided or are the subject of multiple complainants.
- 9.4 At the screening stage, the Commission will inform the firm subject to the complaint of the complaint particulars, such that they may either seek resolution by altering their conduct or put forward a defence at this preliminary stage. The Commission may consider any defences put forward by the respondents at the screening stage only if they are obviously dispositive of the complaint without requiring more detailed investigation and assessment.
- 9.5 The Commission will continue to review the benchmarks for screening based on the experience gained from the screening and investigation of complaints.

10. ESTABLISHING A *PRIMA FACIE* CASE

- 10.1 The Commission will be guided by existing local and international case precedent in respect of the assessment of what constitutes a *prima facie* case. The Commission recognises that it will be for the Competition Tribunal, or court of appeal as the case may be, to determine whether the relevant onus has been satisfied after considering all the applicable evidence.
- 10.2 The Commission recognises that the obligation to present a *prima facie* case requires the Commission to present evidence on all the essential elements of the contravention. However, the Commission also recognises that section 8(4)(c)(i) of the Act creates an express evidential burden on the respondent which requires the adducing of evidence that rebuts the evidence presented by the Commission. In this instance the respondent has an evidentiary burden to show that the price or other trading condition is not unfair.
- 10.3 Practically, in determining if it has a *prima facie* case, the Commission will assess the conduct in terms of the elements outlined in paragraph 3 alongside

any justification or defence put forward by the respondent, as these constitute the essential elements of the contravention. The onus of putting up a justification and the evidence to support that justification lies with the respondent as per section 8(4)(c)(i). Given the onus, where the firm subject to the complaint does not provide any justification for the conduct or where the respondent provides insufficient evidence as to the claimed justification, then the presumption will be that the conduct cannot be justified.

11. AVOIDANCE PROVISION (SECTIONS 8(4)(B))

11.1 Section 8(4)(b) of the Act prohibits dominant firms from seeking to circumvent section 8(4)(a) by avoiding or refusing to buy from a supplier that is an SME or HDP firm. Whilst even dominant firms are free to choose their trading partners, the avoidance provision seeks to prevent situations where that choice is influenced by the desire to avoid the implications of section 8(4)(b). Section 8(4)(c)(ii) requires the dominant firm to show it has not done so after the Commission has established a *prima facie* case. Below we provide the Commission's approach to such an investigation of this type.

11.2 The Commission will first establish whether the firm against which a complaint is made is a dominant buyer within a sector designated by the Minister and whether the complainant is an SME or HDP firm.

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

11.4 Third, the Commission will seek to determine if the rationale for the refusal or avoidance to buy is to circumvent section 8(4)(a) or if there is a reasonable rationale for not buying from the complainant. In doing so, the Commission will consider, amongst others, factors which might point to an avoidance strategy such as:

11.4.1 Whether the firm avoids or refuses to purchase from other SMEs or HDP firms, or a particular sub-category of these firms (such as small firms only), for the relevant good or service in question;

- 11.4.2 Whether the firm avoids or refuses to purchase from SMEs or HDP firms, or a particular sub-category of these firms, for other goods and services;
- 11.4.3 Whether the requirements set by the buyer for its suppliers include requirements which themselves represent a constructive refusal to deal with SMEs and/or HDP firms; and
- 11.4.4 Whether the firm previously bought from SME or HDP firms (or a sub-category thereof) and ceased buying following the amendment to the Act or in anticipation of the amendments.
- 11.4.5 Any internal documents and communications of the respondent which provide insights into its procurement strategy and approach in general, or in relation to the complainant specifically.
- 11.4.6 Any justifications or defences put forward by the respondent for not purchasing from the complainant and/or firms in the designated class (or sub-category thereof). As per section 8(4)(c)(ii), the onus for providing a justification and evidence thereof lies with the respondent.

Prima Facie case

- 11.5 The Commission will be guided by existing local and international case precedent in respect of the assessment of what constitutes a *prima facie* case. The Commission recognises that it will be for the Competition Tribunal, or court of appeal as the case may be, to determine whether the relevant onus has been satisfied after considering all the applicable evidence.
- 11.6 The Commission recognises that the obligation to present a *prima facie* case requires the Commission to present evidence on all essential elements of the contravention. However, the Commission also recognises that section 8(4)(c)(ii) of the Act creates an express evidential burden on the respondent which requires the adducing of evidence that rebuts the evidence presented by the Commission. In this instance the respondent has an evidentiary burden

to show that it has not avoided buying from an SME or HDP supplier in order to circumvent the operation of section 8(4)(a) of the Act.

