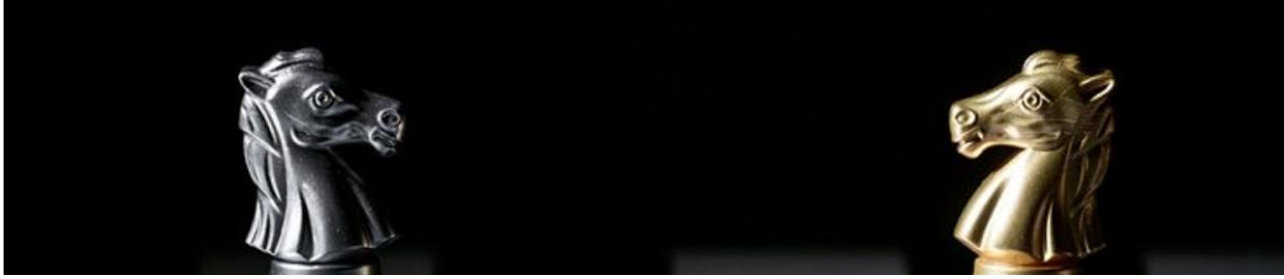

Legal Alert | **August 06, 2021**

Regulation of Abuse of Buyer Power in Kenya Takes Shape – Part 2

Introduction

In June 2021, the Competition Authority of Kenya (CAK), gazetted the Retail Trade Code of Practice (the "Retail Code"). The Retail Code is intended to address buyer power abuse issues specific to the retail industry. CAK is empowered by the Competition Act, 2010 (the "Act") to require vulnerable industries or sectors to adopt a code of practice. CAK develops such codes in consultation with relevant stakeholders, relevant government agencies and the Attorney General.

This second of two alerts on the regulation of buyer power abuse in Kenya focuses on the Retail Code. The first alert focusing on the first Kenyan decision on buyer power abuse can be read **here.**

Recap: 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. The Act prohibits buyer power abuse and provides protections aimed at ensuring fair contracting even where negotiating power is unequal.

CAK can investigate and punish buyer power abuse. Conviction attracts an up to 5-year prison sentence or up to KES 10,000,000 fine. CAK may also impose administrative remedies. These include a penalty of up to 10% of the preceding year's gross annual turnover in Kenya, an order restraining such conduct, remedying, or reversing the violation, or other appropriate relief.

Note

The Retail Code borrows heavily from the UK's Groceries Supply Code of Practice (the "Groceries Code").

Fair Dealing Principles

The Retail Code applies to all suppliers and retailers who include self-selection stores, supermarkets, and hypermarkets. It requires retail players (retailers and suppliers) to deal with each other fairly and lawfully. This means conducting their relationship in good faith, without duress or favouring oral or written contracts. Retailers must recognize the suppliers' need for certainty on the risks and costs of trading, production, delivery, and payment. Suppliers, on the other hand, must consider the retailers' need for certainty on cashflow, product movement and stocking levels.

Proving Buyer Power Abuse

A supplier needs to show that the retailer required the supplier to take an action which the supplier did not agree to. A retailer can defend itself by showing that the request or suggestion was made in response to ordinary commercial pressures. Ordinary commercial pressures include external circumstances which affect the retailer's profitability and require immediate action. However, if the retailer is responsible for those circumstances, the retailer will also need to show that it did not force the supplier to take the action.

Surprisingly, the Retail Code places on the supplier the burden of proving that a retailer did not require an action. There is no legal or commercial reason for a supplier to be responsible for proving a retailer's defence. This is in direct contrast to the Groceries Code and should be corrected.

Unethical Conduct

The Retail Code bars unethical conduct when entering into or renewing supplier contracts (listing). However, the specific provision implies only signatories to the code are barred from unethical conduct. This key prohibition should be reworked to ensure it applies to all retail players.

Confidentiality

No retail player may disclose another's information that is either commercially sensitive or would negatively affect competitiveness until after one year or unless required under law for dispute resolution.

Written Contracts

Retail players must contract in writing. The contract must state the terms of payment, payment date, default interest, conditions for variation or termination including reasonable notice, and dispute resolution mechanism.

Retroactive Adjustments

Retailers may change supply terms in a manner that affects past supplies, where the contract specifically sets out when such adjustments are allowed and how they will be calculated.

