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LEGAL TAKE

ABUSE OF BUYER POWER

AN ANALYSIS OF KENYAN COMPETITION LAWS

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Introduction

Imagine if your customer could dictate how much they paid for your product and the terms you sell your product to them. In certain markets where a buyer or group of buyers are economically superior to its suppliers and represent the supplier's immediate market, they may unduly influence the terms and conditions of sale with their suppliers and when they do, this could potentially be classed as an **abuse of buyer power**.

The Threshold for Buyer Power

The Competition Act (the **Act**) defines **buyer power** as "*...the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to obtain from a supplier more favorable terms, or to impose a long-term opportunity cost including harm or withheld benefit which, if carried out, would be significantly disproportionate to any resulting long-term cost to the undertaking or group of undertakings".*

To determine whether buyer or group of buyer's conduct meets the threshold for abuse of buyer power, the following elements are crucial to understand:

1. the undertaking must have **influence**, meaning the buyer has the ability to switch suppliers by producing the goods or services themselves or sponsoring new entry into the market;

2. the influence can be exerted by **any undertaking or group of undertakings**- this definition safeguards suppliers where a purchaser has Buyer power as defined by Section 24(B) of the Act but does not fall under the criteria for 'dominant position' as characterized by section 23 of the Act. This means that the buyer need not have a stake of 50% of the market (a dominant undertaking) to abuse Buyer power;

3. the influence exerted should result in **imposing long-term opportunity costs** including harm or withheld benefits to the supplier. This takes into account a situation in which a strong buyer or group of buyers might use their influence to impose long-term undue benefits like discounts, early payments, or extra space.

The Effect of Abuse of Buyer Power to the Economy

It is apparent that powerful buyers tend to implement strategies to ensure their survival in buyer-driven supply chain at the expense of suppliers, primarily MSMEs. This is especially concerning since MSMEs in Kenya account for 98 percent of all businesses, contribute up to 40 percent of the gross domestic product and employ seven out of every 10 working Kenyans.

While powerful buyers can get favorable terms from upstream suppliers leading to reduction in input costs and price to consumers and increased consumer welfare, the adverse effect of their abuse of buyer power cannot be ignored. Through the provision of punitive discounts and rebates, mid-term unilateral alteration of contract conditions, and postponing of payments, suppliers are compelled to bear costs and risks that would normally be borne by buyers.

If one market player has preferential purchasing terms over rivals because of its exercise of buyer power, this business may benefit from this favorable position to strengthen its position in the sales market. Competitors who lack this enormous leverage and are unable to obtain comparable concessions are then gradually driven out of the market, and once the pressure from the competition has subsided, the strong buyer is now in a position to raise commodity prices to its commercial advantage.

The **Competition Authority of Kenya** (**CAK**) established primarily to promote and enforce the provisions of the Act is one of the most progressive authorities in competition law in Africa. It has come a long way in handling complaints channeled to it by suppliers regarding abuse of buyer power with the most frequent form of abuse being in respect to delays in payments. Such claims account for 73% of all complaints made to the authority, emphasizing CAK's key role in regulating competitive behaviour within the retail trade in Kenya.

Unpacking the 'Carrefour Decision'

On 20th April 2021, the Competition Tribunal (the **Tribunal**), which hears appeals from parties aggrieved by CAK's decisions, delivered a key judgement in the matter of ***Majid Al Futtaim Hypermarkets Limited (that trades in Kenya as Carrefour) vs CAK and Orchards Limited***. In this matter, a supplier (**Orchards**) had initially filed a complaint to the CAK alleging abuse of buyer power by the buyer (**Carrefour**) on account of the following actions:

1. Delisting Orchards without notice leaving them with dead stock bought in anticipation of renewal of its contract in 2019;

2. Returning products nearing their expiry date;

3. Refusing to take in deliveries at certain branches;

4. Asking for free samples of products that Carrefour then proceeded to sell and make undue profit on, to Orchard's financial detriment;

5. Transferring labor costs from Carrefour to the Orchards by requiring deployment of Orchards' staff to Carrefour's shops; and

6. Introduction of progressive rebates from Orchards' invoices that Carrefour proceeded to unilaterally deduct.

CAK found that Carrefour had abused their buyer power and ordered the following:

a) That they expunge all provisions facilitating this abuse from their supplier contracts including rebates, listing fees and unilateral power to delist their suppliers;

b) That they refund Orchards rebates amounting to 290,000 Kenya Shillings within 30 days;

c) That they pay damages for loss arising from unilateral termination of the contract;

d) That they pay a penalty to CAK of 10% of gross annual turnover from sale of Orchard's products; and

e) That they obtain approval from CAK before refusing to accept goods or returning them.

