



Legal Alert | July 23, 2021

Regulation of Abuse of Buyer Power in Kenya Takes Shape – Part 1

Introduction

On April 20, 2021, the Competition Tribunal (“the Tribunal”) delivered a key decision in *Majid Al Futtaim Hypermarkets Limited vs Competition Authority of Kenya and Orchards Limited* (the “Carrefour Decision”). Two months later, the Competition Authority of Kenya (CAK) gazetted the Retail Trade Code of Practice (the “Retail Code”).

These two developments shape how CAK will recognize abuses of buyer power and implement the protections in the Competition Act (the “Act”). The Carrefour Decision is from an appeal to the Tribunal against a decision by CAK. CAK had determined that Majid Al Futtaim Hypermarkets Limited, trading as Carrefour Hypermarket (“Carrefour”), had abused its buyer power in relation to Orchards Limited (“Orchards”).

The subsequent publication of the Retail Code shows CAK intends to curb buyer power abuse in the retail sector. The Competition Act empowers CAK to require vulnerable industries or sectors to adopt a code of practice. The code should be developed in consultation with relevant stakeholders, relevant government agencies and the Attorney General.

The Retail Code is intended to provide guidelines for how retailers and suppliers will engage. It appears to be a codification of some issues the CAK and the Tribunal addressed in the Carrefour Decision.

This first of two alerts on the impact of these developments focuses on the Carrefour decision.

What is buyer power?

Buyer power simply refers to the ability of buyers to obtain advantageous terms of trade from their suppliers. This can be abused where the buyer has significantly more bargaining power than the seller. In Kenya, the Act prohibits the abuse of buyer power.

The Act defines abuse of buyer power as influence exerted by a purchaser to obtain from a supplier more favourable terms or to impose a long-term opportunity cost (including harm or withheld benefit) which is significantly disproportionate to any resulting long-term cost to the purchaser.

The Act aims to protect parties with weaker bargaining power from unscrupulous dominant parties. It empowers CAK to investigate and punish buyer power abuse. Conviction for buyer power abuse attracts a prison sentence of up to 5 years or a fine of up to KES 10,000,000. CAK may also impose administrative remedies including a penalty of up to 10% of the preceding year’s gross annual turnover in Kenya, restrain such conduct, direct the undertaking to remedy or reverse the violation, or grant other appropriate relief.

The Complaint

Orchards complained to CAK that Carrefour had abused its buyer power by:

- ❖ unilaterally delisting Orchards by blocking its supplier code without notice, which left Orchards with dead stock of packaging materials bought in anticipation of renewal of its contract for 2019;
- ❖ requiring various rebates including a KES 50,000 listing fee, 10% on every second delivery, and 1.25% on all annual sales;
- ❖ introducing a progressive rebate to be calculated from annual sales/turnover of Orchards;
- ❖ unilaterally deducting rebates from invoices and failing to account for payments making reconciliation difficult for Orchards;
- ❖ returning merchandise nearing expiry dates;

July 23, 2021

- ❖ refusing to accept a new price list and deliveries at certain branches;
- ❖ requiring Orchards to deploy its staff to Carrefour shops, thereby transferring labour cost from Carrefour to Orchards; and
- ❖ asking for free samples which Carrefour then sold.

The CAK Decision

CAK found Carrefour guilty of abuse of buyer power, and ordered it to:

- ❖ expunge all provisions in its supplier contracts that could lead to or facilitate abuse of buyer power. Such provisions include, listing fees, rebates, requirement to post supplier staff to stores, and unilateral power to delist suppliers;
- ❖ within 30 days, refund rebates of KES 289,482 to Orchards;
- ❖ pay damages of KES 130,856 to Orchards for the loss arising from unilateral termination of contract; and
- ❖ pay to CAK a financial penalty of KES 124,768 being 10% of Carrefour's gross annual turnover from the sale of Orchards products.

CAK also required Carrefour to obtain its approval before refusing to accept delivery of goods or returning goods.

