competition commission south africa

ENFORCEMENT GUIDELINES ON THE BUYER POWER PROVISIONS

SUMMARY GUIDANCE ON UNFAIR PRICING

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 services[1].

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 that fall within the designated class in terms of their rights to contractual fairness. This summary sheet sets out the enforcement approach to determining whether prices imposed on suppliers are unfair.

Categories of Unfair Pricing

1. The Regulations and Guidelines focus on two categories of potential unfair pricing to SMEs and HDP firms, namely:

   1.1. Unjustifiably paying a lower price relative to other suppliers of like goods or services;

   1.2. Unjustified reduction in prices or imposition of costs onto the supplier.

Unjustified lower price relative to other suppliers

2. 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

[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.

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 buyer can show an objective justification for the extent of difference in price paid.

3. The first step in the assessment is to determine if there is a material difference in the price paid to suppliers of like goods or services.

   3.1. The price assessed will be the net price, inclusive of any rebates or discounts provided to the buyer and net of any additional costs imposed on the supplier (such as contributions to promotions). Price may also consist of a commission paid to a supplier where relevant.

   3.2. The comparator goods and services need not be identical, only similar in terms of intrinsic (i.e. physical characteristics & functional use) and extrinsic (i.e. quality and substitutability) factors. If the buyer uses the goods & services for the same purpose or resells them at similar prices then they will to be considered like goods or services.

4. The Commission will be particularly concerned about price differences which are sizeable, have persisted for a reasonable period and consistently discriminate against suppliers in the designated class.

5. If a material difference in price is established, the onus lies on the buyer to provide an objective justification for the extent of difference in price paid. The objective justification must be linked to real costs and risks incurred in the contractual relationship, such as the terms of payment, service levels, contractual commitments and logistics costs. A failure to provide an objective justification will lead to the presumption that the difference is simply a result of the abuse of buyer power against more vulnerable suppliers within the designated class.

Unjustified reduction in price or imposition of costs

6. 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.

7. A reduction in price or the imposition of costs onto a supplier is more likely to be found to be unfair in the following circumstances:

   7.1. If the reduction in price or imposition of costs was unilateral rather than the subject of negotiation, 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.

   7.2. If the reduction in price or imposition of costs is retrospective in its application, given that these are rarely justifiable in any context.

   7.3. If the reduction in price or imposition of costs is selectively applied to the complainant or suppliers within the designated class.

   7.4. The reduction is unreasonable, insofar as it lacks an objective justification or unreasonably transfers risks and costs onto the supplier that should ordinarily be borne by the buyer or distributed evenly between the buyer and supplier.

8. The Commission notes that even where there is a contractual basis for reducing prices or imposing costs on suppliers, this may still be deemed unfair if the reduction in net price is unreasonable. Similarly, even if the buyer suffers some adverse change in market conditions, such as is the case currently under the COVID-19 crisis, this does not necessarily justify an unreasonable transfer of those hardships onto suppliers in the designated class.

9. If a reduction in price or imposition of costs is found to be unilateral, retrospective or unreasonable, the onus lies on the buyer to provide an objective justification for the reduction in net price paid. The objective justification must be linked to market conditions and a reasonable distribution of costs and risks between buyer and supplier. A failure to provide an objective justification will lead to the presumption that the difference is simply a result of the abuse of buyer power against more vulnerable suppliers within the designated class.

[ENDS]