REPUBLIC OF KENYA

COMPETITION AUTHORITY OF KENYA

Creating efficient markets for consumers

COMPETITION AND CONSUMER PROTECTION LAW DIGEST

First Edition

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Competition and Consumer Protection Law Digest

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FOREWORD

The Competition Act No. 12 of 2010 ("the Act") came into force on 1st August, 2011 to replace the defunct Restrictive Business Practices, Monopolies and Price Control Act No. 504 of 1988. The Act establishes the Competition Authority of Kenya ("the Authority") as the country's competition regulator and consumer watchdog. The Authority actively executes its mandate to promote and safeguard competition in the national economy, to deter abuse of buyer power and to protect consumers from unfair and misleading market conduct. Consequently, the Authority has delivered hundreds of determinations and market inquiries and studies. These determinations have shaped public discourse on enforcement of competition and consumer protection law, set precedent and new jurisprudence in Kenya and beyond. More importantly, these determinations have contributed to the country's economic progress including facilitating investments and safeguarding businesses, as well as enhancing the welfare of consumers of goods and services.

The Authority's Strategic Plan FY 2021/2022 - 2024/2025, which is themed *'Expanding Enforcement Frontiers for Increased Consumer Welfare and Sustainable Economy'*, outlines *'Delivering Effective Enforcement'* as one of its three key strategic priority areas. Further, one of the strategic objectives within this strategic goal is entrenching the Authority as a Centre for Competition and Consumer Protection Law. In furtherance of meeting this objective, the Authority prioritized the development and dissemination of a Competition and Consumer Protection Law Digest ('the Digest').

The Digest comprises select determinations that the Authority has made since inception of the Authority to June 2022. These matters are collated from the Authority's technical units - Enforcement & Compliance Department, Buyer Power Department, Mergers & Acquisitions Department, Consumer Protection Department and Legal Department. In addition, the Digest highlights various market inquiries and studies conducted by the Authority in respect to competition matters and consumer protection interests by the Planning, Policy & Research Department. These determinations, studies and inquiries elaborate on the procedural and substantive application of the Act in the functional mandate of the Authority.

The Digest is intended to provide information on the execution of the Authority's mandate with the aim of enhancing knowledge on competition and consumer protection law and advancing the development of jurisprudence. It is also intended to be a quick reference law guide for competition and consumer protection law practitioners.

I believe the Digest will equip the Authority stakeholders with the information on the mandate of the Authority. Further, the publication will supplement the Authority's awareness creation initiatives and elucidate our mandate of promoting and safeguarding competition in Kenya's economy and protecting consumers from unfair and misleading market conduct.

Mr. Shaka Kariuki
Chairman
Competition Authority of Kenya

ACKNOWLEDGEMENT

The Authority has made significant decisions and carried out market inquiries and studies in execution of its mandate under the Act. This Digest is an embodiment of the Authority's exercise of its administrative powers in execution of its mandate of promoting and safeguarding competition in the national economy and protecting consumers from unfair and misleading market conduct.

This seminal publication is the output of our interaction and active participation in the regional and international competition space, learnings from our enforcement experiences over the years, while cross-referencing our work and decisions with international best practice.

The Authority is highly indebted to the National Council for Law Reporting (NCLR) for their guidance and technical expertise to create this first edition of the Authority's experiences in administering competition law and policy.

I specifically extend my sincere gratitude to the Enforcement & Compliance, Buyer Power, Mergers & Acquisitions, Consumer Protection, Legal Services, Planning, Policy & Research, and the Communications & External Relations Departments of the Authority who were critically involved in developing this Digest.

In addition, I extend my appreciation to all the Authority's staff members, the Board as well as our parent ministry, the National Treasury and Economic Planning, for their continued support in mandate execution as we strive to ensure that our markets work efficiently.

I trust that this Digest, the first of many future editions, shall serve as a learning resource for legal practitioners, scholars, academic institutions and individuals aspiring to venture into competition law, and that it will stimulate the continued growth of jurisprudence in the competition arena in Kenya and beyond.

Dr. Adano W. Roba, PhD

Acting Director-General

Competition Authority of Kenya

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&
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Requirements
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Enforcement and Compliance

Restrictive agreements, practices and decisions

Abuse of a dominant position

Exemption of certain restrictive practices

Acronyms

RTP- Restrictive Trade Practices

Glossary of terms and definition:

Concerted practice: Conduct by competitors knowingly engaging in collusive behavior to reduce uncertainty in the market.

Inter-brand competition: Competition between retailers or distributors selling different brands.

Intra-brand competition: Competition among retailers or distributors selling the same brand.

Lessee: A person who holds the lease of a property; a tenant.

Lessor: A person who lets a property to another; a landlord.

Remedies: Corrective actions imposed by the law to set right an undesired situation.

Downstream market: Companies in the downstream market are those that provide the closest link to everyday users. Eg. After aluminium circles are manufactured (the upstream market) it is converted to cooking pots for sale to the direct consumers (the downstream market)

Essential facility: Means an asset, input, product service or infrastructure to which a third party needs access to offer its own product or service on a market. A facility is considered essential if it is indispensable and cannot easily be replicated"

Undertaking: Means any business intended to be carried on, or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service, and includes a trade association"

Upstream market: Market at the previous stage of the production/distribution chain, e.g. the production of aluminium circles would be an upstream market in relation to the production of aluminium cooking pots"

What are restrictive trade practices?

Restrictive trade practices (RTPs) are agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition. The agreements, decisions and concerted practices include agreements concluded between competitors or between an undertaking and its suppliers, customers or both. The agreements need not to be written, a mere meeting of the minds may be considered to be an agreement.

RTPs are prohibited because they deprive consumers of choices, exploit consumers through exploitative prices and are likely to lead to poor quality of goods and services.

What actions constitute RTPs?

Some of the agreements and conducts constituting RTPs include agreements to fix prices, divide and allocate markets among competitors, engaging in practices to manipulate tendering processes otherwise known as bid rigging.

Synopsis

Can agreements, decisions and concerted practices be exempted?

Despite the fact that coordination of practices by undertakings, association of undertakings and professional associations are prohibited under sections 21 and 22 of the Act, they may be granted exemption by the Authority, upon application under section 25 of the Act or under the criteria in the Block Exemption Guidelines, where overriding public benefits generated from such arrangements is demonstrated.

What is abuse of dominance?

In order to safeguard competition and protect consumers, a dominant undertaking or a party with market power is among other things prohibited from imposing unfair purchase or selling prices, refusing or limiting access to an essential facility to its competitors or treat unfairly its competitors by imposing unfair contracts. A firm is considered to be dominant if they are large enough to control more than half of the goods and services offered in a particular market or have market power.

What guides the Authority in conducting investigations?

The Authority in conducting investigations is guided by the Constitution of Kenya, 2010, the Act, the Competition (General) Rules, 2019, ("the Rules"), the Fair Administrative Action Act, 2015 (FAAA) and various guidelines generated from time to time.

What is contained in this digest?

This section of the digest highlights some of the investigations that the Authority has conducted, ranging from RTPs and abuse of dominance. The section also highlights exemption applications considered and illustrates the criteria considered by the Authority in making decisions.

Restrictive agreements, practices and decisions

Restrictive agreements by competitors on collusive bidding and exchange of commercially sensitive information

This case involved bid rigging in a tender process of supply of electric poles in which parties were found to have engaged in collusive tendering and exchange of commercially sensitive information, practices which were harmful to competition. However, there was no sufficient evidence to conclude that the players had engaged in price fixing.

1. Inter Tropical Timber Trading Limited v Top Range Ventures and 5 others

CAK/EC/05/188/A

February 25, 2021

Competition Law *– restrictive trade practices – collusive tendering – bid rotation – where there was bid rotation through tender allocation scheme among three (3) companies - whether the suppliers of electric posts to REREC engaged in bid rotation - Competition Act (Cap 504), section 21(3)(c).*

Competition Law *– restrictive trade practices – price fixing - whether the companies engaged in price fixing agreements in violation of the law - Competition Act (Cap 504), section 21(3)(a).*

Competition Law *– restrictive trade practices – sharing of commercially sensitive information - where the parties used a common consultant to prepare their tender documents which facilitated exchange of sensitive information contrary to the law – whether the companies participating in the tenders shared sensitive information to influence the outcome of the tendering process — Competition Act Cap 504, section 21(3)(i).*

Brief facts

The Authority received a complaint from Inter Tropical Timber Trading Limited (ITTTL) alleging tender award irregularities by the Rural Electrification and Renewable Energy Corporation (REREC).

The complaint highlighted issues such as illegalities in the tendering processes like unlawful termination of contracts, abuse of office, award of contracts to cronies and proxies, automatic winning of tenders, cross directorship in different companies participating in the same tender, non-compliance to set tender rules and conflict of interest in the tenders floated by REREC.

The Authority investigated the matter and requested for information from REREC and other interested parties to the matter in order to determine the veracity of the allegations of price fixing and collusive tendering by the bidders.

Consequently, Top Range Ventures Limited submitted a settlement proposal asserting that the offence could have been committed unknowingly and they wished to have the matter settled administratively as provided under section 38 of the Act.

Issues:

i. Whether the suppliers of electric posts to REREC engaged in bid rotation in violation of the Act, in order to win the tenders.

ii. Whether the companies that participated in the tenders shared sensitive information to influence the outcome of the tendering process.

iii. Whether the companies that participated in the tenders engaged in price fixing agreements.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 21 - Restrictive trade practices

(1) *Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.*

(2)…….

(3) *Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—*

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(b) …..

(c) involves collusive tendering;

(d) ….

(i) otherwise prevents, distorts or restricts competition.

(4)……

(5) *An agreement or a concerted practice of the nature prohibited by subsection*

(1) shall be deemed to exist between two or more undertakings if—

(a) any one of the undertakings owns a significant interest in the other or has at least one director or one substantial shareholder in common; and

(b) any combination of the undertakings engages in any of the practices mentioned in subsection (3).

Section 38 - Settlement

(1) *The Authority may at any time, during or after an investigation into an alleged infringement of the prohibitions contained in this Part, enter into an agreement of settlement with the undertaking or undertakings concerned.*

(2) *An agreement referred to in subsection (1) may include—*

(a) *an award of damages to the complainant;*

(b) *any amount proposed to be imposed as a pecuniary penalty.*

Findings

1. An agreement or concerted practice of the nature prohibited by section 21(1) of the Act shall be deemed to exist between two or more undertakings if any one of the undertakings owned a significant interest in the other or had at least one director or one substantial shareholder in common. Naweza Investments Limited, Sonara Ventures Limited and Top Range Ventures Limited (the 3 Companies) who won in Mariakani Lot 1, Mariakani Lot 2 and Nyeri Lot 3 respectively had a common directorship, whereby one director held a majority shareholding in all the three (3) companies.
2. There was a collusion, which was a violation of section 21(1) and 21(3)(c)of the Act, among the three (3) companies. It was not a mere coincidence that the companies had identical cover pages and layout of the tender document, similar postal addresses and similar handwriting.
3. There was no evidence to demonstrate that the three (3) companies had engaged in price fixing.
4. In light of the findings, Top Range Ventures Limited proposed a settlement agreement. The Authority in considering the settlement proposal was alive to the following;
    a. The COVID-19 pandemic occasioned economic uncertainty and negatively affected the business environment;
    b. The level of cooperation by the parties in settling the matter under section 38 of the Act resulted in the expeditious conclusion of the matter.
    c. Top Range Ventures Limited had casual workers that they retained even during the hard, economic times caused by COVID -19;
    d. A high penalty on Top Range Ventures Limited would negatively impact the livelihood of the employees as they could be forced to close shop; and
    e. Top Range Ventures Limited had fully cooperated with the Authority in settling the matter.

Orders

The Authority settled the matter on the following terms: -

i) Top Range Ventures Limited to pay a financial penalty of KES. 409,169.50 being 3.5 % of the tender value to be paid in three equal instalments of KES. 136,389.83 commencing March 2021 as follows:
    a. 1st Instalment of KES. 136,389.83 by 31st March 2021;
    b. 2nd Instalment of KES. 136,389.83 by 30th April 2021; and
    c. 3rd Instalment of KES. 136,389.83 by 31st May 2021

ii) Top Range Ventures Limited was required to give an undertaking not to engage in practices and/ or conduct that would be in violation of the Act.

Restrictive agreements by competitors on prices and transport charges

The case involved four company players who engaged in conduct that would amount to restrictive trade practices. BASCO paints agreed to a settlement before determination by the Authority. It was determined that Crown Paints PLC, Kansai Plascon Kenya Ltd and Galaxy Paints and Coatings Ltd, engaged in practices that amounted to agreements on prices and transport charges. The discounting structure in the industry was an indicator of an overcharge in the industry, but there was no sufficient evidence to conclude that the players had engaged in collusive determination of the discounts.

2. Competition Authority of Kenya v Crown Paints PLC and 3 others

CAK/EC/05/166/A

June 17, 2019

Competition Law *– restrictive trade practices - price fixing – agreement on transport charges - agreement on discounts - where the four (4) companies agreed to increase the prices of their paints products simultaneously - where the parties agreed on transport charges to customers outside Nairobi- whether the companies engaged in agreements on discounts and discounts structure in violation of the law - whether the conduct of the parties contravened the provisions on restrictive trade practices under sections 21 (1) and 21 (3) (a) of the Competition Act - Competition Act (Cap 504), section 21(3) (a), 22 (b) (ii).*

Brief facts

The Authority, on its own motion, initiated investigations into the paints manufacturing sector in Kenya in 2018 pursuant to section 31 of the Act. In the course of the investigations, a search and seizure exercise was conducted at the premises of Crown Paints PLC (Crown), Basco Products Kenya Limited (Basco), Kansai Plascon Kenya Limited (Plascon) and Galaxy Paints and Coatings Limited (Galaxy), members of Kenya Paints Association the Association.

Basco elected to settle the matter with the Authority pursuant to section 38 of the Act soon after the search and seizure. A financial penalty of KES. 20,799,228 was imposed.

Upon conclusion of the investigations, the Authority issued a notice of proposed decision to Crown, Plascon and Galaxy on July 17, 2019 where the parties were accorded an opportunity to respond to the allegations leveled against them pursuant to section 34 of the Act. The allegations against the parties were that they were in contravention of sections 21(1) and (3) (a) and 22(1)(b) of the Act.

Issue

Whether the conduct of the parties contravened the provisions on restrictive trade practices under sections 21(1) and 21(3)(a) of the Act.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 21 - Restrictive trade practices

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

(2)…….

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(b)….

(i) otherwise prevents, distorts or restricts competition.

Findings

1. The existence of the Association was not in contention, a fact that was confirmed by the members including Crown, Basco and Galaxy. From the definition of a trade association under section 2 of the Act, the Association needed not to be formally constituted with a constitution, officials, agenda and meeting minutes. An association was presumed as long as its members were pursuing common interest. Consequently, the Association satisfied the tenets of a trade association.
2. Meetings of competitors to discuss common strategies were anti-competitive by their nature since uncertainty in the industry was diminished leading to market distortions. Such discussions were prohibited *per se* as their object was to prevent, lessen or otherwise distort competition amongst the participating undertakings.
3. Plascon, Basco, Crown and Galaxy managing directors implemented price increases in early June, 2015. Correspondence between the four parties amounted to sharing of strategic information that should not ordinarily be discussed amongst competitors. Sharing of future price revision intentions would prevent, lessen or distort competition in the industry.
4. The discounts across the various companies were varied depending on the relationships with the buyer, purchased quantities, quality and types of paints purchased and the settlement period. The discounts ranged from 30% to 50% across the industry, which was an indicator of an overcharge. However, there was no sufficient evidence to support the allegation of an agreement on discounts by the companies.

5. The four companies had a transport charge of 4.5% for deliveries outside Nairobi. There was no plausible reason why the companies had a uniform transport charge and terms of delivery for customers outside Nairobi. The transport sector was a very dynamic sector coupled with a number of external shocks including fuel costs, bulkiness/ weight of the product, distance, terrain among others making infeasible for companies to implement a similar charge.
6. The communication regarding the return policy was geared towards ensuring that the companies' customers do not have expired goods on the counters by implementing a first in first out stock management system. The correspondence on the return policy may not have lead to a negative impact on competition; however, it demonstrated the cordial relationship that existed amongst the four leading players in the industry.

Orders

The Authority made the following orders: -

i) Crown to pay a financial penalty of KES. 132,995,880.

ii) Plascon to pay a financial penalty of KES. 42,154,640.

iii) Galaxy to pay a financial penalty of KES. 19,114,208.

iv) Crown, Plascon, Galaxy and Basco to give an undertaking not to engage in practices and/or conduct that is in violation of the Act and to put in place a competition compliance program to sensitise its leadership and key staff on competition law.

Editorial Note

Crown, Galaxy and Plascon appealed the case to the Competition Tribunal.

Anticompetitive agreements on market allocation, sharing commercially sensitive information and on terms of trade

This case is an agreement by the Energy Dealers Association and its members to engage in market allocation, agreement on terms of trade and sharing of commercially sensitive information, which lessened competition in violation of the Act.

3. Competition Authority of Kenya v Energy Dealers Association and its members

CAK/EC/05/182/A

April 30, 2019

Competition Law *– restrictive trade practices – market allocation, price fixing, sharing of commercially sensitive information and agreeing on terms of trade – where Energy Dealers Association and its members agreed not to deal in any other brand of cylinder except Wajiko brands–where Energy Dealers Association and its members agreed on a pricing formula – where Energy Dealers Association and its members agreed to share strategic information on cylinder population – whether the Energy Dealers Association engaged in restrictive trade practices – Competition Act (Cap 504), sections 21 and 22*

Brief facts

The Energy Dealers Association (EDA) applied to the Authority in September, 2019 for an exemption on potential restrictive trade practices relating to a mutual cylinder exchange agreement namely "Energy Dealers Association Cylinder Reciprocal and Hospitality Agreement of 2019" (the Agreement) signed among its members for a period of 10 years pursuant to the section 25 of the Act. However, it came to the Authority's attention during the evaluation of the exemption application that EDA appeared to have been engaging in certain restrictive trade practices namely, price fixing, territory allocation and exchange of strategic/ commercially sensitive information contrary to sections 21 and 22 of the Act and for which an exemption had not been sought.

Issue:

Whether the Energy Dealers Association and its members engaged in restrictive trade practices contrary to section 21(3) as follows:

a. engagement in price fixing agreement.
b. market allocation.
c. sharing of commercially sensitive information with the effect of lessening competition.
d. agreements on terms of trade

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 21 - Restrictive trade practices

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

(2) …….

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(b)….

(i) otherwise prevents, distorts or restricts competition.

Section 22 – Application to practices of trade associations

(1) (a)….