Analysis of the Tribunal Decision

The Tribunal ultimately upheld CAK's finding that Carrefour abused its buyer power. The Tribunal based its finding on the Act, the Buyer Power Guidelines made under Part III of the Act, and best international practice. The Act requires CAK to consider the nature of the contract terms, payment requested for access of infrastructure and price paid to suppliers when assessing buyer power. We analyse the key takeaways from this decision below.

First, the amendments to the Act in December 2019 did not confer CAK investigative power in-

relation to buyer power abuse but only affirmed its existence. Therefore, any CAK investigation of buyer power abuses after January 13, 2017 is lawful.

Second, CAK does not need formal rules for its hearings to achieve natural justice. What is required for CAK to achieve fair administrative action is fair notice, information, and an opportunity to present a response. CAK is free to decide its procedures, provided it achieves a degree of fairness appropriate to its statutory mandate.

In addition, the Tribunal affirmed that guidelines issued by CAK such as the 2017 Buyer Power Guidelines are not statutory instruments (for example, regulations) and therefore do not require to go through a parliamentary process. The guidelines are informal and are made as part of CAK's administrative powers under the Act. It is important to note that even though Guidelines are not statutory instruments, their application must be consistent.

Third, determining whether there is buyer power goes hand in hand with determining the existence of abuse of that power. The Act identifies buyer power through its effects. CAK is required to consider the nature and determination of contract terms, payment requested for access infrastructure, and the price paid to suppliers.

After CAK delivered its determination but before the Tribunal delivered its decision, Parliament amended the Act to set out specific conduct that amounts to abuse of buyer power. The specific conduct is:

- ❖ delays in payment of suppliers without justifiable reason in breach payment terms;
- ❖ transfer of commercial risks meant to be borne by the buyer to the suppliers;
- ❖ unilateral threats or termination of commercial relationships without justification;
- ❖ demands for preferential terms unfavourable to the suppliers;
- ❖ refusal to receive or return any goods without justifiable reason in breach of contractual terms;

July 23, 2021

- ❖ transfer of costs or risks to suppliers by imposing a requirement for the suppliers to fund the promotion cost;
- ❖ reducing prices by significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; and
- ❖ bidding up prices of inputs by buyers with the aim of excluding competitors from the market.

Fourth, the Tribunal upheld CAK's finding that Carrefour had abused its buyer power by:

- ❖ transferring commercial risk by returning unsold merchandise near its expiry date. A retailer should bear the risk of overstocking, and transfer of this risk indicates a superior bargaining position;
- ❖ refusing to receive goods it had ordered without justifiable reason; and
- ❖ forcing Orchard to agree to progressive and quantity rebates which had no compensating benefit to Orchard.

Fifth, a rebate program will not be buyer power abuse where the party offering the rebate has significant market power. However, where a rebate is the result of duress or has no compensating advantage to the seller, it will be buyer power abuse.

Sixth, if a retailer and seller agree on dispatch of merchandizers to the store this will not be an abuse of buyer power. Merchandisers are employees or agents of a seller positioned at the store to assist with sales, product information, and customer queries. Where the costs, terms and conditions for the dispatch are clear this will not be an abuse of buyer power.

Sanctions

The Tribunal set aside the requirement for CAK to approve refusal of deliveries or returns of goods. The Tribunal found these to be impracticable and commercially unviable. The Tribunal also set aside the damages awarded for unilateral termination of the contract. Orchards had purchased supplies well in advance in anticipation its contract would be renewed. This was not induced by Carrefour's conduct and Orchards did not have a guarantee the contract would be renewed. Therefore, the damages were held to have been wrongly awarded.

Conclusion

As the first local decision, the Carrefour Decision will shape how CAK assesses buyer power and implements protections against its abuse. Therefore, the decision will be an important guideline for industry players.

We note that neither CAK nor the Tribunal considered dominance as a factor. This is unlike comparable countries like South Africa, where dominant entities are prohibited from directly or indirectly imposing their terms on small or medium suppliers. CAK would find it useful to consider a dominance test, as where there is significant inequality of bargaining power the likelihood of buyer power abuse increases.

In Part 2, we will analyse the recently published Retail Code.

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