Supply Shortfalls and Constraints

A supplier must notify the retailer of any anticipated shortfalls and supply constraints on confirmed orders. Otherwise, the retailer can claim a reasonable loss against the supplier. The affected retailer and supplier will be required to agree on the damages.

Supply Chain Procedures Changes

Retailers must give reasonable notice in writing when asking suppliers to significantly change any part of their supply chain procedures. Failing to give notice will allow the supplier to claim for reasonable loss against the retailer. The affected retailer and supplier will also be required to agree on the damages.

Payments

Retailers must pay suppliers as per contract. A retailer must notify the supplier of any documentation issues within seven days. The supplier will have seven days to resolve the issues. Retailers should pay all undisputed amounts while resolving disputed amounts with the suppliers.

Previously disputed amounts should be paid within 30 days of reaching settlement. Retailers will pay suppliers interest on delayed payments, at a pre-agreed rate.

Prohibited Payments

Retailers are prohibited from requiring the following payments from suppliers:

Better in-store positioning or more shelf space: only allowed in relation to a promotion.

Consumer complaints: For complaints that can be resolved through a refund or replacement, the retailer must show that the cost exceeds the product's retail price, or the supplier is to blame.

For complaints that cannot be resolved through refund or replacement, the retailer may only require payment if the following conditions are met: the payment must be related to the complaint; the complaint must be justified and there must be evidence the supplier is to blame; the retailer must have given the supplier a full report on the complaint; and the retailer must have given the supplier adequate evidence that the complaint is justified, and the supplier is to blame.

In-store damage: not allowed unless the damage occurred due to the supplier's negligence or default and the contract clearly sets out what constitutes default or negligence. Alternatively, a retailer may agree with a supplier on a percentage the supplier will cover with the retailer covering the excess.

Listing: not allowed but subject to an exception for promotion related costs. A retailer may also require payment where it has not listed a product in at least 25% of its stores in the past year. Such payment must be a reasonable estimate of the retailer's risk in listing such a product.

Retailer Costs: these include design, research, store opening or refurbishment, hospitality, visits by retailer staff, and listing, and are not allowed unless contractually agreed.

Shrinkage Payments: not allowed unless the retailer can prove supplier negligence. Shrinkage is loss of goods after delivery due to theft, damage, or other internal aspects of the retailer. Suppliers should assist retailers to reduce shrinkage through training and ensuring product barcoding is done accurately.

Delisting

A retailer may only terminate a supplier contract for genuine commercial reasons and with reasonable notice. The notice must inform the supplier of its right to request the retailer's senior management team or relevant officer to review the decision. The Retail Code does not specify what genuine commercial reasons are. It does, however, bar a retailer from terminating a contract in response to a supplier's exercise of its rights under contract or the Retail Code.

Forecasting Errors

A retailer should prepare forecasts in good faith, with due care, and after consulting suppliers. Otherwise, a supplier can claim against the retailer full compensation for costs incurred due to forecasting errors by the retailer.

Promotions

Retail players may agree on promotion of a supplier's products, or a retailer can request a supplier to participate in a promotion. The retailer must give the supplier reasonable notice before holding the promotion. If a retailer requires a supplier to participate in a promotion not agreed to, the retailer will be taken to have varied the supplier contract. Retailers must not over-order products at promotional prices and must agree with the supplier on how to deal with any excess after a promotion.

Prompt Payment Committee

The Retail Code establishes a Prompt Payment Committee. The committee will comprise of the chairpersons and chief executive officers of the Association of Kenya Suppliers (AKS), the Kenya Association of Manufacturers (KAM), and the Retail Trade Association of Kenya (RETRAK). The committee's primary mandate is to assess and report on the implementation of the Retail Code.

Retail Trade Dispute Settlement Committee

The Retail Code establishes a Retail Trade Dispute Settlement Committee to handle disputes arising under the code. The committee's decisions are binding on participants and where they relate to buyer power abuse can be appealed to CAK. However, the committee's jurisdiction is not exclusive, and a party may instead opt to seek judicial intervention. The committee will comprise of seven members, being two nominees each of RETRAK and KAM, and one nominee each of AKS, the Council of Governors, and the Ministry of Trade.

Conclusion

We expect the Retail Code will be well received in the retail sector, especially given its implicit endorsement by industry associations and representatives. Buyer power abuse protections in relation to promotions will certainly be welcomed by suppliers who have long pushed for them. However, the code requires cleaning up to ensure it achieves its goal.