(b) the making, directly or indirectly, of a recommendation by a trade association to its members or to any class of its members which relates to—

(i) the prices charged or to be charged by such members or any such class of members or to the margins included in the or to the pricing formula used in the calculation of those prices; or

(ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

Finding

1. The development of the Energy Dealers Association Rules, 2019 with a clearly outlined pricing formulae that members were aware of, amounted to recommendations on pricing by EDA to its members. The fact that the rules were not implemented was not a defense to the object of EDA to fix prices. The Energy Dealers Association Rules, 2019 which provided for a pricing formula was a violation of sections 21(3)(a) and 22(1)(b) of the Competition Act.
2. The information shared was not commercially sensitive because they were about the sales that EDA Gas Limited had made of Wajiko cylinders to members of EDA and not information on sales made by EDA members. The sharing of such information was not in violation of the Act.
3. EDA and its members did not engage in market allocation but they agreed that the members should collect their cylinders from Pro Gas who was holding the cylinders because Pro Gas had not been paid for release of the same.
4. EDA Gas Limited was incorporated and registered in February 2019 with the Business Registration Services (BRS) to enable its members meet the 5000-cylinder licensing requirement to deal in LPG by adopting a common brand which each member of the

association would have the responsibility of promoting.

5. EDA did not engage in agreement on terms of trade in breach of the Act as the agreement to work between 5.00am – 7.00pm was to ensure compliance with the COVID-19 pandemic requirement by the government. The agreement was also aimed at mitigating illegal cross-filling of cylinders during the period of limitation of movement imposed by the government and was therefore towards achieving safety of the gas content for consumers.

Orders

i. The Authority imposed a pecuniary penalty of KES.. 408,000.00, being 5% of the relevant turnover of EDA, and

ii. The Association was required to establish a compliance program to sensitize its members on competition law and policy.

Restrictive agreements by sharing commercially sensitive information on output and sales

This case involves an agreement by East Africa Cement producers Association and its members, of engaging in sharing of commercially sensitive information, which lessened competition in violation of the Act. The East Africa Cement producers Association was found to have engaged in restrictive trade practices, in violation of the Act.

4. Competition Authority of Kenya v East Africa Cement Producers Association and its members

CAK/EC/05/52/A

April 11, 2015

Competition Law *– restrictive trade practices – price fixing and market allocation - sharing of commercially sensitive information – agreement to share commercially sensitive information - whether East Africa Cement Producers Association (EACPA) and its members agreed to share commercially sensitive information – Competition Act (Cap 504), section 21(3)(a).*

Brief facts

The Authority initiated investigations into the Kenyan cement industry on its own motion in June, 2014 pursuant to section 31 of the Act. The investigation was triggered by the Africa Competition Forum (ACF) study on cement in 6 African countries which highlighted possible markers for collusive conduct in the cement market in Kenya. The ACF study observed that Kenya had the second highest prices in the region, slightly below Zambia, which was patently not competitive because it had a near monopoly status with a dominant player controlling over 80% of the cement market. There was also existence of cross shareholdings and directorship between the major producers.

Issues

i. Whether the association and its members shared commercially sensitive information with the effect of lessening competition.

ii. Whether the association and its members agreed on pricing of cement.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 21 - Restrictive trade practices

(1)Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

(2)…….

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(b)….

(i) otherwise prevents, distorts or restricts competition.

Section 22 – Application to practices of trade associations

(1)….

(b) the making, directly or indirectly, of a recommendation by a trade association to its members or to any class of its members which relates to—

(i) the prices charged or to be charged by such members or any such class of members or to the margins included in the or to the pricing formula used in the calculation of those prices; or

(ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

Findings:

1. The supply capacity of cement had substantially exceeded local demand because of substantial investments by the manufacturers.
2. Entry of new cement manufacturers had a significant impact on pricing by increasing competition, first in late 2009 with the entry of Mombasa Cement. However, that competition subsequently appeared to be dampened when Mombasa Cement became a member of the East Africa Cement Producers Association (EACPA). Those dynamics were confirmed by the minutes of several of the companies.
3. There was a likelihood that EACPA was being used as a platform for information sharing and monitoring activities by its members. The EACPA data was being used by the members to condition their competitive behavior, for example, in deciding to target a market share (only possible with the sales volumes of other producers), rather than to grow their sales.
4. EACPA and its members used a similar system to the industry association in Southern Africa to collate and share data on sales volumes. That was done on a quarterly basis and later on a monthly basis.
5. The sharing of information on sales and output had the effect of lessening competition in contravention of section 21(3)(i) of the Act.
6. The fact that entrants, not members of the EACPA or local manufacturers of clinker were required to bring competition served to reinforce the absence of effective competition between the EACPA members in Kenya.
7. There was evidence to show that the incumbents had been constraining production in order to get good prices and they were also using the information shared under the EACPA platform to monitor market shares and also influence their decisions.

Order

The Authority settled the matter on condition that EACPA and its members cease the sharing of commercially sensitive information and to only collate at least six (6) month old data on total sales in Kenya. The collated data to be shared in aggregate format not earlier than three months after collation.

Restrictive agreements by an association and its members on recommendation of prices/levies to be charged on billboards that diminished competition in breach of the Act

This case involved an agreement by Outdoor Advertising Association of Kenya (OAAK) on billboard prices. OAAK, through a circular, recommended the necessary prices to be set by its 12 members with regard to their advertising services. The Authority found that the recommendation violated the Act.

5. Competition Authority of Kenya v Outdoor Advertising Association of Kenya & others

CAK/EC/05/59/A

February 13, 2015

Competition Law *– restrictive trade practices - price fixing – where the Outdoor Advertising Association of Kenya's 12 members agreed to increase the prices of their outdoor advertising bill boards – whether the Advertising Practitioners Association (APA) was engaging in restrictive trade practices by recommending the prices to be charged by its members for advertising services - Competition Act (Cap 504), sections 21(3) (a) and 22(1)(b)(ii).*

Brief facts

The Authority received a complaint in anonymity alleging that the Advertising Practitioners Association (APA) was engaging in restrictive trade practices by recommending prices to be charged by its members for advertising services. Based on preliminary investigation's findings, the Authority initiated formal investigations into the practices and activities of players in the advertising industry. The investigations focused on the activities of APAand the OAAK. APA dealt with concept generation and converted it to a product (advert) that was then run by the media while OAAK placed adverts on outdoor advertising platforms i.e. billboards.

Issue

Whether the APA and OAAK were engaging in restrictive trade practices by recommending the prices to be charged by its members for advertising services.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 21 - Restrictive trade practices

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

(2).....

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies

in particular to any agreement, decision or concerted practice which—

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(b)….

(i) otherwise prevents, distorts or restricts competition.

Section 22 - Application to practices of trade associations

(1) The following practices conducted by or on behalf of a trade association are declared to be restrictive trade practices—

(a) ....

(b) the making, directly or indirectly, of a recommendation by a trade association to its members or to any class of its members which relates to—

(i) the prices charged or to be charged by such members or any such class of members or to the margins included in the prices or to the pricing formula used in the calculation of those prices; or

(ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

Findings

1. The Authority interrogated the Articles of Association of APA and no restrictive clauses were revealed. The pitching process (process the advertising agencies use to identify potential firms to advertise with) was also interrogated and did not reveal any anti-competitive practices. Thus, there was no finding of infraction of the Act by APA.
2. OAAK derived its membership from the practitioners in outdoor advertising. The Authority discovered a circular from OAAK signed by the 12 members including its Chairman to all media buying agencies and clients advising them on revised billboard prices.
3. The circular titled, "Notice of Bill Board Prices", advised that OAAK resolved to revise charges levied for the standard 12Mx10M with effect from August 1, 2014. Interrogation of the circular revealed that the recommendation of the prices was in violation of section 22(1)(b) of the Act as it directly fixed selling prices.
4. Pursuant to section 22(4) of the Act, the OAAK and its members were jointly and severally culpable in infringing the Act. Consequently, penalties were be imposed on OAAK and its Members.
5. Given that there were 12 members to the contravention, the first group of undertakings that opted for an expeditious settlement were penalized 2% of the relevant turnover. The undertakings that settled after two and four weeks were penalized 5%, while those that delayed by not providing information were penalized 8% of the relevant turnover.

Orders

i. All the members of OAAK opted to settle with the Authority on individual terms and

a. A cumulative financial penalty of KES. 11.89 Million was arrived at based on their respective relevant turnover.

b. Non-financial remedies, that was reprimand and warning in respect of the conduct; and

c. Requirement that OAAK gives an undertaking that it would desist from any anti-competitive conduct in the future.

Restrictive agreements by competitors using their association to fix insurance premium

This case involves an agreement by re-insurance companies in Kenya who used their association, the Association of Kenya Re-insurers, to engage in setting/recommending minimum premium rates. The Authority found that such conduct was harmful to competition and violated the Act.

6. National Intelligence Service v Association of Kenya Re-insurers and its members

CAK/EC/05/45/A

March 9, 2015

Competition Law *– restrictive trade practices – setting minimum premium rate – where parties agreed to set minimum premium rate – whether recommendation of a minimum premium rate by a trade association to its members amounted to restrictive trade practices - Competition Act (Cap 504), section 21(3)(a).*

Competition Law *– application to practices of trade associations -recommendations by a trade association to its members – where a trade association recommends that its members adopt a minimum premium rate – whether such conduct amounted to restrictive trade practices - Competition Act (Cap 504), section 22(1)(b)(ii).*

Brief facts

The Authority, initiated investigations on the reinsurance companies in Kenya upon receipt of a complaint from the National Intelligence Service (NIS). The subject of investigation was a circular authored by the Association of Kenya Reinsurers (AKR) and executed by its members, advising insurance companies interested in tendering for provision of the Renewal of NIS Group Life Scheme-2013/2014, the NIS contract of the minimum applicable rate of premium. The circular was later withdrawn by AKR.

The members of the AKR consisted of Kenya Reinsurance Corporation Limited, African Reinsurance Corporation, East Africa Reinsurance Company, Zep-Re (PTA Reinsurance Company) and Continental Reinsurance Limited Kenya.

The conduct involved direct recommendation by a trade association to its members for the prices (minimum applicable premium of 15 per mille) on the renewal of the NIS contract.

Issue

Whether the recommendation of a minimum premium rate by a trade association to its members amounted to a restrictive trade practice.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 21 - Restrictive trade practices

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

(2)…….

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;
(b)….

(i) otherwise prevents, distorts or restricts competition.

Section 22 – Application to practices of trade associations

(1) (a)….

(b) the making, directly or indirectly, of a recommendation by a trade association to its members or to any class of its members which relates to—

(i) the prices charged or to be charged by such members or any such class of members or to the margins included in the or to the pricing formula used in the calculation of those prices; or

(ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

Finding

1. The conduct of the reinsurance companies had effect in the upstream and downstream insurance markets. The reinsurance companies were agreeing to set their upstream prices and indirectly influencing downstream rates at which the insurers would bid for the NIS contract.
2. Insurance Regulatory Authority (IRA) Guidelines on reinsurance arrangements did not provide any fixed or recommended premium rate, but instead, provided that every insurer must have their independent reinsurance management strategy (RMS) that was appropriate to their overall risk profile.
3. The insurance companies were required to use an independent actuary to determine their individual premium rates which they filed with the IRA for approval.
4. The recommendation of the minimum premium rate of 15 per mille to insurance companies was in violation of section 22(1)(b) of the Act.
5. The setting of the premium rate and the request to all the insurance companies tendering for the NIS contract to charge the fixed rate amounted to collusion and was in violation of section 21(1)(3)(a) and (c) of the Act.

Orders

i. The authority imposed a financial penalty of KES. 712,715 on the AKR.

ii. Other non-financial remedies to both AKR and its members, included:

a. Issuing of a reprimand and/or warning in respect of the withdrawn circular; and

b. AKR and its members were required to give an undertaking that they would desist from any anti-competitive conduct in the future.

Abuse of a dominant position

Complaint on abuse of dominance through refusal to deal in the aluminium circles market in Kenya

Sufuria World Limited alleged that Kaluworks Limited, a major producer of aluminium circles, a key raw material in the manufacture of aluminium pots, had refused to supply them with the raw materials. Sufuria World Limited believed that the move was aimed at unfairly strengthening Kaluworks Limited's dominant position by eradicating and frustrating competitors. The Authority found that the allegations by the complainant did not meet the thresholds set for a refusal to deal offense.

7. Sufuria World Limited v Kaluworks Limited

CAK/EC/05/120/A

April 5, 2018

Competition Law *– dominant position – abuse of dominant position – where a dominant market player is accused of refusing to supply a key raw material to another market player – whether there existed a refusal to deal by a dominant market player resulting in other market players being placed at a disadvantage – Competition Act (Cap 504), section 24(2)(b).*

Competition Law *– dominant position – abuse of dominant position – allegations of refusal to deal in an essential facility - whether the aluminium circle produced by Kaluworks Limited was an essential facility - whether the facility was indispensable to carrying out the competitors business, in which there were no potential substitutes-whether there were technical, legal or economic obstacles which made it impossible or unreasonably difficult to replicate the facility, thus refusal to deal excluded any effective competition - whether the refusal was objectively justified.*

Brief facts

The Authority received a complaint from Sufuria World Limited ("Sufuria World"), a company dealing with the production of aluminium cooking pots. Sufuria World Limited alleged that Kaluworks Limited ("Kaluworks"), a major producer of aluminium circles, a key raw material in the manufacture of aluminium pots, had refused to supply them with the raw material. The complainant believed that the move was aimed at unfairly strengthening Kaluworks Limited dominant position by eradicating and frustrating competitors.

The harm attributed to the alleged conduct was that the complainant was forced to shut down their aluminium cooking pots manufacturing plant (due to lack of raw materials), resulting in loss of livelihood of its 20 direct employees.

The complainant requested the Authority to investigate the allegations and assist in accessing the materials locally in order for its business to be a going concern. The Authority sought to establish the indispensability of the aluminium circle produced by Kaluworks Limited to the complainant's business.

Issues

i. Whether the aluminium circle produced by Kaluworks Limited was an essential facility/ input with regard to the following considerations;
   a. whether the acility/input was indispensable to carrying out the competitors business, in which there were no potential substitutes;
   b. whether there were technical, legal or economic obstacles which made it impossible or unreasonably difficult to replicate the facility, thus refusal to deal excluded any effective competition;
   c. whether the refusal had been objectively justified.

ii. Whether there existed a refusal to deal by a dominant market player resulting in other market players being placed at a disadvantage.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 23 - Criteria for determining dominant position

(1) For purposes of this section, "dominant undertaking" means an undertaking which—

(a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description which are produced, supplied or distributed in Kenya or any substantial part thereof; or

(b) provides or otherwise controls not less than one-half of the services which are rendered in Kenya or any substantial part thereof.

(2) Notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking—

(a) though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power;

(b) controls less than forty per cent of the market share but has market power.

Section 24 - Abuse of dominant position

(1) Any conduct which amounts to the abuse of a dominant position in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes—

(a) ….

(b) limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;

(c) applying dissimilar conditions to equivalent transactions with other trading parties;

Findings:

1. In order to prove a refusal to deal case, there must be an existence of two markets, the upstream market and downstream market. A party engaging in abuse of dominant position must be participating in both markets and must be dominant in the upstream market. The exclusionary act must or potentially have anticompetitive effects. Further the item

which supply was denied must be an essential facility and must meet the conditions of an essential facility/input: -

a. The facility/input must be indispensable to carrying out the competitor's business, in which there were no potential substitutes;
b. There must be technical, legal or economic obstacles which would make it impossible or unreasonably difficult to replicate the facility/input. Such that refusal to deal exclude any effective competition;
c. There must not be any objective justification for the refusal.

2. Other than processing circles in-house there existed a local and international market from ready-made circles meeting standard specification that the aluminium cooking pots manufacturers could freely procure. The import market represented another satisfactory source of supply other than Kaluworks Limited. Proper purchase planning would ensure a smooth uninterrupted production process.
3. Other manufacturers of cookware such as Nacol Limited, Crystal, Oshwal and Menengai had managed to sufficiently replicate the Kaluworks Limited facility and were producing their own circles. Further there was a presence of circles in the international market such as China, India, South Africa, and Australia where the complainant could source their supply.
4. Any business was free to choose its business partners. However, under certain circumstances, there could be limits on that freedom for a firm with market power.
5. Kaluworks Limited facility/input was seemingly a convenience other than an essential facility to the complainant. The complainant alone or with collaboration with others could easily replicate the facility. The only obstacle would be perhaps the amount of capital (initial) investment required. Further, Kaluworks Limited had submitted that they had not refused to supply the complainant as long as the minimum order requirements were met.
6. The allegations by the complainant did not meet the thresholds set for a refusal to deal offense.

Orders

i. The Authority determined that Kaluworks Limited had not acted in breach of the Act and recommended that:

a. The complainant be informed of the availability of the aluminium circles on an order basis as stated by Kaluworks Limited.
b. The complainant be informed of the availability of financing facilities by the Ministry of Industrialization for startups through the National Industrialization project by the Ministry.
c. The matter be closed

Abuse of dominance through exclusive dealing arrangement in the mobile money transfer service market

This case involves abuse of dominance where Safaricom Limited had entered into agreements with its mobile money transfer service agents (M-PESA agents) which prohibited the agents from dealing in competing products.

8. Airtel Kenya Limited v Safaricom Limited

CAK/EC/05/34/A

July 18, 2014

Competition Law *– dominant position – abuse of dominance – practices that could constitute abuse of dominance – creation of agreements that promoted exclusive dealing - whether Safaricom Limited was a dominant undertaking as defined under the Competition Act - whether Safaricom Limited abused its dominance by entering into exclusive arrangements with its M-PESA agents – Competition Act (Cap 504), sections 23 and 24(2)(b).*

Brief facts

The Authority received a complaint from Airtel Kenya Limited against Safaricom Limited with regard to abuse of dominance practices. They alleged that Safaricom Limited had entered into agreements with its M-PESA agents requiring them not to offer mobile money transfer services for competing mobile money transfer service providers. The M-PESA agents were threatened with termination of contract if they entered into contract with competing mobile money transfer service providers.

The Authority, upon conclusion of investigations, determined that Safaricom Limited was dominant in the mobile money transfer service market and that the arrangement between itself and its agents had the effect of lessening competition in breach of the Act, and communicated the same to Safaricom Limited. Safaricom Limited invoked the provisions of section 38 of the Act and settled the matter with the Authority.

Issues

i. Whether Safaricom Limited was a dominant undertaking as defined under the Competition Act.
ii. Whether Safaricom Limited abused its dominance by entering into exclusive arrangements with its M-PESA agents.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 23 - Criteria for determining dominant position

(1) For purposes of this section, "dominant undertaking" means an undertaking which—

(a) produces, supplies, distributes or otherwise controls not less than one-half of the total

goods of any description which are produced, supplied or distributed in Kenya or any substantial part thereof; or

(b) provides or otherwise controls not less than one-half of the services which are rendered in Kenya or any substantial part thereof.

(2) Notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking—

(a) though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power;

(b) controls less than forty per cent of the market share but has market power.

Section 24 - Abuse of dominant position

(1) Any conduct which amounts to the abuse of a dominant position in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes—

(a)….

