

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

ECONOMIC DEVELOPMENT DEPARTMENT

NO. 1423

21 DECEMBER 2018

REQUEST FOR PUBLIC COMMENT ON THE FIRST DRAFT SET OF PRICE DISCRIMINATION REGULATIONS IN TERMS OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998) AND THE COMPETITION AMENDMENT BILL, 2018 [B 23B-2018]

Background

In my address to the National Assembly at the Second Reading Debate on the Competition Amendment Bill, 2018 [B 23B-2018] (the "Bill") on 23 October 2018, I announced the establishment of a Panel which would draft regulations to give effect to the Bill once it has been passed by Parliament. It was further announced that these regulations would be the subject of consultation with the public and the Competition Commission (the "Commission"), in line with the proposed amendments to section 78 of the Competition Act (Act. 89 of 1998) (the "Act").

Following the approval of the Bill by the National Council of Provinces on 4 December 2018, the Panel has concluded its preliminary work on a first draft set of regulations to give effect to the amendments in section 9 of the Act, regarding Price Discrimination.

Clause 6(b) of the Bill has introduced a new sub-paragraph 9(1)(a)(ii) to the Act, which states that an action by a dominant *firm*, as the seller of *goods or services*, 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 historically disadvantaged persons, to *participate* effectively.

Clause 6(e) of the Bill has further provided for regulations made by the Minister in terms of section 78 of the Act—

- (i) to give effect to section 9, including the benchmarks for determining the application of this section to *firms* owned and controlled by historically disadvantaged persons; and
- (ii) setting out the relevant factors and benchmarks for determining whether a dominant *firm's* action is price discrimination that impedes the *participation* of

small and medium businesses and firms controlled or owned by historically disadvantaged persons.

The attached first draft set of regulations provides the initial thinking by the Panel on the general approach to determining the appropriate factors and benchmarks to give effect to the amendments to section 9.

Call for public comment

I hereby call on interested parties to provide representation and comment on these first draft set of regulations, including comment on (i) the general approach to the regulations; (ii) the specific wording used in the regulations; and (iii) any preferences for the options which have been presented in the regulations.

Specifically, comment is sought (i) from large firms as to whether the first draft set of regulations provides sufficient guidance regarding the practices which the Commission may investigate as a prohibited practice under section 9; (ii) from small and medium firms as to whether the first draft set of regulations sufficiently captures the range of abuses which small and medium firms may suffer as a result of price discrimination; and (iii) from interested parties as to whether the first draft set of regulations sufficiently addresses the changes in industries as a result of technological shifts, in particular those relating to the Fourth Industrial Revolution.

Process to be followed

In making the proposed Price Discrimination Regulations, I intend to follow the following process:

Step 1 (this step): A first draft set of regulations is hereby published in order to begin an initial consultation on the proposed Price Discrimination Regulations prior to the President's assent to the Bill and its subsequent proclamation. Representation and comment should be made by 31 January 2019 in fulfilment of this step of the process.

Step 2: Following the notice issued in step 1 above, the Ministry intends to host a set of forums with firms, including large firms and small and medium firms, which may be impacted by the proposed amendments to section 9 of the Act. Any firm who wishes to be considered for participation in these forums should write to the Minister by 15 January 2019 to advise of its interest.

Step 3: Following assent of the Bill by the President; promulgation of the relevant sections; and conclusion of the Steps 1 and 2 above, a further second draft set of regulations will be published for public comment.

Step 4: Once this Step 3 has been completed it is expected that a final set of Price Discrimination Regulations will be published, taking into account the public comments, accompanied by promulgation of the amendments to section 9 of Act.

The process outlined above is thus intended to allow for a collaborative and open process regarding the publication of the final regulations to enable the maximum participation by affected parties.

Representation and comments, and requests to be considered for participation in any forums on the regulations, should be addressed to the Minister of Economic Development, for the attention of Ms MT Mushi, Email: ministry@economic.gov.za, Economic Development Department, Private Bag X149, Pretoria, 0001 or hand delivered at 77 Meintjies Street, Block A, Utangamari Building, 3rd Floor, Sunnyside, 0132. Deadlines for submission are set out in the text above.

**Enquiries: Ms MT Mushi
Tel: 012 394 3458**

**Closing date: 31 January 2019 for written submissions
Deadline for expression of interest in attendance at forum: 15 January 2019.**



**EBRAHIM PATEL
MINISTER OF ECONOMIC DEVELOPMENT**

PRICE DISCRIMINATION REGULATIONS

FIRST DRAFT FOR PUBLIC COMMENT. NOTE: Reference to the Competition Act in these draft Regulations refers to the version of the Act passed by the National Council of Provinces on 4 December 2018.

1. Short Title

1.1. These Regulations may be cited as the *Price Discrimination Regulations*.

2. Interpretation

2.1. A word or expression that is defined in a chapter of the Act bears the same meaning in these Regulation as in the Act.

2.2. In these Regulations,

2.2.1. a reference to a section by number refers to the corresponding section of the Act;

2.2.2. a reference to a Regulation by number refers to the corresponding item of these Regulations; and

2.2.3. a reference to a sub-rule or paragraph by number refers to the corresponding item of the Regulations in which the reference appears.

2.3. In these Regulations unless the context indicates otherwise, "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended from time to time.