- 11.7 Practically, in determining if it has a *prima facie* case, the Commission will assess the conduct in terms of paragraphs 11.2 to 11.4 (incl. sub-paragraphs) alongside any justification or defence put forward by the respondent, as these constitute the essential elements of the contravention. The onus of putting up a justification and the evidence to support that justification lies with the respondent as per section 8(4)(c)(i). Given the onus, where the firm subject to the complaint does not provide any justification for the conduct or where the respondent provides insufficient evidence as to the claimed justification, then the presumption will be that the conduct cannot be justified.

12. PENALTIES

- 12.1 Section 59(1)(a) of the Act stipulates that 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 or, as per section 59(2A), up to 25% of turnover for a repeat offence. Section 59(3A) also provides for the administrative penalty to include the turnover of any controlling firm(s) where such controlling firm(s) knew or should reasonably have known that the respondent was engaging in the prohibited conduct.

13. DISCRETION

- 13.1 These guidelines set out the general approach that the Commission will follow in its assessment of alleged contravention of section 8(4) of the Act, and do not, in any way, fetter the discretion of the Commission, the Tribunal and the CAC in the determination of alleged contravention of section 8(4) of the Act on a case-by-case basis.

FREQUENTLY ASKED QUESTIONS

Which firms fall within the category of SMEs

1. The thresholds for qualifying as a small business or a medium-sized business are determined by the Minister by notice in the Government Gazette. As such Government Notice No. 987 of 12 July 2019 (Government Gazette No. 42578) sets out these criteria in terms of sector-specific employment and turnover thresholds. Both thresholds (employment and annual turnover) have to be met by a particular firm to qualify in a particular category. These thresholds, as published, are replicated as an annexure to these guidelines for convenience. In addition, small firms are defined to include both small and micro firms as outlined in the annexure.

Does this provision apply to all firms controlled and owned by historically disadvantaged persons?

2. No. This provision only applies to HDP firms in terms of the benchmarks set by the Minister in the Buyer Power Regulations. These benchmarks have been published in the Government Gazette no. 43018 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. The 20% threshold will be calculated by considering the purchases of the dominant firm over the same period as 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 are set out in the Buyer Power Regulations and include agro-processing, grocery wholesale & retail, eCommerce and online services. 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.

4. In addition, the buyer power provisions only apply to firms that are dominant buyers 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 buyer.
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 buyer 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 buyer to provide evidence that there is no avoidance strategy.

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)?

8. 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. The implication is that a violation will predominately occur where the SMEs or HDP firms typically receive inferior trading terms or prices relative to larger suppliers, or where uniform trading conditions impose an undue burden on SMEs or HDP firms.

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

9. 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 buyer, then this contracting relationship is highly unlikely to be exploitative and contain contracting terms that would be considered unfair.

If the firm had an enterprise development programme then would this be seen as a mitigating factor in the face of a complaint?

10. Not necessarily. The Commission is required to consider the complaint in terms of the Act and if an enterprise development programme has no distinct bearing on the complainant then it would be irrelevant to the assessment of the complaint itself. This is in the context where a complainant also has a right to self-refer to the Tribunal. If, however, the complainant also received benefits that fell within the ambit of the other factors listed in section 9(2), then these may be considered cumulatively if appropriate.

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?

11. Highly unlikely. It is usually mutually beneficial to the supplier and buyer to negotiate a lower price in exchange for greater volumes. The buyer 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 the context where there are off-setting volume gains. Furthermore, if there were benefits to the supplier, then it is also unlikely that the supplier will lodge a complaint.

12. However, where the dominant buyer has used the façade of a volume discount negotiation to impose deep price cuts in exchange for limited volume gains then that 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?

13. 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?

14. No. 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.

15. The Commission however 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:

15.1. 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 and Buyer Power Regulations. Such attempts at compliance, such as a complete review of contracts to ensure compliance with these guidelines, should also reduce the risks that firms will be in contravention of the provisions.

15.2. 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.

15.3. Once a complaint is fully investigated and referred a meritorious complaint to the Competition Tribunal, then any settlement post referral will require an admission of a contravention and penalties.

Are SME or HDP purchasers obliged to provide suppliers their detailed cost information for compliance purposes if requested?

16. No. SME or HDP suppliers are not obliged to provide detailed cost structures to a dominant buyer 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.

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 WHOLESALE & 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.
 - 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 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.