(b) limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;

Findings:

1. The major players in the market were Safaricom Limited, Airtel Kenya Limited and Telkom Limited with Safaricom Limited leading with a market share of over 75%. Safaricom was therefore dominant as defined under the Act.
2. The M-PESA agent agreements barred the agents from selling, displaying or in any other manner promoting the products and services of any entity in indirect or direct competition with Safaricom Limited's M-PESA service, unless expressly permitted.
3. The exclusivity clause in the agreement between Safaricom Limited and its M-PESA agents was not used against banks and large supermarkets, which were allowed to act as agents of more than one mobile money transfer service providers.
4. Agents of Safaricom Limited who were willing to invest in other companies which were offering mobile money transfer services were unable to do so for fear of victimization by Safaricom Limited.
5. The mobile money transfer operators, including Safaricom Limited, made minimal investments at the retail level. The minimal investment did not justify exclusivity, as the mobile money transfer service providers could not suffer loss from joyriders if the agents entered into contract with more than one mobile money transfer service provider.
6. Exclusive dealing arrangement limited investments by M-PESA agents in other mobile money leading to lessening or distortion of competition in the mobile money transfers at retail level. In addition, the exclusive dealing arrangement between Safaricom Limited and its agents led to inefficient use of investments/resources of M-PESA agents dealers as their investments were under-utilized.
7. The exclusive dealing arrangement limited investment by M-PESA agents in other mobile

money transfers and therefore competition was limited in the mobile money transfers at retail level. That impeded socio-economic growth. In addition, the exclusive dealing arrangement led to inefficient use of resources by M-PESA agents thus limiting output.

Orders

The matter was settled on the following terms: -

i. *Safaricom Limited to amend the agreements with its MPESA agents expeditiously. The restrictive clauses in the agreements between Safaricom Limited and its agents be expunged expediently to give the agents liberty to contract with other money transfer service providers.*

ii. *Safaricom Limited's oversight over the agents to be limited to its business with the agents.*

iii. *Each mobile money transfer service provider would be responsible for ensuring compliance with Central Bank of Kenya Regulations.*

Exemption of certain restrictive practices

Exemption on mutual cylinder reciprocal and hospitality agreement 2019

This was an application for exemption on restrictive trade practices relating to market allocation, product exclusivity and agreement on terms of trade contained in the mutual and reciprocal cylinder exchange agreement by Energy Dealers Association. The said restrictions were likely to distort, prevent or lessen competition hence the application.

9. In the matter of Energy Dealers Association

CAK/EC/05/182/A

July 21, 2021

Competition Law *– restrictive trade practices – grant of exemptions for certain restrictive trade practices – justifications for certain restrictive trade practices - whether exemptions with regard to exclusive dealing among members of the EDA association on territory exclusivity, information sharing and increase of cylinder population by 10,000, annually, would benefit consumers - whether proper justification had been provided for proposed practices by the EDA, hence exemptions ought to be granted – Competition Act (Cap 504), sections 25 and 26*

Brief facts

The Energy Dealers Association (EDA) applied to the Authority in September, 2019 for an exemption on potential restrictive trade practices relating to a mutual cylinder exchange agreement namely "Energy Dealers Association Cylinder Reciprocal and Hospitality Agreement of 2019" (hereinafter the Agreement) signed among its members for a period of 10 years pursuant to the provisions of section 25 of the Act. However, it came to the Authority's attention during the processing of the exemption application that EDA appeared to have been engaging in certain restrictive trade practices namely, price fixing, territory allocation and exchange of strategic/commercially sensitive information contrary to sections 21 and 22 of the Act and which an exemption had not been sought.

Specifically, EDA members were suspected of agreeing on the per kilogram price of LPG through the association, sharing strategic information relating to their sales of LPG among themselves, agreeing on a single supplier (Pro Gas Limited) from whom to source the LPG cylinder, and agreeing on other terms of trade such as working hours (between 5.00am – 7.00pm) and investment requirements (cylinder population controls) with the aim of lessening, preventing and/or distorting competition.

Issues

i. Whether exemptions with regard to exclusive dealing among members of the EDA association, information sharing and increase of cylinder population by 10,000, annually, would benefit consumers.

ii. Whether proper justification had been provided for the proposed practices by the EDA, hence grant of exemptions.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 25 - Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of Section A or B of this Part in respect of—

(a) any agreement or category of agreements;

(b) any decision or category of decisions;

(c) any concerted practice or category of concerted practices.

(2) An application for an exemption in terms of subsection (1) shall be—

(a) made in the prescribed form and manner;

(b) accompanied by such information as may be prescribed or as the Authority may reasonably require.

(3) The Authority shall give notice by publishing a notice in the Gazette of an application received in terms of subsection (1)—

(a) indicating the nature of the exemption sought by the applicant; and

(b) calling upon interested persons to submit to the Authority, within thirty days of the publication of the notice, any written representations which they may wish to make in regard to the application.

Section 26 - Determination of application for exemption

(1) After consideration of an application for exemption and any representations submitted by interested persons, the Authority shall make a determination in respect of the application, and may—

(a) grant the exemption;

(b) refuse to grant the exemption, and notify the applicant accordingly with a statement of the reasons for the refusal; or

(c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions contained in Section A or B of this Part.

(2) The Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same, ought to be excluded from the prohibitions contained in Section A or B of this Part.

(3) In making a decision under subsection (2), the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in—

(a) maintaining or promoting exports;

(b) improving, or preventing decline in the production or distribution of goods or the provision of services;

(c) promoting technical or economic progress or stability in any industry;

(d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

Findings:

1. EDA members controlled approximately 28% of the total LPG cylinder population in the country at the time. However, based on sales, none of the EDA members had a significant market share in the relevant market and therefore that arrangement did not raise significant competition concerns. The detriment to competition from the exclusivity arrangement would be minimal.
2. The information shared was not commercially sensitive because they were about it related to the sales that EDA Gas Limited (a company in which EDA members were stakeholder) had made of Wajiko cylinders (a common LPG cylinder brand dealt in by EDA members) to members of EDA and not information on sales made by EDA members. The sharing of such information was not in violation of the Act.
3. The requirement to increase their LPG cylinder population by at least 10,000 LPG cylinders would encourage each EDA member to invest in their own cylinders and help curb practices such as cylinder hoarding which would defeat the purpose of setting up the mutual pool. That was expected to deepen LPG distribution and access to consumers around the country and result in significant environmental and health benefits.
4. The exclusive dealing arrangement of the mutual exchange pool would result in significant health and environmental benefits to the public which would outweigh the lessening of competition as contemplated under section 26(3)(d) of the Act.
5. The application for exemption and justifications by the applicants with regard to sharing information on their annual LPG cylinder population increments with EDA, that would give effect to the requirement to increase their cylinder population by 10,000 cylinders per year, per depot was justified under section 26(3) of the Act. However, the sharing of any other commercially sensitive information had not been justified under section 26(3) of the Act.
6. EDA limiting predatory activities by association members ensured that EDA members/ parties to the agreement were accountable for each other's brands' which was ultimately to the consumers' benefit. There were some players who were mopping out other players in the market by either not refilling their products or by storing other competitor products. That ensured that there was no creation of monopolies within the markets by the various players.
7. On exclusive dealing between EDA members, the resultant consumer and economic benefits guaranteed protection for consumers (continuity even if one member exits), improved competition among market players since there were several brands, increased access of LPG in the country. It increased consumer convenience since there was no need to travel for long distances in search of a particular brand. It also reduced operational costs associated with logistics since cylinders would be filled in the nearest depot and hence result in savings on the cost of moving cylinders across the country.
8. Requiring EDA members to work between 5.00am and 7.00pm did not amount to unjustifiable agreement on terms of trade since that was intended to enhance consumer

safety by curbing cross-filling of cylinders of competition, which was always done at night.

Orders

i. Exemptions were granted in the following terms:

a. Exemption on exclusive dealing among the members of the EDA was granted;

b. Exemption on the agreement on terms of trade to increase their LPG cylinder population by at least 10,000 LPG cylinders per year per depot and to pay monthly contribution towards the Wajiko brand for a period of five years was granted;

c. Exemption granted on information sharing related to only members' requirement to increase their LPG cylinders population by at least 10,000 LPG cylinders per year per depot. However, all other forms of commercially sensitive information including pricing, margins, volumes, input costs, capacity in the market, any specific information about customers, current or future product development plans, and proprietary information including trade secrets, know-how, technological innovation and other intellectual property would be prohibited.

Restrictive agreements in allocation of market/customer and sharing of commercially sensitive information

The case was an exemption application with respect to a horizontal agreement between a wheat manufacturer with provision on market/customer allocation, sharing commercially sensitive information on local wheat pricing and quantities purchased locally. The practices were likely to distort, prevent or lessen competition hence the application.

10. In the matter of Cereal Millers Association

CAK/EC/05/218/A

January 5, 2022

Competition Law *– restrictive trade practices – exemptions to restrictive trade practices – where justification on the benefits of a restrictive trade practice was given – exemptions with regard to market allocation, information sharing and price discussions – whether an exemption of restrictive trade practices such as information sharing, market allocation and price discussion was justified and therefore should be granted – Competition Act, sections 25 and 26.*

Brief facts

Cereal Millers Association(CMA) applied to the Authority for an exemption on potential restrictive trade practices for a period of 36 months (3 years). Specifically, they were requesting to be granted an exemption to: participate in the meetings to discuss the prices of local wheat production and prices for farmers for the wheat buying programme as well as agree on the minimum price per bag of wheat grain; allocate locally produced wheat among its members to support the farmers by ensuring that all local wheat was purchased from each farmer and from each region, as well as to approve the application for East Africa Community (EAC) duty remission scheme gazettement; share local wheat purchase information with CMA wheat milling members, Agriculture and Food Authority (AFA), Ministry of Agriculture (MoA) and National Treasury.

CMA was a members' association for the grain milling industry for wheat, maize and other cereal crops whose members comprised 45 large grain milling companies in the country that operate mills in various parts of the country.

Issue

Whether an exemption of restrictive trade practices such as information sharing, market allocation and price discussion was justified and therefore should be granted.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 25 - Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of Section A or B of this Part in respect of—

(a) any agreement or category of agreements;

(b) any decision or category of decisions;

(c) any concerted practice or category of concerted practices.

(2) An application for an exemption in terms of subsection (1) shall be—

(a) made in the prescribed form and manner;

(b) accompanied by such information as may be prescribed or as the Authority may reasonably require.

(3) The Authority shall give notice by publishing a notice in the Gazette of an application received in terms of subsection (1)—

(a) indicating the nature of the exemption sought by the applicant; and

(b) calling upon interested persons to submit to the Authority, within thirty days of the publication of the notice, any written representations which they may wish to make in regard to the application.

Section 26 - Determination of application for exemption

(1) After consideration of an application for exemption and any representations submitted by interested persons, the Authority shall make a determination in respect of the application, and may—

(a) grant the exemption;

(b) refuse to grant the exemption, and notify the applicant accordingly with a statement of the reasons for the refusal; or

(c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions contained in Section A or B of this Part.

(2) The Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same, ought to be excluded from the prohibitions contained in Section A or B of this Part.

(3) In making a decision under subsection (2), the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in—

(a) maintaining or promoting exports;

(b) improving, or preventing decline in the production or distribution of goods or the provision of services;

(c) promoting technical or economic progress or stability in any industry;

(d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

Findings:

1. The pricing discussion was a government initiative to encourage continued production of

wheat by the local farmers. The pricing discussion would encourage wheat farming to be stabilized and not collapse due to a lack of sufficient farmers' incentives. Wheat was a key staple food which was crucial in the national breadbasket and therefore the arrangement ensured national food security in the medium term and also ensured that the local wheat production did not collapse.

2. Participation in the price discussion under the Wheat Purchase Programme with the Government and the farmers was justifiable under section 26(3) of the Act.
3. There was a significant benefit to the farmers with regards to the guaranteed market for their wheat produce and hence ensuring continuity in the wheat production.
4. If the system of pricing discussion was conducted in a transparent manner, a more levelled playing field would be created, avoiding import storage and demurrage costs by millers which were trickled down to the final product i.e. wheat flour.
5. Allocation of locally produced wheat among members of CMA was not justifiable under section 26 (3) of the Act.
6. The request by CMA to share wheat purchase information among the members posed significant threats that would result in the prevention or lessening of competition. AFA was ready to collect the information from the individual millers as a regulator, and allow millers to directly submit information to them. The applicants were to be prohibited from sharing any commercially sensitive information among themselves, other than that shared in the fulfilment of the Wheat Purchase Programme.

Orders

i. CMA to participate in the Government's Wheat Purchase Programme on behalf of its members to discuss wheat price per bag for a period of three (3) years;

ii. There was need to resuscitate and stabilize the industry and therefore AFA should oversee the sharing of commercially sensitive information as follows: -

a. oversee the allocation of locally produced wheat quantities and sharing of such information with Treasury and the Ministry of Agriculture as the need arises; and

b. oversee the collection and sharing of commercially sensitive information of all wheat millers. Specifically, the individual millers would be expected to share their individual information with AFA rather than CMA. Commercially sensitive information included information on pricing, margins, volumes, input costs, capacity in the market, any specific information about customers, current or future product development plans, and proprietary information including trade secrets, know-how, technological innovation and other intellectual property;

iii. AFA to publish annually, the growth in wheat production in Kenya and the subsequent consumer welfare benefits as envisaged by the programme.

Editorial Note

Gazette Notice No. 1192, Dated September 16, 2022

Exemption on allocation of territories, brand exclusivity, resale price maintenance and non-compete obligations

The case dealt with an application for exemption with respect to a vertical agreement between a manufacturer and its distributors with regard to restrictions on territory allocation, product exclusivity, non-compete obligations and resale price maintenance. These restrictions were likely to distort, prevent or lessen competition hence the application.

11. In the matter of Cooper K- Brands Limited

CAK/EC/05/136/A

October 31, 2018

Competition Law *– restrictive trade practices – exemptions to restrictive trade practices – exemptions of restrictive trade practices such as territory allocation, brand exclusivity and resale price maintenance - whether the grant of exemptions for certain restrictive trade practices such as territory allocation, product exclusivity and resale price maintenance would result in negative competition – Competition Act (Cap 504), sections 25 and 26.*

Brief facts

Pursuant to section 25 of the Act, Coopers K-Brands (CKL) and their Strategic Business Partners (SBP) submitted an exemption application in respect of a proposal to enter into exclusive distribution agreements for a period of five (5) years. The SBP had undertakings to distribute CKL's products in assigned territories to stockists.

Specifically, the parties sought exemption in respect to territory allocation, restricting sales, non-compete obligations and resale price maintenance. The parties provided justification, which included protection of the market from counterfeit products, accessibility of products across Kenya and promoting investments in SBP.

Issue

Whether the grant of exemption on restrictive trade practices such as territory allocation, brand exclusivity and resale price maintenance would result in negative competition.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 25 - Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of Section A or B of this Part in respect of—

(a) any agreement or category of agreements;

(b) any decision or category of decisions;

(c) any concerted practice or category of concerted practices.

(2) An application for an exemption in terms of subsection (1) shall be—

(a) made in the prescribed form and manner;

(b) accompanied by such information as may be prescribed or as the Authority may reasonably require.

(3) The Authority shall give notice by publishing a notice in the Gazette of an application received in terms of subsection (1)—

(a) indicating the nature of the exemption sought by the applicant; and

(b) calling upon interested persons to submit to the Authority, within thirty days of the publication of the notice, any written representations which they may wish to make in regard to the application.

Section 26 - Determination of application for exemption

(1) After consideration of an application for exemption and any representations submitted by interested persons, the Authority shall make a determination in respect of the application, and may—

(a) grant the exemption;

(b) refuse to grant the exemption, and notify the applicant accordingly with a statement of the reasons for the refusal; or

(c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions contained in Section A or B of this Part.

(2) The Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same, ought to be excluded from the prohibitions contained in Section A or B of this Part.

(3) In making a decision under subsection (2), the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in—

(a) maintaining or promoting exports;

(b) improving, or preventing decline in the production or distribution of goods or the provision of services;

(c) promoting technical or economic progress or stability in any industry;

(d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

Findings

1. The clauses on territorial restrictions that were aimed at protection of the markets from counterfeits and ensuring availability of products in Kenya were not justified. The war against counterfeits could not be addressed by territorial restriction but rather by effective and concerted efforts by those mandated by the law.
2. The applicant had systems in place, namely the Batch Tracking System that they effectively used to establish if counterfeit products originated from their distribution system. Hence,

the territorial restrictions were not warranted.

3. A structured approach could, to some extent, ensure that products reach the stockists. However, territorial restriction on its own could not guarantee constant availability of supply of the CKL products. On the other hand, competition within the territories would ensure that stockists had more than one alternative stock replenishing points and that was more likely to guarantee constant availability of stock other than territorial restrictions.
4. CKL had a strong market presence of 25%-30% which was likely to severely limit intra-brand competition if there were exclusive territorial restrictions. That would lessen product penetration and the related consumer benefits on prices.
5. The applicant failed to demonstrate how territorial allocation would lead to prevention of counterfeit products and result in ensuring the availability of their products across Kenya. The justification provided did not meet the thresholds as laid out by section 26(2) and (3) of the Act.
6. Resale Price Maintenance (RPM) was a per-se prohibition under section 2(3)(d) of the Act. RPM not only restrained intra-brand competition but could also restrain inter-brand competition by depriving distributors of sufficient pricing flexibility to compete effectively with distributors of rival brands. That would not result in obtaining benefits to the consumers that would outweigh the lessening of competition as contemplated by section 26(3)(d) of the Act.
7. Competition among the SBP and between the SBP and the stockists would likely spur intra-brand competition. The benefits would likely result in the farmer enjoying lower costs and have a variety of stockists.
8. Brand exclusivity would not lessen competition because there were significant competing product regions where the SBP were located as CKL did not hold a dominant position in any of the sub-markets and was therefore unlikely to negatively affect competition.
9. Clauses on immediate termination of SBP contracts were too prohibitive since they aimed at killing investments at the stroke of a pen.

Orders

i. The application for the exemption on dealing with competing brands and non-compete obligations was granted.

ii. The exemption application in relation to the exclusive arrangement on territorial allocation, some clauses on non-compete obligations and clause on RPM was declined.

Editorial Note

The applicants later amended their strategic partnership agreement to remove the clauses which the Authority had declined to grant exemption and subsequently filed a fresh application which the Authority considered and determined.

{Gazette Notice No 4322, Dated June 26, 2020}

Joint venture agreement between two airlines offering passenger and cargo services in Kenya and Tanzania

The case involved an application for exemption on joint venture agreement in the aviation industry with clauses providing for reciprocal code sharing on the joint venture routes, coordination of network activities with respect to terms of routes, schedules, capacity and designation, alignment of price of ticket fares on the joint venture routes, revenue management, coordination of marketing and sales activities. The exemption would benefit both the consumer and aviation industry hence it was granted.

