

# Call for comment: second draft of Price Discrimination and Buyer Power Regulations

By [Daryl Dingley](#)

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On 10 October 2019, the Minister of Economic Development published second drafts of the Price Discrimination Regulations and Buyer Power Regulations (collectively, the 2019 Regulations) for public comment (Government Gazette No. 42760 is accessible [here](#)).



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The publication of the 2019 Regulations is a significant development. The contentious amendments to the Competition Act 89 of 1998 (the Act) pertaining to buyer power and price discrimination have been a cause of concern for many companies. A clear set of final regulations (and hopefully soon-to-be published guidelines) will be essential to assess risk and guide compliance protocols.

Overall, in comparison to the 2018 Regulations, the 2019 Regulations are more coherent and concise. The 2019 Regulations appear to have addressed a number of criticisms levelled against the earlier version, such as its over expansive application and information asymmetry barriers. The 2019 Regulations aim to address these criticisms by removing onerous benchmarks and incorporating parameters which seek to narrow the categories of prospective complainants against dominant firms.

Small and medium businesses must meet certain thresholds based on total full-time equivalent paid employees and total turnover. Firms controlled by historically disadvantaged persons (HDPs) must either buy less than 20% of goods / services supplied by a dominant seller or supply 20% or less of the purchases of a dominant buyer. In assessing risk, companies will have to assess their own market position and determine whether suppliers or customers fall within these categories. It is also important to note that the Buyer Power Regulations 2019 only apply to three sectors - agro-processing, grocery retail and online intermediation services.

The 2019 Regulations are however, not without complications - for instance, it may have been more appropriate to designate sectors in separate gazetted notices. Furthermore, although the 20% threshold is welcome, it may possibly extend to relatively large buyers or suppliers e.g. a purchaser that buys 20% of one billion widgets. It will also be important to understand how dominance / market power will be determined in purchasing markets, particularly in the context of small companies with beneficial arrangements in place with dominant firms.

The Regulations make provision for the Competition Commission to issue guidelines in respect of its enforcement approach to these new sections of the Act and it would be ideal for these guidelines to be released before the end of commentary period, so that the practical implementation of these significant amendments is viewed with context. Comments are due by 7 November 2019.

A short summary of some of the key aspects of the 2019 Regulations is set out below.

## **Price Discrimination Regulations 2019**

*Proposed section 9(1)(a)(ii) of the Act provides that an action by a dominant firm is prohibited price discrimination if it is likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by HDPs, to participate effectively.*

### **Key definitions and thresholds:**

- Significantly, the Price Discrimination Regulations clarify upfront that a designated class of supplier includes a small business or a medium -sized business (as defined in the Act or any regulations made by the Minister); or alternatively a firm controlled or owned by historically disadvantaged persons (HDPs).
- In relation to the HDPs designation above, it is specified that the Price Discrimination Regulations apply to firms controlled or owned by HDPs that purchase less than 20% of the relevant good or service supplied by the dominant seller.

### **What would a complainant have to prove?**

Factors that should each be satisfied in order to establish a price discrimination contravention:

1. The selling firm must be dominant or shown to have market power within the context of the Act.
2. There is different treatment between the purchaser in the designated class and other purchasers outside that class in respect of equivalent transactions in relation to, inter alia, price, discounts, rebates, the provision services etc.
3. The differential treatment cannot be justified i.e.:
  - It does not make reasonable allowance for differences in the cost of supplying the good or service based on differing places or methods of supply.
  - It does not constitute an act of good faith to meet a competitor's price.
  - It is not a legitimate response to changes in market conditions.

The differential in price relative to other purchasers impedes the effective participation of a firm or firms in the designated

class of purchasers.

## What is meant by "impede effective participation"?

Factors and benchmarks for determining whether the price discrimination is likely to impede effective participation by the designated class include, but are not limited to:

- the extent of the difference in respect of price or other factors relative to other purchasers in the same or adjacent downstream markets;
- the significance of the input in the cost structure of production or as a driver of sales in the downstream market;
- the duration and timing of the price differential;
- the likelihood that the elimination of the differential would result in the firm in the designated class facing increased demand for its goods or services in the downstream market;
- the likelihood that the elimination of the differential would improve profitability and investment for the firm in the designated class.

## Buyer Power Regulations 2019

*Proposed section 8(4)(a) of the Act provides that it is prohibited for a dominant firm in a sector designated by the Minister 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 HDPs, unfair prices or other trading conditions.*

### Key definitions and thresholds:

A strong criticism of the 2018 Regulations was its proposed broad application to entire supply chains across a multitude of industries. The 2019 BP Regulations specifically only apply to the following designated sectors:

- **Agro-processing** - which constitutes the subset of manufacturing that processes raw materials and intermediate products derived from the agricultural sector, including agriculture, forestry and fisheries
- **Grocery wholesale and retail sector** - which constitutes the wholesale or retail of food, pet food, drinks, cleaning products, toiletries or household goods
- **Online intermediation services** - constitute information services that allow business users to offer goods or services to consumers with a view to facilitating the initiating of direct transactions between those business users and consumers. These include online e-commerce market places, online software application stores, online matching services and online social media services.

It is also specified that the Buyer Power Regulations 2019 apply to firms controlled or owned by HDPs that supply 20% or less of the purchases of the dominant buyer.

## What would a complainant have to prove?

Factors that should be satisfied in order to establish a buyer power contravention:

1. The purchasing firm must lie within a designated sector.
2. The buyer firm must be dominant or shown to have market power in a purchasing market.
3. The supplier must fall within the designated class of suppliers (see definition above).
4. The price or trading condition must be required from or imposed on the supplier by the buyer firm.
5. The price or trading condition must be unfair.

## What constitutes an unfair price?

Factors and benchmarks for determining the unfairness of the price include, but are not limited to, the following:

- The price paid to other suppliers of like goods or services, in particular those outside the designated class;
- The magnitude of any differences in prices to other suppliers of like goods or services;
- Whether reductions in the purchasing price are directly or indirectly required from or imposed;
- Whether reductions are retrospective and /or unilateral and /or unreasonable;
- Whether costs are directly or indirectly imposed on or required from the supplier which reduce the net price received;
- Whether the direct or indirect imposition or requirement of costs is retrospective and /or unilateral and /or unreasonable.

## **What constitutes an unfair trading condition?**

Factors and benchmarks for determination of whether a trading condition may be deemed unfair include, but are not limited to, the following:

- Whether the trading condition unreasonably transfers risks or costs onto a firm in the designated class of suppliers.
- Whether the trading condition is one-sided, onerous or not proportionate to the objective of the clause (such as unduly long payment terms).
- Whether the trading condition bears no reasonable relation to the objective of the supply agreement.

## **ABOUT THE AUTHOR**

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