

ECONOMIC DEVELOPMENT DEPARTMENT

NO. 169

13 FEBRUARY 2020

COMPETITION ACT, 1998 (ACT NO. 89 OF 1989)

REGULATIONS ON PRICE DISCRIMINATION MADE BY THE MINISTER UNDER
COMPETITION ACT, 1998

I, Ebrahim Patel, Minister of Trade and Industry, after consultation with the Competition Commission, hereby in terms of section 9(4) read with section 78 of the Competition Act, 1998 (Act No. 89 of 1998), make the regulations as set out in the Schedule hereto.

The regulations will come into effect on the date of publication hereof in the *Gazette*.



MR EBRAHIM PATEL
MINISTER OF TRADE AND INDUSTRY
DATE: ..2020/02/12.....

SCHEDULE

PRICE DISCRIMINATION REGULATIONS

Interpretation

1. In these Regulations a word or expression to which a meaning has been assigned in the Act, has the meaning so assigned and, unless the context indicates otherwise—

"designated class of purchaser" means a small business or medium-sized business as defined in section 1 of the Act or any regulations made by the Minister; or alternatively a firm controlled and owned by historically disadvantaged persons within the meaning of the Act and within the benchmarks determined by these Regulations;

"Regulations" means the Price discrimination Regulations; and

"the Act" means the Competition Act, 1998 (Act No. 89 of 1998).

Purpose

2. The purpose of these Regulations are—
- (a) to give effect to section 9(1)(a)(ii) of the Act and to provide for the benchmarks for determining the application of section 9(1)(a)(ii) to *firms* owned and controlled by historically disadvantaged persons; and
 - (b) to set 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 and owned by historically disadvantaged persons.

Factors of Price Discrimination to satisfy to establish a contravention

3. The factors that should each be considered in the establishment of a price discrimination contravention, includes:

- (a) The selling firm must be dominant within the meaning of section 7 of the Act;
- (b) there is differential treatment between the purchaser in the designated class of purchaser and other purchasers outside that class of the form of discrimination set out in section 9(1)(c) in respect of equivalent transactions for goods or services of like grade and quality as set out in section 9(1)(b) of the Act;
- (c) the differential treatment—
 - (i) 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 section 9(2)(a)(i) or (ii);
 - (ii) does not constitute an act of good faith to meet a competitor's price as set out in section 9(2)(b); or
 - (iii) is not a legitimate response to changes in market conditions as set out in section 9(2)(c); and

- (d) the differential treatment in price relative to other purchasers is likely to impede the effective participation of a firm or firms in the designated class of purchasers.

Price Discrimination

4. Factors and benchmarks that may be relevant as to whether the price discrimination by a dominant firm is likely to impede effective participation by a designated class of purchaser includes:

- (a) The extent of the difference in respect of price or other factors outlined in section 9(1)(c) of the Act relative to other purchasers in the same market or in markets in which the purchaser in the designated class is a potential competitor;
- (b) the significance of the input in the cost structure of the purchaser in the designated class of purchaser or as a driver of sales in the downstream market for the purchaser in the designated class of purchaser;
- (c) the duration and timing of the price differential;
- (d) the likelihood that the differential treatment would result in the purchaser in the designated class of purchaser facing decreased demand for its goods or services in the downstream market; and
- (e) the likelihood that the differential treatment would result in decreased investment by the purchaser in the designated class.

Application to firms controlled and owned by historically disadvantaged persons

5. These Regulations apply to firms controlled and owned by historically disadvantaged persons that purchase less than 20% of the relevant good or service supplied by the dominant seller over the same period as the discrimination.

Guidelines

6. The Competition Commission may issue guidelines in terms of section 79 of the Act in respect of its enforcement approach to section 9(1)(a)(ii) in light of these regulations.

Short Title

7. These Regulations are called the Price Discrimination Regulations, 2020.