12. In the matter of Kenya Airways PLC (KQ) and Precision Air services PLC

CAK/EC/05/112/A

July 26, 2018

Competition Law *– restrictive trade practices – exemption to restrictive trade practices – reciprocal code sharing on the joint venture routes – whether allocation would guarantee more access and quality of service – Competition Act (Cap 504), sections 21(3)(a)(i) and 25.*

Competition Law *– restrictive trade practices – exemption to restrictive trade practices – coordination of network activities with respect to terms of routes, schedules, capacity and designation - whether an agreement coordinating network activities with respect to terms of routes, schedules, capacity and designation would enhance export and technical progress - Competition Act (Cap 504), section 21(3) (i) and 25.*

Competition Law *– restrictive trade practices – exemptions to restrictive trade practices - agreement to align price of ticket fares on the joint venture routes - whether agreement to align price of ticket fares on the joint venture routes would lead to more ticket sales– Competition Act (Cap 504), sections 21(3)(i) and 25.*

Competition Law *– restrictive trade practices – exemptions to restrictive trade practices -agreement to jointly manage revenue in joint venture routes - whether joint revenue management would lead to more public benefits – Competition Act, No.12 of 2010, section 21(3)(i) and 25.*

Competition Law *– restrictive trade practices - exemptions to restrictive trade practices -agreement on coordinating marketing and sales activities – whether agreement to coordinate marketing and sales activities would lead to more public benefits – Competition Act, No.12 of 2010, sections 21(3)(f)(i) and 25.*

Brief facts

Kenya Airways PLC (KQ) submitted an application in April, 2018 pursuant section 25 Act with regards to a proposed Joint Venture (JV) agreement between KQ and Precision Air services PLC (Precision). The scope of the JV comprised Nairobi, Mombasa, Kisumu, Dar-es-salam, Kilimanjaro and Zanzibar routes. They sought to be granted exemption for a period of five (5) years.

Specifically, the parties sought exemption in respect of reciprocal code sharing on the joint venture routes, coordination of network activities with respect to terms of routes, schedules,

capacity and designation, alignment of price of ticket fares on the joint venture routes, revenue management and coordination of marketing and sales activities. The parties provided justification which included enhanced access, quality service and improved exports.

Issues

i. Whether reciprocal code sharing on the joint venture routes would enhance accessibility of services offered.

ii. Whether coordination of network activities with respect to terms of routes, schedules, capacity and designation would enhance export and technical progress.

iii. Whether alignment of price of ticket fares on the joint venture routes would promote ticket sales.

iv. Whether joint revenue management would lead to more public benefits.

v. Whether coordination of marketing and sales activities would lead to more public benefits.

Relevant Provisions of the Law
Competition Act (Cap 504)

Section 25 - Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of Section A or B of this Part in respect of—

(a) any agreement or category of agreements;

(b) any decision or category of decisions;

(c) any concerted practice or category of concerted practices.

(2) An application for an exemption in terms of subsection (1) shall be—

(a) made in the prescribed form and manner;

(b) accompanied by such information as may be prescribed or as the Authority may reasonably require.

(3) The Authority shall give notice by publishing a notice in the Gazette of an application received in terms of subsection (1)—

(a) indicating the nature of the exemption sought by the applicant; and

(c) calling upon interested persons to submit to the Authority, within thirty days of the publication of the notice, any written representations which they may wish to make in regard to the application.

Section 26 - Determination of application for exemption

(1) After consideration of an application for exemption and any representations submitted by interested persons, the Authority shall make a determination in respect of the application, and may—

(a) grant the exemption;

(b) refuse to grant the exemption, and notify the applicant accordingly with a statement of the reasons for the refusal; or

(c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions contained in Section A or B of this Part.

(2) The Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same, ought to be excluded from the prohibitions contained in Section A or B of this Part.

(3) In making a decision under subsection (2), the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in—

(a) maintaining or promoting exports;

(b) improving, or preventing decline in the production or distribution of goods or the provision of services;

(c) promoting technical or economic progress or stability in any industry;

(d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

Findings

1. The code sharing arrangement would enhance convenience for passengers and cargo under one brand and seamless service through coordinated arrival and departure schedules and would therefore lead to generation of more public benefits that outweigh detriment to competition.
2. Under code sharing arrangement, each party collected ticket fares on behalf of the other. There was therefore a need to put in place mechanisms to manage such revenues to ensure each party got the rightful share of its revenue. The efficient management in terms of collection of revenue would lead to the ultimate benefit to the public.
3. Coordinating marketing sales would create efficiencies regarding costs of air services offered to customers, and generate operational and commercial synergies leading to lower fares for consumers. The arrangement would lead to the economic stability of KQ.
4. Coordination of network activities in terms of routes, schedules, capacity and designations would enhance customer reach and widen the offer that airlines give to customers in terms of the number of destinations. There would also be efficiencies and improvements as regards scheduling of air services offered to customers and efficiencies generated from rationalization of capacity available.
5. Although price alignment was a hard-core restriction to competition given that price was the major parameter of competition between players in a market, the negative effect on competition purely attributable to the JV would be insignificant. The benefits that would accrue to the Government of Kenya and the Kenyan citizens that owned shares in KQ substantially outweighed the detriment to competition.
6. Alignment of price of ticket fares on the joint venture routes would not lead to significant lessening of competition in Kenya because there was no overlap of the routes of the two companies in Kenya.

Orders

The Authority approved the exemption application for a period of five years.

Editorial Note

The applicant applied for a one year exemption effective June 16, 2017, which was granted. They later applied for a four year exemption to harmonize with the five year exemption, which was granted by the Fair Trade Commission of the United Republic of Tanzania.

{Gazette Notice No 4322, Dated 26th June, 2020}

Exclusive lease agreement between a shopping mall owner and a retail supermarket chain.

The case involves an exemption application regarding a lease agreement where the mall owner, lessor, guaranteed the lessee exclusive rights to operate in the mall by not leasing any part of the mall to any hypermarket, supermarket, butcheries, greengrocers and fruit and vegetable stores in the mall without the written consent of the lessee. That clause was likely to distort, prevent or lessen competition and was prohibited under the Act.

13. In the matter of Two Rivers Lifestyle Centre (TRLC) and Majid Al Futtaim Hypermarkets Ltd (t/a Carrefour)

CAK/EC/05/122/A

August 21, 2018

Competition Law *– restrictive trade practices – exemptions to restrictive trade practices – exclusive dealing – request for exclusive dealing between a lessor and tenants, limiting the operation of retailers – whether a request for exclusive dealing between a mall as lessor of retail space and its tenant that limited the expansion of another retailer and restricted entry of other retailers, was justified – Competition Act, No.12 of 2010, sections 25 and 26.*

Brief facts

An exemption application was submitted pursuant to the provisions of section 25 of the Act with regard to a Lease agreement between Two Rivers Lifestyle Centre the lessor and Majid Al Futtaim Hypermarkets Limited (t/a Carrefour) for a period of seven years.

Specifically, the parties sought exemption in respect of exclusive leasing arrangement between the parties. The agreement required the lessor to not lease any part of the Two Rivers Mall to any other hypermarket, supermarket, butcheries, greengrocers and fruit and vegetable stores in the Two Rivers Mall, or permit the expansion of and existing competitor supermarket (Chandarana Supermarkets), without the written consent of the lessee (Carrefour). The clause granted exclusivity to Carrefour in Two Rivers Mall.

The parties provided justification which included protection of Carrefour from competition to enable it recoup the costs of its investments in Two Rivers Mall.

Issue

Whether a request for exclusive dealing between a mall as lessor of retail space and its tenant that limited the expansion of another retailer and restricted entry of other retailers, was justified.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 25 - Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of Section A or B of this Part in respect of—

(a) any agreement or category of agreements;

(b) any decision or category of decisions;

(c) any concerted practice or category of concerted practices.

(2) An application for an exemption in terms of subsection (1) shall be—

(a) made in the prescribed form and manner;

(b) accompanied by such information as may be prescribed or as the Authority may reasonably require.

(3) The Authority shall give notice by publishing a notice in the Gazette of an application received in terms of subsection (1)—

(a) indicating the nature of the exemption sought by the applicant; and

calling upon interested persons to submit to the Authority, within thirty days of the publication of the notice, any written representations which they may wish to make in regard to the application.

Section 26 - Determination of application for exemption

(1) After consideration of an application for exemption and any representations submitted by interested persons, the Authority shall make a determination in respect of the application, and may—

(a) grant the exemption;

(b) refuse to grant the exemption, and notify the applicant accordingly with a statement of the reasons for the refusal; or

(c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the prohibitions contained in Section A or B of this Part.

(2) The Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision, concerted practice or category of the same, ought to be excluded from the prohibitions contained in Section A or B of this Part.

(3) In making a decision under subsection (2), the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in—

(a) maintaining or promoting exports;

(b) improving, or preventing decline in the production or distribution of goods or the provision of services;

(c) promoting technical or economic progress or stability in any industry;

(d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

Findings

1. The relevant market was the retail sale of food and household items within the Two Rivers Mall as it provided an end-to-end shopping and entertainment experience for shoppers. The current players in the relevant market were Carrefour and Chandarana Supermarkets.
2. The transaction had a negative impact on competition as it imposed a strategic barrier to entry and expansion for other retailers which ultimately had negative ramifications on the establishment of local value chains and denied consumers the benefits of increased choice and quality.
3. Anchor tenants were the main tenants in a shopping centre/mall whose prestige and brand recognition attracted not only retail customers but also other tenants. In the context of shopping malls, it was considered essential to have a lease commitment from an anchor tenant to be financed by most financial institutions. That requirement gave the anchor tenants some power to negotiate for long term exclusivity. There was no information that Carrefour guaranteed the lessor for financing purposes.
4. The conferment of exclusivity on the premise of an anchor tenant could not lead to promotion of exports, improving or preventing the decline in production, promoting technical or economic progress in the industry or obtaining a benefit to the public that outweighed the lessening of competition. To the contrary, it increased barriers to entry for prospective entrants.
5. There were no additional costs that accrued to occupation of more floor space as the floor space was sold at a predetermined amount per square meter and the amount of space occupied by Carrefour was informed by their space requirements.
6. The parties argued that the Two Rivers Mall was located at a green field site which necessitated additional investments and effort by parties to create goodwill and traffic at the mall therefore the exclusivity would ensure recoupment of investment. However, the parties did not demonstrated the indispensability of exclusivity to the recoupment.
7. The arrangement was likely to lead to a creation of strategic barriers to entry and expansion for other retailers which ultimately had a negative impact on the establishment of local value chains. It also denied consumers the benefits of increased choice and quality, and price competition between retailers. The application therefore had not met the threshold set out under section 26 of the Act for grant of exemptions.

The application for exemption was rejected.


BUYER
POWER

Buyer Power

Requirements for finding of abuse of buyer power

Remedies under abuse of buyer power

Limitation of investigations in abuse of buyer power conduct

Glossary of terms

Ability to switch: Credibility to threaten or resort, within a reasonable time frame, to alternative sources.

Bargaining power: The bargaining strength that a buyer undertaking has with respect to its suppliers in a bilateral negotiation.

Buyer Power: 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 favourable terms; or 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.

Contract: A written or oral commercial agreement that is intended to be enforceable by law.

Gate-keeper: A market player, in this case a buyer undertaking, that provides an important gateway between suppliers and consumers. In other words, the suppliers can only access downstream (consumer) markets through the gatekeepers (buyer undertakings).

Monopsony: A market structure or situation in which a single buyer undertaking or an association of buyer undertakings substantially controls the market as the major or only purchaser of goods and services offered by several would-be sellers or suppliers.

Payment for access to infrastructure: Payments required from the supplier by the buyer for commencement, extension or renewal of a supply contract, or for acceptance of supplies.

Preferential terms: Conditions in an agreement or other arrangement that are better than those usually offered.

Preliminary investigation: Screening of complaints to establish those which require a more detailed investigation and those which are unlikely to succeed even with a more detailed investigation.

Price paid: The price per unit paid to the supplier net of any rebates or discounts provided to the buyer and net of other costs imposed on or required of the supplier by the buyer.

Supplier dependency: A situation where a buyer undertaking accounts for a significant share of the supplier's output, and the supplier has poor alternatives or is unable to replicate the scale of sales to a particular buyer undertaking.

Synopsis

Ability of a single buyer, or a group of buyers, to influence or dictate the terms of trade with upstream suppliers. This power may derive from strategic advantages enjoyed by the purchaser or alternatively from holding a dominant or collective dominant position or possession of market power in the input market.

Generally, buyer power is concerned with how downstream firms can affect terms of trade with upstream suppliers. It is a scenario where an undertaking, in this case, a powerful buyer, in a regular transaction with a supplier may impose terms and conditions of trade that are outside the scope of normal business practices or unfair. Buyer power may also present itself in the form of dependency of the supplier on the particular powerful buyer. For instance, where a supplier by virtue of its generated revenue, a great percentage can be attributed to a specific powerful buyer, the supplier tends to accept different prices, terms and conditions despite being below competitive level due to its dependency.

How is buyer power established?

In determining buyer power, the Authority takes into account all relevant considerations including the nature and determination of contract terms; the payment requested for access to infrastructure; and the price paid to supplier.

Additionally, the Authority assesses additional factors when determining the presence of buyer power as enumerated under guideline 43 of the buyer power guidelines 2022. These factors include the actual position and concentration of the buyer undertakings in the market relative to supplier undertakings; the ability of the buyer undertaking to easily switch to competing suppliers and the supplier to easily switch buyers; the dependency of the supplier undertaking on the buyer; the buyer's ability to sponsor new entry or self-supply without incurring substantial sunk costs; and whether the buyer is a gate-keeper.

Conducts that constitute abuse of buyer power

Conducts that constitute abuse of buyer power include delayed payment by a buyer without justifiable reasons; unilateral termination (or threat of termination) of a commercial agreement; buyer's refusal to receive or return goods without justifiable reasons in breach of contractual terms; buyer transfer of costs or risks to suppliers; demanding preferential terms that are unfavorable to suppliers, or demanding suppliers to limit products sold to competitors.

In developing the abuse of buyer power case summaries, the Authority made consideration to how general principles and policy approaches were applied in assessing whether alleged conduct contravened section 24A(1) of the Act. Further, the cases are organized into 3 thematic areas based on the outcome of the assessment and investigation of the cases namely; requirements for finding of abuse of buyer power, remedies under buyer power and limitation of investigations in abuse of buyer power conduct.

Requirements for finding of abuse of buyer power

Establishment of a buyer - supplier relationship where there is an intermediary between the buyer and the supplier

The complainant lodged a complaint against Jumia (an online trading platform) for alleged abuse of buyer power through refusal to accept delivered goods. The Authority found that the parties were not in a buyer–supplier relationship and that the offence created by abuse of buyer power was limited to circumstances where the commercial relationship between the complainant and the offender was one of a supplier and a buyer. The Authority further found that the parties were in a digital platform – merchant relationship as opposed to a buyer–supplier relationship since the defendant (Jumia) acted as an intermediary between the merchant and final customers. The Authority also found that it was precluded from conducting an investigation into the complaint as its subject matter did not fall under the purview of the Act.

14. Joel Maina t/a Timely Options and E-Cart Services Kenya t/a Jumia Kenya

CAK/CPD/06/407/A

May 22, 2020

Competition Law *- buyer power - abuse of buyer power – factors to consider in establishing abuse of buyer power - buyer-supplier relationship - whether buyer-supplier relationship could exist between a merchant and an online trading platform - whether abuse of buyer-power could arise where an online trading platform declined to accept goods on delivery from a merchant - Competition Act (Cap 504), sections 2 and 24A(1).*

Brief facts

Joel Maina t/a Timely Options lodged a complaint with the Authority where it indicated to have entered into an agreement with E-Cart Services Kenya t/a Jumia Kenya, an online trading the platform, to sell sugar on the online store. The complainant sold several bags of sugar through the platform successfully until it was turned back on a sale it made after already delivering the product at jumia drop off hub. The complainant further asserted that the decline was due to the buyer claiming that the product was bulky and did not conform to the packaging guidelines, though it had been vetted before being uploaded to the platform to conform to the required standards. The complainant alleged that the buyer refused to accept goods on delivery and canceled its orders without compensation.

Issues

1. Whether a buyer-supplier relationship could exist between a merchant and an online trading platform.

2. Whether abuse of buyer-power could arise where an online trading platform declines to accept goods on delivery from a merchant?
3. Whether a digital trading platform could be defined as a buyer.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 - Interpretation

*"**buyer power**" means the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product or service to—*

(a) obtain from a supplier more favourable terms; or

(b) 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

Section 24A - Abuse of buyer power

(1) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

Findings

1. Section 24A(1) of the Act created the offence of abuse of buyer power and provided that any conduct that amounted to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, was prohibited. Buyer power was defined at section 2 of the Act as the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product or service to obtain from a supplier more favourable terms or 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. Therefore, the offence created by section 24A(1) was limited to circumstances where the commercial relationship between the complainant and the offender was one of a supplier and a buyer. Any other commercial relationships other than that of a buyer-supplier were not contemplated under section 2 and 24A(1) of the Act.
2. There was no purchase of goods or services between Jumia and the complainant. The parties were in a digital platform–merchant relationship as opposed to a buyer – supplier relationship since Jumia acted as an intermediary between the complainant and final customers.

Investigation closed; complainant advised to pursue other remedies available under the law.

Establishment of a buyer - supplier relationship where there is a principal and agent

The complainant lodged a complaint on alleged abuse of buyer power through delayed payment of commissions. The Authority found that the parties were not in a buyer – supplier relationship and that the offence created of abuse of buyer power was limited to circumstances where the commercial relationship between the complainant and the offender was one of a supplier and a buyer. The Authority also found that it was precluded from conducting an investigation into the complaint as its subject matter arose prior to coming into force of the abuse of buyer power provisions under the Act.

15. Lavington Insurance Agency Limited and CIC General Insurance Limited

CAK/BP/09/141/A

January 20, 2022

Competition Law *- buyer power - abuse of buyer power – whether buyer - supplier relationship could exist in principal–agent agreements – whether an agent could be defined as a supplier - Competition Act, (Cap 504), sections 2 and 24A(1).*

Statutes *- application of statutes - retrospective application of statutes - retrospective application of the Act - whether the abuse of power provision under the Act could be applied retrospectively - Interpretation and General Provision Act (cap 2), section 9(1) and (3).*

Brief facts

Lavington Insurance Agency Limited lodged a complaint with the Authority where it indicated that it was a cash and carry insurance agency and acted as an intermediary between insured persons and CIC General Insurance Limited (CIC). The terms of payment for collection and remission of premiums to CIC were in the form of commissions. CIC delayed payments of commissions accrued from the service rendered.

Issues

i. Whether a buyer- supplier relationship could exist in principal – agent agreements.
ii. Whether the abuse of buyer power provisions under the Act could be applied retrospectively.
iii. Whether an agent could be defined as a supplier.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 24A - Abuse of buyer power

(1) *Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.*

....