Upholding CAK's decisions, the Tribunal found that Carrefour was guilty of abuse of buyer power. It also found Carrefour guilty of transferring commercial risk by returning goods nearing expiry date, failing to receive goods unjustifiably and forcing the supplier into rebates that had no compensating benefits. However, the Tribunal set aside the decision setting a requirement for CAK to approve or turn down delivery and return of goods funding, finding these to be impracticable and commercially unviable.

The above decision was especially important because it was the first local decision regarding abuse of buyer power, shaping how the CAK assesses buyer power and implements protections against its abuse. It formed a basis and paved the way for the development of guidelines into the area of buyer power, subsequently leading to CAK's gazettement of the following standard codes of practice for various stakeholders.

*A. The Retail Trade Code of Practice, 2021 (**RTCP**)*

The RTCP seeks to regulate the relationship between retailers and their suppliers in the Kenyan market by providing for obligations of both parties in their trade relationships. It further requires both traders and suppliers to trade in ethical and fair dealing by prohibiting unilateral variation to supply agreements unless circumstances call for the same.

The RTCP caters for several interesting issues:

a) It provides for fair and ethical dealing that requires both the retailer and supplier to act in good faith and without duress in trading;

b) It introduces the concept of "*ordinary commercial pressures*" that a retailer can rely on when asking for particular actions from the supplier;

c) It addresses confidentiality of information whose disclosure may affect competitive positions of either party;

d) It makes provision for matters such as delayed payments, additional costs, payments for shrinkage and damages, compensation for errors and de-listing; and

e) It creates an elaborate framework for implementation of the CAK's guidelines.

By increasing openness and predictability in retailer-supplier trade interactions, the RTCP should work to safeguard suppliers from abuse by retailers.

*B. Buyer Power Guidelines, 2022 (**2022 Guidelines**)*

Guidelines were initially issued in 2017 by CAK to clarify the Act's provisions on the issue of buyer power. In 2022, CAK updated these 2017 guidelines due to concerns across the board owing to a general lack of understanding by stakeholders of the standards and processes used by the CAK to determine buyer power and/or its abuse.

To respond to this, the 2022 Guidelines shed more light on these concerns by providing a detailed road map for the assessment of buyer power and elements of its abuse including the approach to be taken by CAK in making this determination and the procedure for investigation of such claims.

The 2022 Guidelines also note the factors that CAK will consider in making this determination, these being;

a) The nature of the buyer and supplier markets;

b) The extent of the dependency of the supplier on the buyer;

c) The factors relevant to the buyer and commercial significance of the products in relation to the buyer's undertaking;

d) Whether the buyer can easily switch to alternative suppliers;

e) Whether the buyer can sponsor new entry or self-supply without incurring substantial sunk costs; and

f) Whether the buyer is a 'gatekeeper', meaning it is the gateway to the downstream (consumer) market.

Further, the 2022 Guidelines outline and characterize the two types of buyer power, namely:

(i) **Monopsony Power**: Whereas the primary or exclusive consumer of the goods and services provided by numerous potential sellers or suppliers, a single buyer or an organization of buyers substantially controls the market; and

(ii) **Bargaining Power**: Which essentially is the strength of a buyer in its negotiations with sellers or suppliers.

Finally, one of the issues brought out by the 2022 Guidelines is a description of the standards used to determine whether specific sectors require common and standard codes of practice to control the misuse of buyer power. To that end, CAK was mandated to publish and release additional codes of practice for various sectors aimed at curtailing abuse of buyer power.

Conclusion

An effective regulatory regime is crucial for ensuring that the negative effects of buyer power do not affect supplier's businesses and by extension the competitiveness of the Kenyan economy. Together with recent enactments to the country's competition laws including the Competition Amendment Act, 2019, the 2022 Guidelines, the RTCP and a more proactive CAK can help improve the regulatory framework for checking buyer power and restrictive trade practices. Ultimately, this will serve to make Kenya a leader in African competition law whose markets function for the benefit of the entire economy.

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