



South African Competition Commission reveals wide scope of buyer power provisions

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On 12 May 2020, the South African Competition Commission (the **Commission**) published its enforcement policy on the new buyer power provisions of the South African competition regime. In the buyer power guidelines (the **Guidelines**), the Commission has revealed an expansive approach to dominant buyers under these provisions. As a result, as recently seen under the Covid-19 price regulations, the Commission is targeting a wide range of businesses that would not normally be considered as dominant under the Competition Act.

The buyer power provisions were adopted last year as part of a package of wide-ranging and sweeping reforms to the South African competition regime aimed at the promotion and protection of small and medium sized businesses (**SMEs**) and firms controlled or owned by historically disadvantaged persons (**HDPs**). These provisions set out that it is an abuse of dominance for a dominant buyer to require suppliers that are either SMEs or HDPs (**designated suppliers**) to sell goods/services at a price which impedes the ability of the supplier to participate effectively.

Adopted in February 2020, implementing regulations specified that the buyer power provisions were limited to three sectors (i.e. agro-processing, ecommerce and online services and grocery wholesale and retail). Further, the

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regulations set out a list of factors to determine the unfairness of a price or trading condition imposed by a dominant buyer on a designated supplier. For example, the regulations state that such a price must be compared to those agreed with suppliers outside of the designated class.

While the Guidelines mainly flesh out these factors in a relatively self-evident manner, one of their most controversial aspects relate to the Commission's policy on the assessment of dominant buyers. As a point of departure, the Commission will define the relevant purchasing market in accordance with the distributional channel in question. For example, as opposed to viewing a broader market for the purchase of chicken, the Commission will see the relevant market as limited to the purchase of chicken by retailers. In addition, such a relevant market may be further limited to supplies by designated suppliers.

Although the Competition Act creates a rebuttable presumption of dominance for market shares above 35%, the Commission will consider buyers with as low as a 15% purchasing market share as dominant. In addition to market shares, as part of the dominant buyer assessment, the Commission will take into account other factors, such as the suppliers' dependency on the buyer, the alternative suppliers available to the buyer and the nature of the supply negotiations.

In light of the narrow purchasing market approach adopted by the Commission, there is a material risk that a wide range of businesses in the relevant sectors that would not normally be considered as dominant under the Competition Act will fall within the scope of the buyer power provisions. While such businesses may attain the 15% market share threshold in a narrow market, the Commission could easily look to other dynamics to support a finding of dominance. For example, the lack of meaningful negotiations between the buyer and the designated supplier will be seen as indicative of buyer power.

In this regard, the Commission's expansive approach to dominance under the buyer power provisions is similar to the

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one currently being adopted under the Covid-19 price regulations. In the enforcement of the Covid-19 regulations, the Commission has prosecuted a number of small businesses (in some cases, individual stores) as dominant providers of essential products and services. This approach to abuse of dominance is radically different to the Commission's previous enforcement approach where it was limited to industrial giants (such as SASOL and ArcelorMittal).

Building on the momentum of the Covid-19 price regulations, the Commission's approach to the buyer power provisions threatens to promote abuse of dominance to a key pillar of its enforcement policy going forward. As a result, the whole range of buyers in the relevant sectors will need to assess their market position and power to determine whether they might trigger enforcement of the buyer power provisions in their procurement of goods and services from designated suppliers.

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