(4) *In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—*

a. *the nature and determination of contract terms between the concerned undertakings*
b. *the payment requested for access to infrastructure; and*

c. *the price paid to suppliers.*

Interpretation and General Provision Act (Cap 2)

Part III: General Provisions Regarding Written Laws

Section 9 – Commencement of Acts

1) *Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the Gazette.*

3) *If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly.*

Insurance Act (Cap 487)

Section 2 - Interpretation

(1) *"agent" means a person, not being a salaried employee of an insurer who, in consideration of a commission, solicits or procures insurance business for an insurer or broker;*

Findings

1. Section 24A(1) of the Act created the offence of abuse of buyer power and provided that any conduct that amounted to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, was prohibited. Buyer power was defined at section 2 of the Act as the influence exerted by an undertaking or group of undertakings in the position of purchaser of a product or service to obtain from a supplier more favourable terms or 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. Therefore, the offence created by section 24A(1) was limited to circumstances where the commercial relationship between the complainant and the offender was one of a supplier and a buyer. Any other commercial relationships other than that of a buyer-supplier were not contemplated under section 2 and 24A(1) of the Act.
2. The parties were in a principal – agency relationship as opposed to a buyer – supplier relationship. The complainant acted as an intermediary between CIC and its customers, as opposed to being in a direct relationship with the CIC as the buyer and complainant as the supplier. The complainant performed services for CIC through collection and remission of premiums and the acts of the complainant legally bound CIC.
3. In an agency relationship, a party expressly or impliedly consented that the other should represent them and the other consents to do so. The agent performed a service for the principal, represented the principal and the acts of the agent affected the legal position of the principal. That was the nature of the commercial arrangement between the parties.
4. The subject matter of the complaint arose prior to coming into force of the abuse of buyer power provisions under the Act. The delayed payments forming the subject matter of the complaint arose over diverse dates between the year 2000 and 2015. The abuse of buyer power provisions in the Act were introduced vide a 2016 amendment which came into force on January 13, 2017. The Authority, being bound by section 9(1) and (3) of the Interpretation and General Provision Act (cap 2), on commencement of Acts, was therefore precluded from conducting an investigation into the complaint.

Investigation closed; complainant advised to pursue other remedies available under the law.

Establishing buyer power where the supplier has a superior bargaining position

The complainant lodged a complaint on alleged abuse of buyer power through delayed payments. The Authority found that the complainant, by unilaterally drawing the terms of engagement between the parties, had a superior bargaining position and hence the defendant did not possess buyer power over the complainant. Additionally, the Authority found that the complainant was not economically dependent on the defendant since there was no business engagement between the parties after the instance of delayed payments and the complainant had alternative buyers.

16. Globodent LLC and Dental Art Centre

CAK/BP/09/219/A

March 2, 2023

Competition Law *- buyer power - abuse of buyer power – whether buyer power could exist where the supplier had a superior bargaining position - Competition Act (Cap 504) section 24A(1) and (4).*

Competition Law *- economic dependency - manifestation of economic dependency - what were the circumstances under which economic dependency was manifested.*

Brief facts:

Globodent LLC lodged a complaint on alleged abuse of buyer power through delayed payments. The complainant (supplier) entered into a contract with Dental Art Centre (buyer) for the exclusive purchase and resale of the complainant's branded professional dental products. The complainant alleged that the Dental Art Centre delayed payments for goods supplied.

Issues:

i. Whether buyer power could exist where the supplier has a superior bargaining position over a buyer.
ii. What are the circumstances under which economic dependency manifest.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 24A - Abuse of buyer power

(1) *Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.*

....

(5) *In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—*

d. *the nature and determination of contract terms between the concerned undertakings*
e. *the payment requested for access to infrastructure; and*
f. *the price paid to suppliers.*

Findings

1. The complainant unilaterally came up with the terms of engagement between the parties. The complainant drafted the contract setting out the terms of engagement with Dental Art Centre with regards to exclusivity of distribution of the products. That indicated the complainant was not in a disadvantaged position in determining the contractual terms hence the accused did not possess buyer power over the complainant in this aspect.
2. The complainant was not dependent on Dental Art Centre for business. Economic dependency of a supplier on a buyer ideally manifests in a situation of continuous business engagement, after incidences of delayed payments and/or a lack of alternative buyers to a supplier and is necessary for a finding of the existence of buyer power. In the instant case, the evidence on record was not sufficient to support a finding of economic dependency by the complainant on Dental Art Centre based on the fact that the parties only had one business engagement which gave rise to the delayed payments.
3. The complaint did not fall within the relevant threshold for abuse of buyer power as envisaged under section 24A(1) of the Act and as such could not be addressed further by the Authority.

Investigation closed; complainant advised to pursue other remedies available under the law.

Justifiable delayed payments in assessing a claim of abuse of buyer power

The complainant lodged a complaint on alleged abuse of buyer power through delayed payments. The Authority found that whilst the defendant had buyer power against the complainant, it did not abuse that power because it demonstrated justifiable reasons for the delay in payments.

17. Motorcare Limited and Jubilee Insurance Company Ltd

CAK/BP/09/186/A

December 30, 2022

Competition Law *- buyer power - abuse of buyer power – factors to consider in establishing abuse of buyer power - delayed payments - whether justifiable delay in making payments would be a defense in a claim of abuse of buyer power – Competition Act (Cap 504), section 24A(1), (4) and (5)(a).*

Brief facts

Motocare Limited, entered into a contract with Jubilee Insurance Limited (buyer) for the provision of motor vehicle repair services for Jubilee. The complainant alleged that Jubilee Insurance Limited delayed payments for service rendered. Jubilee justified the reasons for the delay in payments as there being disputes relating to supporting documentation and non-compliance with standards of supply agreed under the supply contract.

Issue

Whether justifiable delay in making payments would be a defense in a claim of abuse of buyer power.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 24A - Abuse of buyer power

(1) *Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited;*

(4) In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including –

a) *the nature and determination of contract terms between the concerned undertakings;*

b) *the payment requested for access to infrastructure; and*

c) *the price paid to suppliers.*

(5) Conduct amounting to abuse of buyer power includes—

a) *delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;*

Finding

1. Jubilee had buyer power but did not abuse such power since the delay in payments was largely attributable to disputes relating to supporting documentation and non-compliance with the standards of supply, agreed under the supply contract. The issues raised between the parties pertained to a dispute that fell outside of the Authority's jurisdiction. Therefore, the conduct complained of did not fall within the threshold contemplated under section 24A(5)(a) of the Act which referred to delays in payment without justifiable reason in breach of agreed terms of payment.

Investigation closed; complainant was advised to pursue other remedies available under the law.

Abuse of buyer power through delayed payments does not exist where the buyer justifies reasons for delayed payments

The complainant lodged a complaint on alleged abuse of buyer power through delayed payments. The Authority found that whilst the defendant had buyer power against the complainant, it did not abuse this power through delay of payments.

18. Selling Point Media Limited and Royal Mabati Factory Limited

CAK/BP/09/182/A

January 3, 2023

Competition Law *- buyer power - abuse of buyer power – delayed payments - whether abuse of buyer power could exist where the buyer justified reasons for delay in payments – Competition Act (Cap 504), section 24A (1), (4) and (5)(a).*

Brief facts

Selling Point Media Limited entered into a contract with Royal Mabati Factory Limited buyer for the provision of wall branding services in Kisumu, Kericho, Kisii and Ruiru for the buyer. The supplier alleged that the buyer delayed payments for service rendered. The buyer justified the reasons for delay in payments being disputes relating to standards of supply under the supply contract.

Issue

Whether abuse of buyer power could exist where the buyer justified reasons for delay in payments.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 24A - Abuse of buyer power

(1) *Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited;*

(4) *In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—*

a) *the nature and determination of contract terms between the concerned undertakings;*

b) *the payment requested for access to infrastructure; and*

c) *the price paid to suppliers.*

(5) *Conduct amounting to abuse of buyer power includes—*

a) *delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;*

Finding

The buyer had buyer power but did not abuse such power since the delay in payments was largely attributable to disputes relating to standards of supply under the supply contract. As such, the issues raised between the parties pertained to evidentiary thresholds that fell outside of the Authority's jurisdiction. Subsequently, the conduct complained of did not fall within the threshold contemplated under section 24A(5)(a) of the Act which referred to delays in payment without justifiable reason in breach of agreed terms of payment.

Investigation closed; complainant advised to pursue other remedies available under the law.

Economic dependency by a supplier on a buyer is necessary in establishing the existence of buyer power

The complaint was on alleged abuse of buyer power through delayed payments. The Authority found that the complainant was not economically dependent on the buyer which was necessary for finding the existence of buyer power. Further, the Authority noted that the complainant was yet to invoice the buyer for the work done owing to a dispute between the parties on the pending amount.

19. Philafe Engineering Limited and Linksoft Integrated System East Africa Limited

CAK/BP/09/183/A

August 12, 2022

Competition Law *- buyer power - abuse of buyer power - factors to consider in establishing abuse of buyer power - economic dependency - whether economic dependency by a supplier on a buyer was necessary to establish the existence of buyer power - Competition Act (Cap 504), section 24A(1) and (4).*

Brief facts

Philafe Engineering Limited entered into a contract with Linksoft Integrated System East Africa Limited, for the provision of renovation works for their premises. Philafe Engineering Limited alleged that Linksoft Integrated System East Africa Limited delayed payments for the service provided and thus sought the intervention of the Authority.

Issue

Whether economic dependency by a supplier on a buyer was necessary to establish the existence of buyer power.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 24A - Abuse of buyer power

(1) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

(4) In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—

a) *the nature and determination of contract terms between the concerned undertakings*

b) *the payment requested for access to infrastructure; and*

c) *the price paid to suppliers.*

Findings

1. Economic dependency of a supplier on a buyer was necessary for a finding of the existence of buyer power. Philafe Engineering Limited was not in such a position with regard to the buyer. The complainant was among the top-ranked electrical engineering companies in operation within Kenya. On analysis, the parties were of equal bargaining position with none being at a position of disadvantage in determination of contract terms and in the manner of conduct of the contract. As such, the buyer was not in a position of buyer power over the Philafe Engineering Limited.
2. The relevant market presented viable alternatives that the Philafe Engineering Limited could transact with. Investigations indicated that Philafe Engineering Limited had undertaken projects within the relevant market with other buyers of similar and at times higher caliber than the buyer. That pointed to Philafe Engineering Limited's ability to switch to other buyers and a lack of dependency on the buyer. Philafe Engineering Limited was therefore not economically dependent on the buyer.
3. The complaint did not fall within the relevant threshold for abuse of buyer power as envisaged under section 24A(1) of the Act and as such could not be addressed further by the Authority.

Investigation closed; complainant advised to pursue other remedies available under the law.

Abuse of buyer power does not exist where the buyer justifies reasons for delayed payments

The complaint was on alleged abuse of buyer power through delayed payments without a justifiable reason. The Authority found that whilst the defendant had buyer power against the complainant, it did not abuse that power because it demonstrated justifiable reasons for delayed payments.

20. Maccern Refrigeration Sales and Services and Frigoglass East Africa Ltd

CAK/BP/09/47/A

September 1, 2021

Competition Law *- buyer power - abuse of buyer power – whether abuse of buyer power could exist where the buyer had justified reasons for delaying the payments – Competition Act (Cap 504), section 24A(1) and (5)(a).*

Brief facts

Maccern Refrigeration Sales and Services was sub-contracted by Frigoglass East Africa (buyer) to undertake repair and maintenance to its client's coolers through service orders issued from an e-service platform system. Maccern Refrigeration Sales and Services alleged that the buyer delayed payments for services rendered. The buyer presented justifications for delaying the payments which it claimed were reasonable. Maccern Refrigeration Sales and Services failed to respond to the buyer's justifications despite the Authority affording it the opportunity to do so.

Issue

Whether abuse of buyer power could exist where a buyer had justified reasons for delaying the payments.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 24A - Abuse of buyer power

(1) *Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited;*

(4) In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—

a) *the nature and determination of contract terms between the concerned undertakings;*

b) *the payment requested for access to infrastructure; and*

c) *the price paid to suppliers.*

(5) *Conduct amount to abuse of buyer power includes –*

a) *delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;*

Findings

1. Maccern Refrigeration Sales and Services's continued failure to close jobs within the system as required under the contract led to delays in invoicing. The system was deployed by the buyer to prevent false service claims by contractors and was a prerequisite to any invoice being settled.
2. Maccern Refrigeration Sales and Services had in its possession spare parts belonging to the buyer which it held for over 2 years and were not accounted for as required.
3. Maccern Refrigeration Sales and Services sought settlement of invoices for repairs of coolers that were not in the buyer's database upon which the latter requested that it be provided with images of the coolers and their serial numbers/replacement serials as proof of asset existence. The complainant failed to submit the required information and as such the buyer was unable to verify the claims.
4. Maccern Refrigeration Sales and Services's failure to work within the specified indicators as per the contract led to customer complaints which significantly affected buyer's business since it led to the loss of customers who relied on the coolers. The alleged conduct did not fall within the threshold contemplated under section 24A(5)(a) of the Act under which only delays in payment of suppliers without justifiable reason were actionable. The conduct by the buyer, therefore, did not qualify as abuse of buyer power as envisaged under section 24A(1) and (5)(a) of the Act and as such could not be addressed further by the Authority.

Investigation closed; complainant advised to pursue other remedies available under the law.

Delayed payments without justifiable reasons amounts to abuse of buyer power

The complaint was on alleged abuse of buyer power through delayed payments. The Authority found that the defendant had buyer power against the complainant, and had abused that power through the delay of payments.

21. Alfred Mwangi t/a Autosolve Nairobi and Invesco Insurance Company

CAK/BP/09/88/A

March 24, 2023

Competition Law *- buyer power - abuse of buyer power – factors to consider in establishing abuse of buyer power - delayed payments - whether abuse of buyer power could exist where the buyer fails to justify reasons for a delay in payments - Competition Act (Cap 504), section 24A (1),(4) and (5)(a).*

Brief facts

Alfred Mwangi t/a Autosolve Nairobi (supplier) entered into a contract with the Invesco Insurance Company (buyer) for the provision of vehicle repair services on a motor vehicle for the buyer. The supplier alleged that the buyer delayed payments for service rendered. The buyer did not justify the reasons for the delay in payments.

Issue

Whether abuse of buyer power could exist where the buyer failed to justify reasons for the delay in payments.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 24A - Abuse of buyer power

(1) *Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited;*

(4) *In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—*

a) *the nature and determination of contract terms between the concerned undertakings;*

b) *the payment requested for access to infrastructure; and*

c) *the price paid to suppliers.*

(5) *Conduct amounting to abuse of buyer power includes—*

a) *delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;*

Findings

1. The parties were in a buyer-supplier relationship which involved the repair of motor vehicles. From the evidence availed by the supplier in the form of commercial documents (authorization letter from the buyer giving the supplier instructions to undertake repair of the motor vehicle, invoice among others), it was clear that the parties were in a commercial relationship of the nature of a buyer-supplier.
2. The buyer had buyer power over the supplier based on the following reasons:
    i. The parties did not record the terms of the supply agreement between them. Where parties have not put their agreement down in writing circumstances tend to favour the stronger party who may establish terms that are more ideal to them from time to time. The absence of a written contract was disadvantageous to the supplier.
    ii. There were 37 licensed insurance companies offering general insurance business and in contrast, there were more than 160 garages that were members of the Kenya Motor Repairers Association (KEMRA) in addition to others that were not KEMRA members. The ability to switch is closely related to the switching costs. Thus, with many garages, Invesco Insurance could easily switch suppliers with minimal switching costs while on the other hand, Alfred Mwangi t/a Autosolve Nairobi could not easily switch buyers.
    iii. Insurance companies have a superior economic position as a gateway to services in the motor vehicle repair business, giving them a position of buyer power as compared to their suppliers.
3. The delayed payments amounted to abuse of buyer power. The parties had entered into an agreement where the buyer was to pay the supplier within 45 days after being invoiced. However, over 238 days after being invoiced, the buyer had not released the payment despite reminders and follow-ups from the supplier.

Investigation closed; matter fully settled.

Remedies under abuse of buyer power

Restraining the accused undertaking from engaging in similar conduct, refund of rebates, payments of losses arising from unilateral termination and financial penalty

The complaint was on alleged abuse of buyer power through transfer of commercial risks, refusal to receive ordered goods, de-listing/unilateral termination, application of rebates and listing/registration fees, and demand for deployment of the supplier's staff. The Authority noted that the supplier sought a refund of the sum of KES. 519,244 for lost sales in 2019. It furnished a sales forecast based on 2018 sales to the buyer from which was computed lost profits totaling to the claimed sum. The Authority found that the claim was one for a speculative loss best assessed by a court of law and not within the purview of the Authority's powers at section 36 of the Act.

22. Orchards Limited and Majid Al Futtaim Hypermarkets Limited (t/a Carrefour)

CAK/BP/09/03/A

February 4, 2020

Competition Law *– buyer power – abuse of buyer power – claim that certain conducts, inter alia, application of listing fees and unilateral delisting of suppliers, amounted to abuse of buyer power – whether the buyer's conduct amounted to abuse of buyer power – Competition Act (Cap 504), section 24(2A) and (2B) (repealed) Buyer Power Guidelines, 2017.*

Jurisdiction *– jurisdiction of the Authority – jurisdiction to award compensation to a supplier in a case of abuse of buyer power - whether it was within the purview of the Authority to award a supplier refund of money based on the supplier's sales forecast - Competition Act (Cap 504), section 36.*

Brief facts

Orchards Limited (supplier) entered into a contract with the Majid Al Futtaim Hypermarkets Limited t/a Carrefour (buyer) to supply merchandise for its stores. Supplier alleged that it was required to pay listing fees and rebates, deploy a permanent staff member in each of the buyer's branches at Supplier's cost, deliver free introductory cartons of merchandise which the buyer then sold, deliver a fridge to one of the buyer's branches as a condition for receiving orders to deliver to that branch, and supply yoghurt at four degrees centigrade which necessitated using a refrigerated van and keeping the vehicle running throughout the long delivery processes.

Further, supplier alleged that the buyer returned goods already delivered based on its local

purchase orders (LPOs) on grounds that they were nearing expiry. On various occasions, the buyer refused to take delivery of goods supplied based on its LPOs thereby forcing supplier to find alternative outlets on short notice. Additionally, supplier claimed that the buyer was unwilling to do away with or adjust rebates and on the supplier's attempts to renegotiate the supply agreement, the buyer unilaterally and without notice terminated the contract. The supplier thus sought Authority's intervention via the instant complaint.

Issues

i. Whether the following conducts amounted to abuse of buyer power:
   a) application of listing fees;
   b) application of rebates;
   c) requirement on suppliers to post staff to Carrefour stores;
   d) transfer of commercial risk by returns of delivery;
   e) refusal to accept delivery; and
   f) unilateral delisting of suppliers.

ii. Whether it was within the purview of the Authority to award a supplier of goods refund of money based on the supplier's sales forecast.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 24 (Repealed) - Abuse of dominant position and buyer power

(2A) Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

(2B) In determining buyer power, the Authority shall take into consideration—

(a) the nature and determination of contract terms;

(b) the payment requested for access infrastructure; and

(c) the price paid to suppliers.

