



COMPETITION ALERT

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SELLERS AND BUYERS BEWARE: DRAFT REGULATIONS ON BUYER POWER AND PRICE DISCRIMINATION OUT FOR COMMENT

As most will be aware, the 2018 Competition Amendment Bill (Bill) is set to impact dominant firms' interactions with customers and suppliers that are small and medium businesses, or which are owned by historically disadvantaged persons. In line with the South African and global *Zeitgeist*, this manifests a continued shift towards driving the public interest objectives of competition legislation.

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Firms that wish to participate in proposed discussion forums on the regulations are required to confirm that by 15 January 2019.



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With the Bill having been passed by the National Council of Provinces on 4 December 2018, the Bill looks to be promulgated relatively quickly and the drafting panel has already concluded preliminary work on a first draft of regulations to give effect to the proposed amendments. The regulations were published on 21 December 2018, with a requirement for public comment by 31 January 2019. Moreover, firms that wish to participate in proposed discussion forums on the regulations are required to confirm that by 15 January 2019. Such tight timelines for action can justifiably be criticised as wholly inopportune given that notice of the draft regulations and proposed process coincided with the holiday season in South Africa.

Buyer power

The Bill introduces a new subsection 8(4) to the Competition Act, No 89 of 1998 (Act), prohibiting a dominant firm from "unfairly exploiting" small, medium or black-owned suppliers in terms of prices

or other trading conditions. The provisions will apply only to certain sectors of the economy designated by the Minister of Economic Development (Minister). The regulations are intended to:

- elucidate the factors and benchmarks for determining objective unfairness of prices or trading terms (in themselves or relative to other suppliers);
- determine the sectors to which the new provisions will apply (those mentioned in the draft regulations are supply chains in: food and grocery; apparel retail; online trading; construction; financial and insurance; and private healthcare – but others may qualify as the process unfolds); and
- establish benchmarks limiting the extent to which black-owned firms will benefit (the intention is to facilitate entry, not protect large firms with bargaining power simply because of ownership structure).

CHAMBERS GLOBAL 2011–2018 ranked us in Band 2 for competition/antitrust.

Chris Charter ranked by CHAMBERS GLOBAL 2018 in Band 1 for competition/antitrust.

Andries le Grange ranked by CHAMBERS GLOBAL 2014–2018 in Band 4 for competition/antitrust.



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Relevant to note is that the draft regulations expressly reject the notion that price discrimination might be justified purely on the basis of the quantities sold to particular customers.



Price discrimination

A new s9(1)(a)(ii) to the Act prohibits a dominant firm, as seller of goods or services, from engaging in price discrimination that is likely to have the effect of impeding the ability of small, medium or black-owned businesses from “participating effectively”. The regulations are required to:

- set benchmarks for how the provisions will affect black-owned customers (again, larger customers able to compete should not be afforded preferential treatment because of ownership structure); and
- describe relevant factors and benchmarks to determine whether any discrimination on price might impede the participation of small, medium or black-owned businesses (the avowed intention is not to guarantee that inefficient firms remain in business regardless of acumen, but to facilitate a larger and growing number of enterprises that are small, medium, or black owned).

Relevant to note is that the draft regulations expressly reject the notion that price discrimination might be justified purely on the basis of the quantities sold to particular customers.

Process

In the case of the new provisions on both buyer power and price discrimination, there is no requirement to demonstrate an adverse effect on competition or even consumer welfare. Accordingly, the benchmarks and criteria set out in the regulations will be key to the enforcement regime and compliance. The publication of the draft regulations is the first step of what is intended to be a collaborative and open process towards publication of final regulations in due course.

- Step 1 (in process): publication of the current first draft for initial consultation prior to the Bill coming into force by Presidential assent. A woefully short time has been afforded to make representations – by 31 January 2019.



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Any business large enough to be affected by the proposed amendments, as well as any business small enough to benefit from their protection, should take note of the process and consider notifying their desire to participate in the anticipated forums for further debate and deliberation on the regulations.

- Step 2: the Ministry intends to host a set of forums with firms likely to be affected by the provisions. Firms wishing to participate in the forums are required to inform the Ministry by 15 January 2019. Again, it is regrettable that this was broadcast so late in 2018, when many affected firms would be preoccupied by the vagaries of the festive season.
- Step 3: once the Bill is promulgated, a further draft set of regulations will be published for public comment.
- Step 4: in culmination of what will hopefully be an inclusive and careful process, a final set of regulations will be published to give effect to the amendments.

Any business large enough to be affected by the proposed amendments, as well as any business small enough to benefit from their protection, should take note of the process and consider notifying their desire to participate in the anticipated forums for further debate and deliberation on the regulations.

Chris Charter

Click here to read GCR's South African chapter on Antimonopoly & Unilateral Conduct, authored by **Competition Directors Lara Granville & Albert Aukema** and **Senior Associate, Naasha Loopoo**.



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