

ENFORCEMENT GUIDELINES ON THE BUYER POWER PROVISIONS

FREQUENTLY ASKED QUESTIONS

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 answers to frequently asked questions in respect of these buyer power provisions in the Act.

1. Which firms fall within the category of SMEs

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.

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.

In addition, small firms are defined to include both small and micro firms as outlined in the annexure.

2. Does this provision apply to all firms controlled and owned by historically disadvantaged persons (HDP firms)?

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.

3. Do the new buyer power provisions apply to all sectors and firms?

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.

In addition, the buyer power provisions only apply to firms that are dominant buyers in these sectors.

4. Does the avoidance provision create an obligation to purchase from all SME and HDP suppliers?

No. The provision does not create an obligation to purchase from any SME or HDP supplier that approaches a dominant buyer.

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.

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.

5. 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)?

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.

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

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.

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

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.

8. 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?

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.

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.

9. 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?

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.

10. Is there a grace period for compliance?

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.

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:

- 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.
- 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.
- 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.

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

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.

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