Buyer Power Guidelines, 2017
Conduct that may amount to abuse of buyer power
23. Acts constituting abuse of buyer power, shall include:

a. *bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market;*
b. *Late payment; where a buyer undertaking delays payment without justifiable reasons in breach of agreed terms of payment to suppliers;*
c. *demand for preferential terms by buyer undertakings which are unfavourable to the suppliers or demanding limitations on supplies to other buyers;*
d. *a buyer undertaking depressing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or a buyer undertaking reducing prices below competitive levels;*
e. *De-listing; Unilateral termination of a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason;*

f. *Threat of de–listing; Use of delisting threats to obtain undue advantage and suppress suppliers from raising genuine complains against the buyers,*
g. *Unjust return of goods; Return of goods which the buyer purchased from a supplier;*
h. *Transfer of costs; where buyers transfer costs or risks to suppliers by imposing a requirement for the suppliers to fund the cost of a promotion,*
i. *Transfer of risks; Transferring commercial risks meant to be on buyer to the suppliers;*
j. *Refusal to receive ordered goods; A buyer's refusal to accept delivery of goods for reasons not attributable to the supplier after having entered into a contract, and if it is unavoidable for the transacting party to accept such refusal from concerns about the possible effects on future transactions, unjustly impose a disadvantage on the transacting party in light of normal business practices; and*
k. *Unfavorable treatment like demanding lower buying prices than all other suppliers or demanding limitations on supplies to other buyers*

Findings

1. The Authority was mandated under section 9(1)(b) of the Act to receive and investigate complaints from legal or natural persons and consumer bodies. Any conduct that amounted to abuse of buyer power in a market in Kenya or substantial part of Kenya was prohibited by section 24(2A) of the Act which further provided for both criminal and administrative sanctions for its breach of sections 24(3) and 36.
2. The proposed decision that the buyer, as owner and proprietor of Carrefour stores in Kenya, had abused buyer power with regard to the supplier contrary to section 24(2A) of the Act, had not been controverted.
3. The supplier failed to prove that it was required to deliver free introductory cartons of merchandise, deliver a fridge to one of Carrefour's branches as a condition for receiving orders to deliver to that branch, and supply yoghurt at four degrees centigrade.
4. Under section 36(c) of the Act, the Authority may after consideration of written representations direct any action to be taken by an undertaking to remedy or reverse an infringement or the effects thereof. The claim for amounts deducted as rebates was merited, being an outcome of conduct found to be in abuse of buyer power. The amount claimed for cost of packaging material for use on supplies to the buyer was merited, being a direct consequence of conduct in abuse of buyer power, to wit, unilateral delisting. The claim had been proven from the evidence supplied by the supplier.
5. The supplier sought a refund of the sum of KES. 519,244 for lost sales in 2019. It furnished a sales forecast based on 2018 sales to the buyer from which was computed lost profits totaling to the claimed sum. That claim was one for a speculative loss best assessed by a court of law and not within the purview of the Authority's powers at section 36 of the Act.
6. In view of the findings of breach, and the powers of the Authority at section 36(d) of the Act, wherein the Authority may impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question, the matter qualified for imposition of a financial penalty.

Complaint allowed; the buyer abused its buyer power.

Orders

i. *All current supply agreements of the buyer relating to its Carrefour Hypermarkets in Kenya were to be amended and in any event within sixty (60) days of service of the order to expunge all offending provisions, specifically clauses that provided for, led to or otherwise facilitated abuse of buyer power, including but not limited to:*
   a. *application of listing fees;*
   b. *application of rebates;*
   c. *requirement on suppliers to post staff to Carrefour Hypermarket stores save in circumstances as shall be approved by the Authority;*
   d. *transfer of commercial risk by returns of delivery save in circumstances as shall be approved by the Authority;*
   e. *refusal to accept delivery except in circumstances as shall be approved by the Authority;*
   f. *unilateral delisting of suppliers.*

ii. *The buyer to cease and desist from issuing supply agreements containing the terms set out in the order at (i).*

iii. *The buyer to take action within thirty (30) days of service of the order to remedy the effects of its infringement of section 24(2A) of the Act with regard to the supplier as follows:*
   a. *refund rebates deducted from invoices of the supplier for the years 2017, 2018 and 2019 amounting to KES. 289,482 as set out in the buyer's statements of accounts for those years;*
   b. *pay to the supplier the sum of KES. 130,856 for loss arising from unilateral termination of the supply agreement for the year 2019, being cost of procurement of material for exclusive use for the buyer's orders.*

iv. *A financial penalty of ten percent (10%) of the gross annual turnover in Kenya of the buyer from its Carrefour franchise.*

Editorial Notes

1. The sections of the Act applied in the analysis and determination of this case were repealed vide the Competition Amendment Act No. 49 of 2016. However, the analysis still applies as the provisions were subsequently rearranged as indicated here below:

   Section 24A - Abuse of buyer power

   (1) *Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited;*

   (4) *In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—*

   a) *the nature and determination of contract terms between the concerned undertakings;*

   b) *the payment requested for access to infrastructure; and*

   c) *the price paid to suppliers.*

   (5) *Conduct amounting to abuse of buyer power includes—*

   b) *unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason;*

c) *refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;*

d) *transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of the goods or services;*

e) *transfer of commercial risks meant to be borne by the buyer to the suppliers;*

f) *demands for preferential terms unfavourable to the suppliers or demanding limitations on supplies to other buyers.*

2. The Authority's decision was appealed at the Competition Tribunal.

Limitation of investigations in abuse of buyer power conduct

The Authority is precluded from proceeding in a claim of abuse of buyer power where the High Court had issued interim orders in favour of a buyer

The complaint was on alleged abuse of buyer power through delayed payments and transfer of a commercial risk. The Authority stayed its enforcement as there was an insolvency petition filed in the High Court against the buyer, which had issued interim orders in favour of the buyer staying attachment, sequestration, distress or execution.

23. Cynthia Andia Andisa (Elvante Limited) v Tusker Mattresses Limited (t/a Tuskys)

CAK/BP/09/14/A

February 1, 2021

Jurisdiction *- jurisdiction of the Authority - jurisdiction in a claim of abuse of buyer power - where the High Court had stayed all legal proceedings against a buyer - whether the Authority could proceed in a claim of abuse of buyer power where the High Court had issued interim orders staying attachment, sequestration, distress or execution pending the determination of an insolvency petition against the buyer – Competition (General) Rules, 2019 rule 34 (5)(a)*

Brief facts

Elvante Limited (supplier) entered into a contract with Tusker Mattresses Limited (t/a Tuskys) (buyer) to supply goods to various branches on credit terms upon issuance of an invoice. The supplier alleged that the buyer partially paid for the goods and unjustifiably delayed paying the balance. Further, the supplier alleged that it was instructed to collect unsold goods that were past their expiry dates which was a commercial risk meant to be borne by the buyer. The supplier thus sought the Authority's intervention.

Issue

Whether the Competition Authority could proceed in a claim of abuse of buyer power where the High Court had issued interim orders in favour of a buyer staying attachment, sequestration, distress or execution.

Relevant Provisions of the Law

Competition (General) Rules, 2019

Part VIII - Complaints and Investigations

Rule 34 (5) Notwithstanding sub-rule (1), a complaint may not be considered by the Authority where–the complaint lodged, in whole or in part, is before any court or the Competition Tribunal;

Finding

An insolvency petition was filed at the High Court against the buyer by one of its creditors seeking liquidation proceedings. Interim orders were granted in favor of the buyer staying attachment, sequestration, distress or execution pending the hearing and determination of the petition. In view of the High Court being seized of the matter, the Authority stayed its enforcement against the buyer with respect to the complaint pending the outcome of the petition.

Investigation closed; complainant advised to consider being enjoined in the petition to seek redress.

The jurisdiction of the Authority over a matter that is before a court of law

The complainant lodged a complaint on alleged abuse of buyer power through delayed payments. The Authority found that it was precluded from investigating the complaint by virtue of it being res sub judice.

24. Loch Automobile Valuers and Assessors v Monarch Insurance Company Limited

CAK/BP/09/213/A

February 16, 2023

Jurisdiction *- jurisdiction of the Authority - whether the Authority could exercise jurisdiction over a matter that was pending before a court of law - Competition (General) Rules, 2019 rule 34 (5)(a).*

Brief facts:

Loch Automobile Valuers and Assessors (supplier) entered into a contract with Monarch Insurance Company Limited (buyer) for the provision of assessment of motor vehicles following an accident on behalf of the buyer. The supplier alleged that the buyer delayed payments for services rendered.

Issue

Whether the Authority could exercise jurisdiction over a matter that was pending before a court of law.

Relevant Provisions of the Law

Competition (General) Rules, 2019

Part VIII – Complaints and Investigations

Rule 34 (5) Notwithstanding sub-rule (1), a complaint may not be considered by the Authority where–

a) *the complaint lodged, in whole or in part, is before any court or the Competition Tribunal;*

Finding

The Authority was precluded from investigating the complaint by virtue of it being *res sub judice*. The supplier had proffered a civil claim *(Baraka Ochola t/a Loch Automobile Valuers and Assessors v Monarch Insurance Company Limited,* Case no: SCCCOMM/E203/2023*)* against the buyer before the Small Claims Court for the same matter lodged with the Authority. Rule 34(5)(a) of the Competition (General) Rules, 2019 provided that a complaint could not be considered by the Authority where the complaint lodged, in whole or in part, was before any court or the Competition Tribunal.

Investigation closed.

Advisory on limitation of abuse of buyer power investigation in public procurement matters

The complaint was on an alleged abuse of buyer power by a public entity through delayed payments. The Authority established that the subject matter of the complaint pointed to public procurement regulated by the Public Procurement Regulatory Authority.

25. Edna Kerubo and County Government of Trans Nzoia

CAK/BP/09/29/A

May 11, 2020

Competition Law - buyer power - abuse of buyer power – whether buyer power existed where a supplier had several alternative buyers as opposed to only one buyer - Competition Act, No. 12 of 2010, section 5.

Jurisdiction – jurisdiction of the Competition Authority – jurisdiction over a matter that was regulated by a public entity - whether the Competition Authority could exercise jurisdiction over a matter that was regulated by a public entity.

Brief Facts

The Authority received a complaint from Ms. Edna Kerubo (the complainant) on 5th May, 2020. The complainant was a contractor with Trans Nzoia County. She completed works for the county in 2019 and was yet to be paid. She further indicated that some of her works were yet to be approved in the appropriate system by the relevant county officials.

Issue:

Whether the Authority could investigate abuse of buyer power in public procurement matters.

Relevant provisions of the law

Competition Act (Cap 504)

5. Application

(1) This Act shall apply to all persons including the Government, state corporations and local authorities in so far as they engage in trade.

(3) If a body charged with public regulation has jurisdiction in respect of any conduct regulated in terms of this Act within a particular sector, the Authority and that body shall—

(b) promote co-operation;

(5) For the purposes of this section, without affecting the meaning of "trade" in other respects—

(b) the following do not constitute engaging in trade—

(iv) internal transactions within the Government, a state corporation or a county government.

Edna Kerubo and County Government of Trans Nzoia

Finding:

The matter raised in the inquiry arose from public procurement which was regulated under the Public Procurement & Asset Disposal Act, 2015 (the PPADA). Regulation of public procurement was under the Public Procurement Regulatory Authority (PPRA) which made it the relevant government agency to deal with matters of delayed payment arising out of public procurement.

Complainant advised to lodge the complaint with the public procurement regulatory Authority

Mergers and Acquisitions

Mergers and Acquisitions

Acquisition of minority Shareholding with veto or controlling rights

Approval of mergers with conditions to remedy competition and public interest concerns

Approval of merger with conditions to remedy public interest concern

Acquisition of minority shareholding with joint control rights

Acquisition of assets with a market presence

Glossary of terms

Acquirer:	Refers to the company that is buying shares, business or assets in a merger.
Control:	Ownership of more than 50% shareholding, business or assets in a company.
Downstream Market:	Market at the next stage of the production/distribution chain, for example, the distribution and sale of mobile phones would be a downstream market in relation to the production of mobile phones.
Merger:	Has the same meaning as defined in the Competition Act No 12 of 2010.
Relevant geographic market:	Is the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently similar.
Relevant market:	The relevant market combines the product market and geographic market.
Relevant product market:	A group of products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.
Target:	Refers to the company selling shares, business or assets in a merger.
Upstream market:	Market at the previous stage of the production/distribution chain, e.g. the production, distribution and marketing of mobile phones would be an upstream market in relation to the sale of mobile phones to final consumers.

Synopsis

The Authority's role of merger control is geared towards promoting and safeguarding competition in the Kenyan economy thereby creating efficient markets for consumers. Through regulation of mergers, the Authority ensures that firms do not acquire, enhance or preserve dominant positions (market power) which can be used to the detriment of competitors or consumers.

What is a merger?

Mergers and Acquisitions are enforced in terms of Part IV of the Act sections 41 - 49 of the Act.

Section 2 of the Act defines a "merger" as an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover. In addition to the condition specified in section 2 of the Act, for a transaction to qualify to be a merger it must meet the conditions stated in sections 5 and 41 of the Act.

Control refers to:

i. Ownership of more than 50% shareholding, business or assets of an undertaking;
ii. Ability to cast more than 50% of the votes at a general meeting of an undertaking;
iii. Ability to appoint a majority of the directors of an undertaking;

iv. Ability to appoint the senior management of an undertaking or influence its commercial and strategic decisions; and
v. Ownership of a minority shareholding in an undertaking with controlling or veto rights. The veto or control rights must give rise to control as spelt in section 41(3) (a)-(g) the Act.

Which mergers are notifiable?

All proposed mergers within the Kenyan economy require approval by the Authority pursuant to Section 42(2) of the Act. This applies to, transactions that meet the definition criteria prescribed under section 2 and 41 of the Act and meet the thresholds prescribed by the Competition General Rules, 2019.

However, pursuant to section 42(1) of the Act the Authority has developed the merger Threshold Guidelines with the objective of excluding benign mergers from provisions of the Act and supporting the growth and competitiveness of Micro, Small and Medium Enterprises. The excluded mergers fall into two categories – a) exclusions that do not require the Authorities approval i.e. where the combined turnover/assets of the parties is less than KES 500 million; and b) exclusions that require the approval of the Authority i.e. where the combined turnover/assets of the parties is above KES 500,000,000 but less than KES 1 billion.

The Merger Threshold Guidelines provide the thresholds for merger notifications. In particular;
i. the Authority takes into consideration the combined turnover or assets of parties whichever is higher in Kenya for the preceding year;
ii. a merger must be notified to the Authority where the combined value of assets/turnover is be more than KES 1 billion and that of the target above KES 500 million;
iii. notwithstanding (ii) above, any merger where the acquirer has assets/turnover above KES 10 billion and the parties are in the same line of business or have a vertical relationship is notifiable; and
iv. mergers that meet the thresholds for notification to the COMESA Competition Commission are not notifiable to the Authority.

What does the Authority consider in determining a proposed merger?

In assessing a merger, the Authority identifies the relevant market in which the parties to a merger operate and conducts two tests i.e. the competition and public interest test. The competition test assesses whether the merger is likely to lead to substantial lessening of competition. To answer this question, the Authority looks at increment to market share as a result of the merger or whether as a result of the merger a firm is likely to acquire, increase or preserve its dominance or is likely to acquire a monopoly position. Firms are likely to use their dominance or monopoly to harm their competitors, consumers and suppliers.

The public interest test complements other government policies by looking at how a merger is likely to affect employment, ability of small firms to compete or gain access to markets, ability of national firms to compete in international markets and ability of firms to innovate or be more efficient.

Cases included in the Digest show how the Authority interprets control, defines relevant markets when analyzing mergers, analyses competition and public interest issues, and approves mergers with or without conditions. The conditions imposed by the Authority are meant to remedy competition and public interest concerns identified during analysis.

Acquisition of Minority Shareholding with veto or controlling rights

Acquisition of 49% of the issued share capital of Kenafric Development Limited by Amethis Packaged Food Limited, together with certain veto rights

The transaction involved the acquisition of 49% of the issued share capital of Kenafric Development Limited by Amethis Packaged Food Limited with certain veto rights resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above one billion Kenya shillings in 2016 and therefore the transaction met the thresholds for notification as specified in the Merger Threshold Guidelines. The Authority further found that the relevant product market for the purpose of the transaction was the national market for manufacture and distribution of confectionery products. The Authority also found that the transaction was unlikely to lead to negative competition and public interest concerns.

26. Merger between Amethis Packaged Food Limited and Kenafric Development Limited

CAK/MA/04/486/A

February 15, 2017

Competition Law *– mergers and acquisitions – acquisition of a control - where there was a proposed transaction for acquisition of 49% of issued share capital of a company together with certain veto rights - where the combined turnover of the acquirer and the target was above one billion Kenya shillings - whether a proposed transaction which would result in the acquisition of certain veto rights amounted to acquisition of control within the meaning of the Act - whether the transaction was a merger as defined by the Act - whether the proposed transaction met the thresholds for notification as specified in the Merger Threshold Guidelines - whether acquisition of control in a company by a newly incorporated entity which was not in the same business with the acquirer would lessen or prevent competition in the respective markets and raise negative public interest issues - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant product market analysis - what was the relevant product market in a transaction where the acquirer was newly incorporated while the target was involved in confectionary business.*

Brief facts

Amethis Packaged Food Limited (the acquirer) was a company incorporated in Mauritius. The acquirer was a newly incorporated company and had not undertaken any business. Kenafric Development Limited (the target) was a company incorporated in Kenya. It was mainly involved in the manufacturing and trading of confectionery products.

The parties sought approval from the Authority for the acquirer to acquire a 49% shareholding

and certain veto rights in the target company.

Issues

i. Whether the proposed transaction resulting in the acquisition of 49% shares together with specific veto rights constituted an acquisition of control within the Act.
ii. Whether a transaction in which the combined turnover of the acquirer and the target was above one billion Kenya shillings met the notification thresholds specified in the Merger Threshold Guidelines.
iii. What was the relevant product market in a transaction where the acquirer was newly incorporated and the target involved in the manufacture and distribution of confectionery products?
iv. Whether acquisition of control in a company by a newly incorporated entity which was not in the same business with the acquirer would lessen or prevent competition in the respective markets and raise negative public interest issues.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the businessin question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a)beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b)
is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;
(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);
(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an acquisition by the acquirer of 49% of the issued share capital of the target with certain veto rights, which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above one billion Kenya shillings in 2016 and therefore the transaction met thresholds for notification as specified in the Merger Threshold Guidelines.
3. The acquirer was newly incorporated and had not undertaken any business while the target manufactured and distributed confectionary products. Therefore, the relevant product market for the purpose of the transaction was the market for manufacture and distribution of confectionary products nationally.
4. The post-transaction market structure and concentration would not be affected since the acquirer was not in the same business. The proposed transaction was unlikely to substantially lessen or prevent competition in the respective markets.
5. The market for the manufacture and distribution of confectionary in Kenya would not be affected by the proposed transaction as the acquirer was newly incorporated and therefore the transaction would not occassion competition concerns.
6. The proposed transaction would not lead to loss of employment since the transaction was an acquisition of shares by the acquirer. The transaction would also not negatively affect the abilities of small and medium-sized enterprises to compete. The transaction was thus unlikely to raise any negative public interest issues.