3. Purpose

3.1. In terms of subsection 9(1)(a)(ii) of the Act, an action by a dominant firm, as the seller of goods or services, 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 historically disadvantaged persons, to participate effectively;

3.2. In terms of subsection 9(4) of the Act, the *Minister* must, in terms of section 78, make regulations to address the following:

3.2.1. to give effect to this section, including the benchmarks for determining the application of this section to *firms* owned and controlled by historically disadvantaged persons; and

3.2.2. setting out the relevant factors and benchmarks for determining whether a dominant *firm's* action is price discrimination that impedes the *participation of small and medium businesses* and *firms* controlled or owned by historically disadvantaged persons.

4. Legislative Context to the Price Discrimination Regulations

4.1. The legislative intent of s9(1)(a)(ii) is to ensure that the pricing behaviour of dominant sellers does not undermine the public interest objectives of the Act, namely the participation of small and medium business or firms controlled or owned by historically disadvantaged persons (collectively the "designated class of purchasers") in the economy. In so doing, the purpose is not to guarantee that every firm in the designated class remains in business, regardless of its business acumen and efficiency, but rather to ensure that there is in general a large and growing number of enterprises in this class.

4.2. It does so through creating a distinct provision from that which focuses on the competitive effects of price discrimination. Given this distinction and the focus on purely whether the designated class of firms are impeded or not, the legislature was clear that to establish an offence there is no requirement to:

4.2.1. demonstrate the conduct has an adverse effect on competition in any market;
or

4.2.2. factor into the assessment any impact on consumers, adverse or otherwise.

4.3. Furthermore, given the insertion of s9(3)(a), it is apparent that the legislature also intended that such differentiation in pricing would not be justifiable if the basis for the difference was purely on the costs of supplying different quantities. The rationale is that the designated class of suppliers should not be impeded purely as a result of their more limited size.

4.4. However, in responding to a *prima facie* case as set out in s9(3)(b), the legislation also permits the dominant seller to have reference to the effect of the price discrimination on the broader set of firms in the designated class to whom it sells. The purpose is to ensure the provision is capable of distinguishing between price discrimination that is capable of harming the designated class of firms and other factors which may be causing a single complainant business difficulties.

4.5. As this sub-section falls within the price discrimination provision more broadly, there are a number of elements related to price discrimination that must each be satisfied in order to establish an offence. These elements are:

4.5.1. The selling firm must be dominant or shown to have market power within the meaning of s7 of the Act;

4.5.2. There is discrimination between the designated class of purchasers and other purchasers outside that class of the form set out in s9(1)(c) in respect of equivalent transactions for goods or services of like grade and quality as set out in s9(1)(b) of the Act;

4.5.3. The differential treatment does not make reasonable allowance for differences in the cost or likely cost of supplying the good or service based on differing places or methods of supply as set out in s9(2)(a)(i) or (ii); or constitutes an act of good faith to meet a competitor's price as set out in s9(2)(b); or is a legitimate response to changes in market conditions as set out in s9(2)(c);

4.5.4. The differential in price relative to other purchasers must causally impede the effective participation of the designated class of purchasers.

5. Price Discrimination Regulations

5.1. The Act defines "participate" as "*the ability of or opportunity for firms to sustain themselves in the market*". S9(1)(a)(ii) specifies that it is not just the ability to participate, but participate effectively that must be impeded. In the context of price discrimination this implies:

5.1.1. The price differential must be relative to other purchasers that operate in the same or similar downstream markets;

5.1.2. The price differential must place the firm in the designated class at a competitive disadvantage in the broad markets in which they participate and that such impact is not trivial or immaterial;

5.1.3. This implies that it is not necessary to demonstrate that the firm in the designated class is unable to compete or is not financially viable, but only whether it is at a competitive disadvantage.

5.2. Factors and benchmarks that may be relevant as to whether the price differential itself has impeded participation include, but are not limited to:

5.2.1. The extent of the difference in price relative to other firms in the same market downstream;

5.2.2. The importance of the input in the cost structure of production, or alternatively its importance for other factors that drive sales in the downstream markets such as product or service characteristics, quality and range;

5.2.3. Whether the difference in price combined with its importance is competitively relevant such that it places a firm in the designated class at a disadvantage;

5.2.4. The actual performance of the firm in the designated class, including trends in sales, market entry/exit, customer range, investment and profits;

5.2.5. The actual performance of other firms in the designated class of purchasers, including patterns of entry and exit, trends in sales, customer range, profits and investment, and/or their performance relative to other purchasers in the same or similar downstream markets;

5.2.6. The likely performance of the firm and/or other firms in the designated class in the counterfactual where the differential is eliminated.

6. Application to firms controlled or owned by historically disadvantaged persons

6.1. The wording of s9(1)(a)(ii) makes clear that the legislature intended the section to apply to firms controlled or owned by historically disadvantaged persons that also fell outside the category of small and medium enterprises. However, the legislature also intended to limit its application to such firms, given that customers that did not necessarily suffer from an inferior bargaining position may not require public interest protection.

6.2. In this context, section 9(1)(a)(ii) should not apply to firms controlled and owned by historically disadvantaged persons that purchase a material and significant share of the input from the dominant seller, such that this provides them with countervailing buyer power.

Note to section 6 of the *Price Discrimination Regulations*: Public comment is invited as to whether a presumptive threshold specified as a percentage of purchases should also be set (for example that 10% or less of the output of a dominant firm is purchased by a firm that is controlled or owned by historically disadvantaged persons), outside of which the onus would shift to either demonstrating countervailing power or the lack thereof, and if so the level of such a threshold.