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# COMPETITION ALERT

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### **BREAKING NEWS**

#### **Draft Price Discrimination and Buyer Power Guidelines published for public comment**

On 18 October 2019, the Competition Commission's draft Guidelines on Price Discrimination and Buyer Power were published in the government gazette. This comes shortly after the publication of the Price Discrimination and Buyer Power Regulations (Regulations) by the Minister of Trade, Industry and Competition.

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## Draft Price Discrimination and Buyer Power Guidelines published for public comment

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On 18 October 2019, the Competition Commission's draft Guidelines on Price Discrimination and Buyer Power were published in the government gazette. This comes shortly after the publication of the Price Discrimination and Buyer Power Regulations (Regulations) by the Minister of Trade, Industry and Competition.

Read with the Regulations, the Guidelines serve to inform recently amended sections of the Competition Act, 1998 (Act) and provide a framework within which dominant firms are expected to operate to avoid the unfair treatment of firms in a designated class on the basis of them being small and not part of favoured trading relationships (ie small and medium enterprises (SMEs) and firms controlled by historically disadvantaged persons (HDPs).

The Guidelines give a useful indication of how the Commission will interpret the amended sections on Buyer Power and Price Discrimination in the Act and sets benchmarks for conduct that is likely to fall foul of the Act. Despite the guidance in the Guidelines, the Commission remains at liberty to exercise its investigatory discretion to evaluate the facts and circumstances of each case beyond the parameters of the Guidelines.

The Guidelines provide significant substantive guidance and go as far as to include illustrative examples and a "frequently asked questions" section.

Insofar as price discrimination is concerned, the Guidelines set out price thresholds for the discriminatory treatment that will warrant the initiation of an investigation by the Commission. In relation to buyer power, the Commission also includes a list of trading terms which may be regarded to be unfair under the buyer power provisions of the Act, taking its cue from the Agro-Processing and Grocery Retail Directive and the Online Intermediation Regulation issued by the European and the Buyer Power Regulations issued by the Competition Authority of Kenya.

Public comments to the draft guidelines will be accepted until 15 November 2019. Although the Guidelines reflect a considered approach by the Commission, there remain certain areas of the Guidelines which will benefit from public comment and engagement to ensure that the objectives of the amended Act are achieved.

*Albert Aukema, Kitso Tlhabanelo and Naasha Loopoo*

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