Determination:

i. *The Authority approved the acquisition of control in the target by the acquirer.*
ii. *The Authority shall cause the publication of the notice in the Gazette as soon as it is practicable.*
iii. *The provisions of section 49(1) of the Act provided that the approval did not relieve the parties from complying with other applicable 1aws.*

Gazette Notice No. 2201 Dated February 28, 2017 Vol. CXIX—No. 29 of 10th March, 2017

Acquisition of 25% interest in Macquarie Airfinance Limited by Sunsuper Pty Limited

The proposed transaction involved the acquisition of 25% interest in Macquarie Airfinance Limited by Sunsuper Pty Limited resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2019 and therefore the transaction met the thresholds for mandatory notification as provided in the Merger Threshold Guidelines. The Authority further found that the relevant product market for the purpose of the transaction was the national market for leasing of aircraft. The Authority also found that the transaction was unlikely to lead to negative public interest concerns.

27. Merger between Sunsuper Pty Limited and Macquarie Airfinance Limited

CAK/MA/04/995/A

February 28, 2020

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of 25% interest in a company - where the combined value of assets of the parties in the proposed transaction was above KES. one billion - whether the proposed transaction amounted to acquisition of control within the meaning of the Act - whether the proposed transaction met the thresholds for mandatory notification as specified in the Merger Threshold Guidelines - whether a transaction where the activities of the acquirer and the target did not overlap would lead to substantial lessening or prevention of competition – whether a transaction where the target did not have a physical presence in Kenya would lead to negative public interest concerns - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant market in a transaction where the acquirer was involved in fund management while the target was involved in leasing of aircraft throughout Kenya.*

Brief facts

Sunsuper Pty Limited (the acquirer) was incorporated in Australia. It provided fund management services and did not have operations in Kenya. Macquarie Airfinance Limited (the target) was incorporated in England and Wales. It was a holding company and it owned, managed, and leased aircraft internationally. It indirectly owned and leased a commercial jet to Kenya Airways PLC. Specifically, in Kenya it was involved in the provision of aircraft leasing and maintenance services.

The proposed transaction involved the acquisition of 25% interest in the target by the acquirer. Upon completion of the transaction the parties would sign an investors agreement that would confer on the acquirer joint control of the target. The parties sought approval of the acquisition of 25% of the issued share capital of the target by the acquirer.

Issues

i. Whether a proposed transaction which would result in the acquisition of 25% interest in a target company with the right to joint control amounted to acquisition of control within the meaning of the Act.

ii. Whether a proposed transaction, where the combined value of assets was above KES. one billion Kenya shillings, met the thresholds for mandatory notification as was specified in the merger Threshhold Guidelines.

iii. What was the relevant market in a transaction where the acquirer was involved in fund management services while the target was involved in leasing of aircraft throughout Kenya?

iv. Whether a transaction where the activities of the acquirer and the target did not overlap would lead to substantial lessening or prevention of competition.

v. Whether a proposed transaction where the target did not have a physical presence in Kenya would lead to negative public interest concerns.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking at has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486)*;*

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The transaction would result in the acquisition of the right to joint control which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion in 2019 and therefore the transaction met the thresholds for mandatory notification as provided in the merger Threshold Guidelines.
3. The acquirer was involved in fund management while the target was involved in leasing of aircraft throughout Kenya. Therefore, the relevant market for the purpose of the transaction was the national market for leasing of aircraft.
4. Post-merger, the structure and concentration of the market for aircraft leasing was unlikely to be affected since the parties' activities did not overlap. Therefore, the proposed transaction was unlikely to lead to substantial lessening or prevention of competition in the market for aircraft leasing in Kenya.
5. The proposed transaction was unlikely to lead to any redundancies as the target did not have a physical presence in Kenya and hence its employees were only seconded to Kenya on a need basis. Therefore, it was not anticipated to result in any employment losses. Additionally, the aircraft would continue operating under the current lease to Kenya Airways PLC. The proposed transaction did not raise any negative public interest concerns.

Determination

The Authority unconditionally approved the acquisition of 25% shareholding in the target by the acquirer.

Acquisition of 20% of the issued shares with controlling rights in Icolo Limited by PRIF Africa Holding Limited

The proposed transaction involved the acquisition of 20% of the shares in Icolo Limited by PRIF Africa Holdings Limited with controlling rights resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2018 and therefore the transaction qualified for mandatory notification as provided in the Merger Threshold Guidelines. The Authority further found that the relevant market for the purpose of the transaction was the national market for data centres in Kenya in which Icolo Limited was active. The Authority also found that the transaction was unlikely to lead to substantial lessening or prevention of competition and negative public interest concerns.

28. Merger between PRIF Africa Holding Limited and Icolo Limited

CAK/MA/04/987/A

February 28, 2020

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of 20% of the issued shares of a company with controlling rights - whether a proposed transaction which would result in acquisition of controlling rights amounted to acquisition of control within the meaning of the Act - whether the proposed transaction met the thresholds for mandatory notification as specified in the Merger Threshold Guidelines - whether a transaction where the acquirer and the target did not have similar businesses would lead to substantial lessening or prevention of competition and negative public interest concerns - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant market in a transaction where the acquirer was in the business of import into Kenya and logistics while the target was involved in development and operation of neutral data centres.*

Brief facts

PRIF Africa Holding Limited (the acquirer) was incorporated in Mauritius and was indirectly involved in importation of assorted goods, farm implements, handling of landed cargo, foodstuffs and alcoholic beverages. Icolo Limited (the target) was incorporated in Mauritius and through Icolo Kenya (its wholly owned subsidiary) was involved in development and operation of neutral data centres targeting telecom carriers, ISPs, peering points, IT and cloud providers, content providers, enterprise and financial services customers in Mombasa and Nairobi.

The combined turnover of the parties was above KES. one billion. The parties had sought approval of the acquisition of 20% of the issued share capital with controlling rights in the target.

Issues

i. Whether a proposed transaction which would result in acquisition of 20% shareholding

with controlling rights amounted to acquisition of control within the meaning of the Act.

ii. What was the relevant market in a transaction where the acquirer was in the business of import into Kenya and logistics while the target was involved in development and operation of neutral data centres?

iii. Whether a proposed transaction where the combined turnover of the parties was above Kes. One billion met the thresholds for mandatory notification provided for in the Merger Threshold Guidelines.

iv. Whether a transaction where the acquirer and the target did not have similar businesses would lead to substantial lessening or prevention of competition and negative public interest concerns.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) he acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets

of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an of acquisition of 20% of the issued shares of the target by the acquirer. That transaction would result in the acquisition of controlling rights which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion in 2018 and therefore the transaction met the thresholds for notification as provided in the Merger Threshold Guidelines.
3. The acquirer was a special purpose vehicle controlled by entities with interests in the business of import into Kenya and logistics. On the other hand, the target undertook designs, built and operated state of the art carrier neutral data centres to serve a broad spectrum of clients such as telecom carriers, ISPs and peering points, IT and cloud providers, enterprise and financial services customers. Therefore, the relevant product market was the market for data centres. The target offered its services to its customers through data centres located in Nairobi and Mombasa. However, its customers could be located across Kenya and internationally connecting to the data centre through internet service providers (ISP). Therefore, the relevant geographic market was national.
4. Post-merger, there would be no change in the market shares since the acquirer had no similar business in Kenya and as such, the transaction was not likely raise competition concerns. The proposed transaction was unlikely to lead to substantial lessening or prevention of competition in the market for data centres in Kenya.
5. The proposed transaction involved investment at the shareholder level and was expected to inject more capital for expansion and venturing into new international markets such as Mozambique, South Africa, Nigeria and Tanzania. That was likely to make the business more competitive. The proposed transaction was unlikely to lead to any negative public interest issues.

Determination

The Authority unconditionally approved the acquisition of minority shareholding of 20% with controlling rights in the target by the acquirer.

Gazette Notice No 9337, Dated March 5, 2020 Vol.CXXII-No.199 of 13th November, 2020

Acquisition of a minority 14.02% shareholding with controlling interest in Blowplast Limited by Kibo Plastic Packaging Limited

The proposed transaction involved the acquisition of 14.02% shareholding with controlling interest in Blowplast Limited by Kibo Plastic Packaging Limited resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2015 and therefore the transaction met the thresholds for mandatory notification as was provided in the Merger Threshold Guidelines. The Authority further found that the relevant market for the purpose of the transaction was the national market for the manufacture of plastics. The Authority also found that the transaction was unlikely to cause negative competition and public interest concerns.

29. Merger between Kibo Plastic Packaging Limited and Blowplast Limited

CAK/MA/04/501/A

May 31,2017

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of 14.02% shareholding in a company and certain controlling rights - where the combined turnover of the acquirer and the target was above KES. one billion - whether a proposed transaction which would result in the acquisition of certain controlling rights in a target company amounted to acquisition and control of the company - whether the proposed transaction met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines - whether a proposed merger transaction would raise competition concerns where there was no change in the market structure and concentration - whether a proposed merger the transaction where all the employees of a target company would be retained would lead to negative public interest concerns* **-** *Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant market in a merger transaction where the acquirer had no activities in Kenya but its related entities were involved in forwarding and logistics services while the target was involved in manufacture of plastics.*

Brief facts

Kibo Plastic Packaging Limited (the acquirer) was incorporated in Mauritius as a wholly owned subsidiary of Kibo Fund II LLC (the fund). The fund indirectly through VK Logistics (Mauritius) controlled two companies which were involved in forwarding and logistics services. The acquirer was newly incorporated but the related entities generated a turnover of above KES. one billion in Kenya in 2015.

Blowplast Limited (the target) was a company incorporated in Kenya that was involved in the manufacture of plastics. The target's turnover for 2015 was KES. above one billion. The parties sought the Authority's approval for the acquisition of 14.02% shareholding with controlling interest in the target by the acquirer.

Issues

i. Whether a proposed transaction which would result in the acquisition of controlling rights in a target company amounted to acquisition of control of the company.

ii. Whether a proposed merger transaction where the combined turnover of the acquirer and the target was above KES. one billion in 2015 met the thresholds for mandatory notification as was specified in the Merger Threshold Guidelines.

iii. What was the relevant product market in a merger transaction where the acquirer had no activities in Kenya but its related entities were involved in forwarding and logistics services while the target was involved in the manufacture of plastics?

iv. Whether a proposed merger transaction would raise competition concerns where there was no change in the market structure and concentration.

v. Whether a proposed merger transaction where all the employees of a target company would be retained would lead to negative public interest concerns.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction involved the acquisition by the acquirer of 14.02% shareholding in the target and certain key strategic veto rights relating to approval of the business plan and annual budget. That would result in establishment of control by the acquirer over the target business.
2. The combined turnover of the merging parties was above KES. one billion in 2015 and therefore the transaction met the thresholds for mandatory notification as provided for by the Merger Threshold Guidelines.
3. The acquirer had no activities in Kenya but its related entities were involved in forwarding and logistics services while the target was involved in the manufacture of plastics. Therefore, the relevant market for the proposed transaction was the national market for manufacture of plastics.
4. There were over 100 players in the market for the manufacture of plastics. The target had a market share of 40%. Additionally, according to data from Kenya Revenue Authority in the year 2015, Kenya had about 515 licensed port logistics companies as well as clearing and forwarding companies while the Kenya Transporters Association had a membership of over 900 members. That indicated that the market was contestable and unconcentrated with the acquirer having negligible market shares. Therefore, customers could easily switch to other providers in case of increase in prices.
5. The merged entity would not effectively be able to apply portfolio effect across the manufacture of plastics and forwarding and logistics markets. There was no likelihood of the merged entity exercising market power by foreclosing other customers who had been using the forwarding and logistics services of the fund through subsidiaries of VK Logistics.

6. Post-merger, there would be no change in the market structure and concentration since only the target was present in the market for manufacture of plastics and therefore the transaction would not lead to competition concerns. The proposed transaction was unlikely to lead to negative public interest concerns as per the share subscription agreement signed by the parties and dated February 10, 2017, all the employees would be retained since the transaction involved capital injection through the fund.

Determination

The Authority unconditionally approved the acquisition of 14.02 % with controlling interest in the target by the acquirer.

Gazette Notice No 7256, Dated June 12, 2017 Vol.CXIX-No.105 of 28th July, 2017

Acquisition of 10.68% of the issued shares in I&M Holdings Limited by CDC Group PLC with certain veto rights

The proposed transaction involved the acquisition of 10.68% in I & M Holdings Limited by CDC Group PLC with certain veto rights resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2015 and therefore the transaction qualified for mandatory notification as provided for in the Merger Threshold Guidelines. The Authority further found that the relevant market for the purpose of the transaction was the national market for provision of banking services. The Authority also found that the transaction was unlikely to lead to negative public interest concerns.

30. Merger between CDC Group PLC and I&M Holdings Limited

CAK/MA/04/410/A

June 27, 2016

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of 10.68% of issued share capital of a company and certain veto rights - where the proposed transaction was at shareholder level - where the combined turnover of the acquirer and the target was above KES. one billion - whether a proposed transaction which would result in the accrual of certain veto rights amounted to acquisition of control within the meaning of the Act - whether the proposed transaction met the thresholds for mandatory notification as specified in the Merger Threshold Guidelines - whether a transaction at shareholder level would lead to employment losses and thus negative public interest concerns - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant product market in a transaction where the acquirer was involved in development finance while the target offered banking services.*

Brief facts

CDC Group PLC (the acquirer) was a development finance institution wholly owned by the United Kingdom Government and was indirectly involved in property development, power production and provision of education services. The acquirer did not directly or indirectly control any undertakings in Kenya. The role of the acquirer was to support the building of businesses throughout Africa and South Asia by creating jobs and making a lasting difference to people's lives in the countries in which it invested directly.

I&M Holdings Limited (the target) was incorporated in Kenya and provided through its subsidiaries banking services. The target was a non-operating holding company. Through its subsidiaries, it mainly dealt with banking services with a specific focus in large and middle-sized enterprises. The proposed transaction was an acquisition by the acquirer of 10.68% of the issued share capital of the target. The acquisition would result in the accrual of certain veto rights. The parties had sought the Authority's Approval for the proposed transaction.

Issues

i. Whether a proposed transaction which would result in the accrual of certain veto rights amounted to acquisition of control within the meaning of the Act.

ii. What was the relevant product market in a transaction where the acquirer was involved in development finance while the target offered banking services?

iii. Whether a transaction at shareholder level would lead to employment losses and thus negative public interest concerns.

iv. Whether a proposed transaction where the combined turnover of the acquirer and the target was above KES. one billion met the thresholds for mandatory notification as was provided for in the Merger Threshold Guidelines.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;
(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);
(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an acquisition by the acquirer of 10.68% of the issued share capital of the target. That acquisition would result in the accrual of certain veto rights which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion in 2015 and therefore the transaction qualified for mandatory notification as provided for in the Merger Threshold Guidelines.
3. The acquirer was involved in development finance while the target offered banking and investment advisory services. Therefore, the relevant market for the purpose of the transaction was the national market for provision of banking services.
4. The market for banking services in Kenya was regulated and licensed by the Central Bank of Kenya. No bank was dominant in either the lending or deposit side of the market. Following the acquisition of GIRO Commercial Bank in 2015, the target controlled an estimated market share of 4.8% and and this would not change post transaction.
5. The transaction was unlikely to lead to negative public interest concerns as the proposed transaction was at the shareholder level. Therefore, it was not anticipated to result in any employment losses and would further improve customer satisfaction and the overall stability in the Kenyan banking sector.

Determination:

The Authority unconditionally approved the acquisition of minority shareholding of 10.68% with certain veto rights in the target by the acquirer.

Gazette Notice No 5993, Dated July 27, 2016 Vol.CXVIII-No.87 of 5th August, 2016

Approval of mergers with conditions to remedy competition and public interest concerns

The acquisition of the entire issued share capital of Associated Vehicle Assemblers Limited by Simba Corporation Limited

The proposed transaction involved the acquisition of an additional 50% of the shares in Associated Vehicle Assemblers Limited (the target) by Simba Corporation Limited (the acquirer). The acquisition would lead to the acquirer being the sole shareholder of the target. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2016 and therefore the proposed transaction met the thresholds for mandatory notification as provided in the Merger Threshold Guidelines. The Authority further found that the relevant product markets for the purpose of the proposed transaction were the market for the assembly of motor vehicle and the market for the distribution of commercial motor vehicles. The Authority noted that there existed a vertical relationship between the acquirer and the target. The Authority also found that the transaction was likely to lead to competition concerns. The merger was found unlikely to lead to negative public interest concerns.

31. Merger between Simba Corporation Limited and Associated Vehicle Assemblers Limited

CAK/MA/04/539/A

August 29, 2017

Competition Law *– mergers and acquisitions – acquisition of 50% of shares in the target company leading to change of control from joint to sole control of the shareholding of the target company - where the combined turnover of the acquirer and the target companies was above KES. one billion - whether the transaction was a merger as defined by the Act - whether the proposed transaction met the thresholds for mandatory notification under the Merger Threshold Guidelines - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant product market analysis - what was the relevant product market in a transaction where the acquirer distributed, serviced and sold parts of vehicles while the target engaged in the assembly of commercial motor vehicles.*

Competition Law *- mergers and acquisitions - acquisition of sole control in a company - where there existed a vertical relationship between the acquirer and the target companies -whether the acquisition of sole control in a company where there existed a vertical relationship between the acquirer and the target would lead to vertical competition and/or public interest concerns.*

Brief facts

Simba Corporation Limited (the acquirer) was a company incorporated in Kenya with diversified interests in automotive and generator distribution, real estate and hospitality. The acquirer's motor division accounted for 85% of its revenue. It represented international brands

and franchises such as Mitsubishi, FUSO, BMW, Mahindra, Renault, AVIS, SAME tractors and AKSA generators. Conversely, Associated Vehicle Assemblers Limited (the target), a company incorporated in Kenya, was involved in the assembly of commercial motor vehicles including trucks, buses and pickups for other motor vehicle companies.

The acquirer sought to acquire additional 50% of shares in the target following the intended exit of Marshalls East Africa Limited from the joint venture, making the acquirer the sole shareholder. The parties sought approval from Authority for the acquisition of sole control by the acquirer.

