

# Kenyan Competition Law and the Enforcement of Buyer Power – A Step in the Right Direction?

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30 April 2021

The Competition Tribunal (“Tribunal”) recently handed down a precedent-setting decision in the case of *Majid Al Futtaim Hypermarkets Limited vs Competition Authority of Kenya and Orchards Limited* which will not only set the scene on how the competition authorities will tackle the enforcement and assessment of buyer power in Kenya but will also have substantial consequences for retailers in Kenya.

*In casu* Orchards Limited (“Orchards”) alleged that Majid Al Futtaim Hypermarkets Limited (“Majid”) abused its buyer power. Majid is the operator of the supermarket “Carrefour”, which is supplied with probiotic yoghurts by Orchards. Majid was alleged to have abused its buyer power by: transferring commercial risks to Orchards; refusing to receive Orchards’ goods for reasons which could not be ascribed to Orchards; unilaterally terminating or de-listing the commercial relationship without notice and for no justified reason; applying rebates and listing fees marked as discounts; and requiring Orchards to deploy staff as its own cost.

The Tribunal ultimately upheld the Competition Authority of Kenya’s (“CAK”) judgment in finding, *inter alia*, that Carrefour abused its buyer power in relation to Orchards. While the Tribunal’s decision brings much-needed clarity on various issues, in particular how it will conduct its assessment of buyer power, which represents an area in competition law that has historically been unregulated, the assessment itself appears to only brush the surface in an analysis which typically (and with regard to comparative jurisdictions) necessitates a robust and thorough analysis. The Commission, in reaching its decision *vis-à-vis* the existence and abuse of buyer power, based its



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decision on the Competition Act No 12 (“Act”), the Buyer Power Guidelines under part III of the Act, and international best practice. Section 24(2B) of the Act stipulates that the authority, in determining buyer power, must take into consideration:

- “a) the nature and determination of contract terms;*
- b) the payment requested for access to infrastructure;*
- and*
- c) the price paid to suppliers”*

Section 24(2D) of the Act stipulates that buyer power means:

*“...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 significantly be disproportionate to any resulting long-term cost to the undertaking or group of undertakings.”*

Of particular concern is the Tribunal's approach and *rationale* in determining whether Majid had buyer power and whether it had abused its buyer power. Importantly, the Tribunal appears to be jumping the gun so to speak in expressing that *“...the influence of power of the buyer becomes evident when the buyer engages in the offending conduct”* and therefore, *“by engaging in conduct which amounts to abuse of buyer power, there's buyer power”*. (our emphasis)

According to the Tribunal, the Act defines buyer power by reference to its effects. *In casu*, “abuse” was evidenced by, *inter alia*, declining to renegotiate terms, onerous rebates and listing requirements, and the refusal to take delivery of products that were delivered. This represents a notable departure from traditional competition law assessments of buyer power in various respects. In South Africa, for example, the assessment first centres around the existence of buyer power (which requires the buyer to be dominant), followed by whether there has been an abuse of that buyer power. Michael-James Currie from the Primerio International team notes that the Tribunal has essentially put the cart before the horse and notes that astute competition law counselling requires these trends and policy shifts to be well considered.

By engaging in what appears to be an ex-post assessment, the Tribunal's judgment does not provide much insight or guidance to parties on how to ensure their conduct is aligned with the relevant provisions or how to negotiate trading terms common to commercial practice without facing potential accusations of abuse of buyer power.

Precedent on “buyer power” is scarce and therefore the precedent set by the Tribunal on the matter is of considerable importance both in Kenya and throughout Africa. When viewed comparatively the legislative framework governing “buyer power” in South Africa differs from the Tribunal's judgment mainly on the requirement of “dominance”.

Section 8(4)(a) of South Africa's recently amended Competition Act provides;

*“It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair:*

- (i) prices; or (ii) other trading conditions.”*

Contrastingly, the Buyer Power Guidelines under Kenyan law state:

*“It is not necessary for the buyer to have a dominant position in the market. Although the provisions of abuse of buyer power are included under the provisions of abuse of dominant position, when assessing conduct that amounts to abuse of buyer power, proof of dominance is not a mandatory criteria.”*

Additionally, the Tribunal did not undertake a robust assessment of the relevant market, or an analysis of potential foreclosure concerns, consumer welfare or efficiency. Rather, and instead of focusing on anti-competitive effects (which jurisdictions such as South Africa undertake), the Tribunal appeared to be more concerned with fairness to suppliers.

What remains to be seen is how the Tribunal will distinguish between, *inter alia*, those buyers who extract favourable trading terms by virtue of being dominant in the market vs those buyers who are not, without first undertaking a comprehensive assessment of the buyer's position in the market.

This judgment, being the Tribunal's first in relation to the abuse of buyer power, will shape the way in which buyer power will be assessed in Kenya. As such, it is vital that the competition authorities provide comprehensive guidance and much needed certainty to businesses.

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