

# Competition laws require online platforms in the 'gig economy' to protect SME and black suppliers

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The Competition Act was amended in February 2020 to introduce new rules to protect small, medium and black-owned suppliers in specific sectors (the buyer power provisions). These include the e-commerce and online services sectors - the gig economy.



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On 18 May 2020 the Competition Commission issued its guidelines on the buyer power provisions. These guidelines set out the Commission's interpretation of the new rules and provide guidance on how it will screen and assess complaints. The guidelines contain a list of terms that will be rebuttably presumed to be unfair if they are required from or imposed on suppliers. They set out when prices paid to suppliers will be unfair and likely contravene the laws.

Online platform providers must determine if they are dominant in the relevant purchasing market. Dominant online platforms in the gig economy are required to contract with suppliers on fair terms. If so, they must ensure that their prices paid to SME or black-owned suppliers are fair, both in comparison to prices paid to other bigger suppliers and in themselves. The dominant buyer will also have to keep proof of its objective justifications for differences in prices paid to different suppliers of like goods or services.

The gig economy is a job market where workers are paid for each 'gig' they do, such as transport, food delivery, cleaning jobs, tour guiding and the like. This market has gained significant traction in recent years because of the explosion of apps and websites designed to connect suppliers and customers. These apps give freelance workers the freedom to determine when and how they work, but they may not be protected by employment laws.

The South African government is focused, through various policies, on the growth of small businesses and entrepreneurs. The gig economy provides new opportunities for providing work and income to a wide array of people.

Globally, competition authorities are wrestling with how to balance the interests of consumers against protecting small businesses in the online environment. South Africa has learned from the experience in other countries and has implemented restrictions to protect suppliers to e-commerce platforms and the gig economy. These include restrictions on unfair pricing and unfair terms when the online service provider is dominant in the relevant market.

The guidelines say that providers of e-commerce and online services must set out terms and conditions of operating on its platform in plain language, in particular, they must explain:

- The grounds for any decision to suspend or terminate or impose any other kind of restriction on the services offered by the suppliers;
- Any limitations on the ownership and control of intellectual property rights and personal information of suppliers; and
- The parameters determining the ranking and display of suppliers on their platform.

It will, for instance, be considered unfair if a dominant online provider restricts the ability of the supplier to offer the same goods or services to consumers directly or through a different platform.

The Commission will consider unfair any term that allows the platform provider the use of the suppliers' data and information (incl. pricing, volume, customer sales) to compete with the supplier. The Commission will consider a difference in the price paid of more than 3% to be material but depending on the relevant market, they may still investigate a lesser price differential.

The Commission has cautioned that there should be a fair distribution of risk in the supply chain in response to market shocks like the Covid-19 pandemic. The Commission will not consider it fair if a dominant online provider requires its SME or black-owned suppliers to carry all the risks.

The overarching intention of the new rules is fairness to suppliers who may be historically disadvantaged, or have other challenges such as access to funding or cash flow to ensure that they are able to effectively participate in the economy. Dominant buyers are now required to ensure that their procurement practices do not entrench systemic discrimination or create further barriers to entry. These are novel provisions but the guidelines go some way to helping parties to understand what will be considered fair and when the Commission will investigate these sorts of trading practices.

## ABOUT THE AUTHOR

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