Issues:

i. Whether a proposed transaction which would result in change from joint control to sole control amounted to acquisition of control within the meaning of the Act.
ii. Whether a proposed transaction where the combined turnover of the acquirer and the target was above KES. one billion met the thresholds for mandatory notification under the Merger Threshold Guidelines.
iii. What was the relevant product market in a transaction where the acquirer distributed, serviced and sold parts of vehicles while the target engaged in the assembly of commercial motor vehicles?
iv. Whether the acquisition of sole control in a company where there existed a vertical relationship between the acquirer and the target would lead to competition and/or public interest concerns.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

"merger" *means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486*);*

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed acquisition would lead to the acquirer being the sole shareholder of the target. That acquisition would result in sole control which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion for the preceding year 2016 and therefore the transaction qualified for mandatory notification as provided in the Merger Threshold Guidelines.
3. The acquirer distributed, serviced and sold parts of vehicles while the target engaged in the assembly of commercial motor vehicles including trucks, buses and pickups for other motor vehicle companies. Therefore, the relevant product markets for the proposed acquisition were the markets for assembly of commercial motor vehicles; and the market for distribution of commercial motor vehicles including trucks, buses and pickups. There existed a vertical relationship between the acquirer and the target, since the target assembled the FUSO and Mitsubishi for the acquirer's distribution.
4. Post-merger, there would be no change in the market structure and concentration since the acquirer had no assembling business. Additionally, there would be no change in the market structure and concentration in the distribution of commercial vehicles as the target was not competing directly in the same market but competed through the acquirer's brands.

The transaction would unlikely lead to competition concerns in the market for distribution of commercial vehicles including trucks since the target was not in similar business.

5. Based on the fact that the acquirer would wholly own the target, post-merger there was likelihood of:
   a. market foreclosure for other brands (Scania, TATA, Toyota and Hino) that utilized 36.8% of the targets operating capacity;
   b. locking out any other potential entrants that might want to use the plant such as Volvo, Scania and Beiben that were in negotiations to use the target's plant; and
   c. change of the terms for the other brands that utilized the target's plant.
6. The proposed transaction was likely to raise concerns in the market for the assembly of commercial motor vehicles, specifically on how third-party brands would be treated, or allowed to utilize the target's plant. Hence there was a need for cushioning third party brands from being foreclosed from the plant.
7. The employees of the target were to be retained by the acquirer upon completion of the transaction. Additionally, neither the acquirer nor the target foresaw any impact on SME's ability to compete in the marketplace. The transaction was also unlikely to raise any negative public interest concerns.

Determination:

i) *The Authority approved the acquisition of the entire issued share capital of the target by the acquirer subject to the following conditions:*
   a) *that the merged entity would keep the plant open to existing third party brands and any other competing brand that would wish to use the target's plant for assembly, for as long as there existed excess capacity at the plant; and*
   b) *that the merged entity honoured the existing assembly contracts with third-party brand assemblers at the target's plant.*

Gazette Notice No 1131, Dated October 11, 2017 Vol.CXIX-No.171 of 17th November, 2017

Acquisition of 100% of the issued share capital of De La Rue Kenya Limited by HID Corporation Limited

The proposed transaction involved the acquisition of 100% of the issued share capital of De La Rue Kenya Limited by HID Corporation Limited, where the latter established control over the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2018 and therefore the transaction qualified for mandatory notification as provided in the Merger Threshold Guidelines. The Authority further found that the relevant product market for the purpose of the transaction was the national market for provision of electronic secure printing solutions. The Authority also found that the transaction was unlikely to raise competition concerns and negative public interest concerns. However, the Authority noted that the target had contracts with Government entities.

32. Merger between HID Corporation Limited and De La Rue Kenya Limited

CAK/MA/04/900/A

July 31, 2019

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of 100% of the issued share capital of a company - where the combined turnover of the acquirer and the target was above KES. one billion - whether the proposed transaction amounted to acquisition of control within the meaning of the Act - whether the proposed transaction met the thresholds for mandatory notification provided for in the Merger Threshold Guidelines - whether a merger transaction would raise competition concerns where the post-merger market shares were substantially low and where there was stiff competition from other global participants in the relevant market - whether a proposed merger in which no employees would be affected negatively by the transaction the merger would lead to negative public interest concerns - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant product market analysis - what was the relevant product market in a transaction where the acquirer was involved in provision of electronic government identity solutions while the target was involved in the supply of electronic passport and ID card solutions to the Government of Kenya.*

Brief facts

HID Corporation Limited (the acquirer) was incorporated in England and was engaged in the business of offering solutions primarily in identity and access management and identity technology solutions. The acquirer had no contracts with the Government of Kenya and its turnover was generated through provision of identity and access management solutions. According to the audited financial statements, for the preceding year, 2018, the acquirers turnover was above KES. one billion.

De La Rue Kenya Limited (the target) was incorporated in Kenya and was involved in the supply of electronic passport and ID card solutions to the Government of Kenya.

The parties had sought for approval of the acquisition of 100% of the issued share capital of the target by the acquirer.

Issues

i. Whether a proposed transaction which would result in the acquisition of 100% shareholding amounted to acquisition of control within the meaning of the Act.

ii. What was the relevant product market in a transaction where the acquirer was involved in the provision of electronic government identity solutions while the target was involved in the supply of electronic passport and ID card solutions to the Government of Kenya*?*

iii. Whether a proposed transaction where the combined turnover of the acquirer and the target was above KES. one billion met the thresholds for mandatory notification provided for in the Merger Threshold Guidelines.

iv. Whether a merger transaction would raise competition concerns where the post-merger market shares were substantially low and where there was stiff competition from other global participants in the relevant market.

v. Whether a proposed merger in which no employees would be affected negatively by the transaction would lead to negative public interest concerns.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) malgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486*);*

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an acquisition by the acquirer of 100% of the issued share capital of the target. That transaction would result in the acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion in 2018 and therefore the transaction qualified for mandatory notification as provided in the Merger Threshold Guidelines.
3. The acquirer was involved in the business of offering solutions primarily in identity and access management and identity technology solutions while the activity of the target was the supply of electronic passport and ID card solutions to the Government of Kenya**.** Therefore, the relevant market for the purpose of the transaction was the national market for electronic secure printing solutions.
4. Post-merger, the merged entity would have market shares of 11%, 2% and 6% for e-passports, e-ID and e -Government identity solutions respectively. Additionally post-merger market shares were substantially low in each category and therefore not likely to raise competition concerns. In addition, there was stiff competition from other global participants in the same market. Therefore, the proposed acquisition of 100% of the issued share capital of the target by the acquirer was unlikely to raise competition concerns.

5. No employees would be affected negatively by the transaction and therefore the transaction was unlikely to raise any negative public interest issues. However, since the entity had contracts with Government of Kenya entities there was need for a condition to ensure that the contract terms were adhered to.

Determination

i. *The Authority approved the acquisition of 100% of the issued share capital of the target by the acquirer on condition that all the existing contracts that the target had with the Kenyan Government would be honoured.*

Gazette Notice No 8122, Dated August 5, 2019 Vol.CXXI-No.113 of 30th August, 2019

Acquisition of control in Gulf Energy Holdings Limited by Kenol-Kobil PLC

The proposed transaction involved the acquisition of the entire issued share capital of Gulf Energy Holdings Limited by Kenol-Kobil PLC resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2018 and therefore the transaction met the thresholds for mandatory notification as provided in the Merger Threshold Guidelines. The Authority further found that the relevant markets for the purpose of the transaction were: the national market for the importation of petroleum products under the open tender system; the national market for the storage of petroleum products; retail markets for petroleum products; lubricants, LPG and petroleum fuels; and market for jet fuel. The Authority also found that the transaction was unlikely to lead to the prevention or substantial lessening of competition in all the identified markets. In regard to public interest issues, the Authority found that the transaction was likely to the lead to loss of jobs in the target, negatively affect small and medium enterprises' operating in the retail service station of the target and negatively affect contracts that the target had entered into with operators of its retail service stations.

33. Merger between Gulf Energy Holding Limited and Kenol-Kobil Limited

CAK/MA/04/950/A

November 28, 2019

Competition Law *– mergers and acquisitions – acquisition of a control - where there was a proposed transaction for acquisition of the entire issued share capital of a company - whether the proposed transaction which would result in acquisition of the entire issued share capital amounted to acquisition of control within the meaning of the Act - whether the proposed transaction by the parties met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines - whether a transaction where the activities of the parties overlapped in the importation, storage and the retail of petroleum products would lead to negative competition and public interest concerns - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant market in a transaction where the activities of the acquirer and the target overlapped in the importation, storage and the retail of petroleum products.*

Brief facts

Kenol-Kobil PLC (the acquirer) was a wholly-owned subsidiary of Rubis Energie SAS (Rubis). The acquirer was involved in importing, storage, retailing, marketing and distributing of refined automotive fuels, lubricants, liquefied petroleum gas and households' fuels in Kenya, Uganda, Ethiopia, Zambia, Rwanda and Burundi through local subsidiaries. Gulf Energy Holdings Limited (the target) was a company incorporated in Kenya and was involved in the

retail, oil marketing made up of 41 service stations, sale of petroleum products to commercial and industrial establishments, export and transit markets, and retail service operations, trading in lubricants, liquefied petroleum gas (LPG) and aviation fuels.

The parties had applied for approval of the acquisition of 100% shareholding in the target by the acquirer. Through the acquisition, the acquirer would gain control of the target.

Issues

i. What was the relevant market in a transaction where the activities of the acquirer and the target overlapped in the importation, storage and retail of petroleum products?
ii. Whether a transaction where the activities of the parties overlapped in the importation, storage and the retail of petroleum products would lead to negative public interest concerns.
iii. Whether a proposed transaction for acquisition of the entire issued share capital of a company met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines.
iv. Whether the merger transaction raised any competition and/or public interest concerns.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change

in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486)*;*

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an acquisition by the acquirer of the entire issued share capital of the target which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion in 2018 and therefore the transaction met the thresholds for mandatory notification as provided in the Merger Threshold Guidelines.
3. The parties' activities overlapped in the importation, storage and the retail of petroleum products. Therefore, the relevant markets for the purpose of the transaction were the national market for the importation of petroleum products under the open tender system (OTS); the market for the storage of petroleum products; retail markets for petroleum products; lubricants, LPG and petroleum fuels; and market for jet fuel.
4. The importation of petroleum products into Kenya was centrally coordinated by the Ministry of Energy and Petroleum through the OTS at the port of Mombasa and had been in operation since 2005. Information obtained from Energy Regulatory Commission (ERC) 2018, indicated that there were 13 oil marketing companies (OMCs) that participated in the monthly OTS tenders out of the possible 96 OMCs.
5. Based on the fact that importation through OTC was regulated by Ministry of Energy and Petroleum, importation was planned and covered the requirements for a projected period under the OTS, and monthly invitation to tender were issued to all OMCs which may bid for all or specific petroleum cargoes defined in the tender, the proposed transaction

was unlikely to lessen or prevent competition in the participation of OMCs in OTS and subsequently the upstream market for the importation of petroleum products into Kenya.

6. Post-merger, the transaction was unlikely to affect the storage arrangements as the target was in a different line of storage, dealing in heavy fuel oil while the acquirer was mainly focused on the other petroleum products. Additionally, the merged entity would face competition for storage space from the other entities with larger storage capacities. Moreover, the merger would enable the target to gain access to the acquirer's terminal in Mombasa and enable it to grow its retail business in the area by reducing its cost of storage and supply.
7. The proposed transaction was unlikely to raise any competition concerns in the storage business as the parties stored different products and it would not disrupt the hospitality arrangements currently existing. Post transaction there would be a slight market accretion of less than 4% and the merged entity, with less than 10% of the market share, would face competition from the other market leaders.
8. Additionally, most of the OMCs preferred to service the lubricant demands of their own retail stations and therefore, the market players would continue with that arrangement post transaction. The proposed transaction was thus unlikely to lessen or prevent competition in the market for the supply of lubricants. The proposed transaction was also unlikely to substantially lessen or prevent competition in the market for LPG.
9. The proposed transaction was unlikely to lead to a substantial lessening or prevention of competition in the market for jet oil. The market was highly dependent on bidding and winning contracts. Additionally based on the contractual nature of the market, the acquirer's market share was not permanent and may cease to exist given a change of contract by either Kenya Airways or Aviation Services Management.
10. The downstream market of retail of petroleum products was regulated by the Energy Regulatory Commission (ERC), where the maximum retail pump prices of petroleum products were determined in accordance with the formula set out by ERC. The proposed transaction was unlikely to lead to a substantial lessening or prevention of competition in the downstream market for retail petroleum products.
11. The transaction was likely to lead to redundancies especially at the Gulf head office and at the retail stations. To mitigate against the same, the parties committed that, 24 months from the date of implementation of the transaction; no steps would be taken to declare any employee redundant; basic remuneration for all the employes would not be reduced; and other employment benefits would, taken as a whole, be no less favourable than those provided as at the date of signing of the agreement.
12. The proposed merger was likely to affect the arrangements between the small and medium enterprises (SMEs) and the target and thus, there was a need to ensure that the merged entity retained the current agreements with the SMEs. Most of the target's retail stations fell within dealer owned – dealer operated and company owned – dealer operated petrol stations. The dealer in the two scenarios identified a prime location, got into a contractual agreement with the company, carried out investments to see that the station was set up and then the company supplied it with pumps and the product. The dealer was prohibited from stocking products from other OMCs besides that of the OMC it was contracted to supply.
13. The proposed merger was likely to affect those arrangements. Therefore, since the dealer

carried out huge investments to set up the station and attract customers into it, it was prudent that the merged entity ensured that the contractual arrangement was not affected by the merger for the length of the contract.

Determination

i. *The Authority approved the acquisition of control in the target by the acquirer subject to the following conditions:*
   a. *For a period of 24 months from the date of implementation of the proposed transaction, the merged entity would not declare any of the 102 employees of the target undertaking redundant and ensure that basic remunerations and other benefits to all the employees transferred to the merged entity were not less favorable than those provided at the date of the signing of the initial agreement.*
   b. *For the duration of the existing contract between the target and the SMEs operating within its retail stations, the merged entity would ensure that those SMEs enjoyed the same benefits within the contract as provided at the signing of the contract.*
   c. *The merged entity would ensure that the contracts entered into between the target and the retail station dealers were maintained for the length of such contracts.*
   d. *The merged entity would furnish the Authority with annual reports regarding the aforementioned conditions for a duration of 24 months or up to the expiry of the longest of any of the existing contracts between the target and the SMEs or the dealers, whichever was longer.*

Acquisition of control of all the Kenyan business, assets and properties of ARM Cement PLC (Under Administration) by National Cement Company Limited

The proposed transaction involved the acquisition of control of all the Kenyan business, assets and properties of ARM Cement PLC by National Cement Company Limited, where the latter established control over the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2017 and therefore the transaction met the thresholds for mandatory notification as provided in the Merger Threshold Guidelines. The Authority further found that the relevant markets for the purpose of the transaction were the national upstream market for limestone and clinker, and national market for manufacture and distribution of cement. The Authority also found that the transaction was likely to lead to competition concerns in the market for limestone and clinker. Moreover, the Authority found that the transaction would lead to negative public interest concerns.

34. Merger between National Cement Company Limited and ARM Cement Limited

CAK/MA/04/878/A

October 4, 2019

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition all the business, assets and property of a company - where the combined turnover of the parties was above KES. one billion – where the proposed transaction was likely to lead to redundancies among employees - whether the acquisition amounted to acquisition of control within the meaning of the Act - whether the proposed transaction met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines - whether a transaction where the activities of the merging parties overlapped would lead to substantial lessening or prevention of competition and negative public interest concerns - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant market in a transaction where the acquirer was involved in manufacturing and distribution of cement while the target was involved in manufacture and sale of cement, mining and processing of industrial minerals and chemicals, trading in other building products and sale of fertilizers.*

Brief facts

The National Cement Company Limited (the acquirer) was incorporated in Kenya and was engaged in the manufacturing and distribution of cement in Kenya. ARM Cement Limited (the target), was a company incorporated in Kenya and was under administration by UBA Kenya Bank Limited. The target's activities were the manufacture and sale of cement, mining and processing of industrial minerals and chemicals, trading in other building products and sale of fertilizers.

The proposed transaction involved the purchase of the Kenyan business, assets and properties of the target by the acquirer. The parties sought for approval of the acquisition of the business, assets and property of the target by the acquirer.

Issues

i. Whether a proposed transaction which would result in the acquisition of all business, assets and property amounted to acquisition of control within the meaning of the Act.

ii. Whether a proposed transaction where the combined turnover of the parties was above KES. one billion met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines.

iii. What was the relevant market in a transaction where the acquirer was involved in manufacturing and distribution of cement while the target was involved in the manufacture and sale of cement, mining and processing of industrial minerals and chemicals, trading in other building products and sale of fertilizers?

iv. Whether a proposed merger transaction where the activities of the acquirer and target (under administration) overlapped would lead to substantial lessening or prevention of competition.

v. Whether a proposed transaction which was likely to lead to redundancies among employees would lead to negative public interest concerns.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover "market" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an acquisition by the acquirer of all the business, assets and property of the target, which would result in the acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion in 2017 and therefore the transaction met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines.
3. The parties' activities overlapped in the production and distribution of cement and related products. Therefore, the relevant product markets were: upstream market for limestone and clinker; and market for manufacture and distribution of cement. The parties distributed their products throughout Kenya and thus the relevant geographical market was national.
4. Post-merger, the merged entity, made up of the target, the acquirer and Cemtech would control 81% of the total identified limestone available for exploration in Kenya and therefore acquire dominance. Additionally, the *ex-ante* nature of the merger regime required that a forecast was carried out on the post-merger structure and concentration of the market based on statistics available beforehand because of the uncertainty of relying on information that had not yet been revealed and tested.
5. The Authority took cognizance of the fact that despite the variance in the type of limestone,

the entities were able to produce at relatively similar costs of production, as informed by the close pricing of cement intimating that the various limestone types did not necessarily impact on the strength and cost of producing cement. The proposed transaction was likely to lead to competition concerns in the upstream market for clinker as it would concentrate 81% of the total limestone minerals identified in Kenya to the merged entity.

6. Post-merger, clinker manufacturing and consumption in Kenya was unlikely to change as the entities would continue with their operations *ceteris paribus*. However, availability of limestone and terms of acquiring clinker locally were likely to be affected by the proposed transaction. Therefore, post-merger, the merged entity would have a combined market share of approximately 24% and would face competition from the other players. The proposed transaction was unlikely to affect the downstream market for cement manufacturing in Kenya provided that the availability of limestone and clinker was assured. The proposed transaction was likely to negatively affect competition in the upstream markets for limestone in Kenya.
7. Concerning public interest issues, the proposed transaction was likely lead to redundancies. Additionally, being a failing firm, the Authority was desirous in ensuring that the crucial assets of the target were kept in the market and remained productive and thus salvaging employment. The proposed transaction was thus likely to lead to negative public interest concerns.

Determination

i. *The Authority approved the acquisition of control of the all the business, assets and property of the target by Simba Cement Company Limited subject to the following conditions:*
   a) *Following the completion of the proposed transaction, the acquirer would retain at least 557 (95%) of the 587 employees of the target post-merger for a period of one year.*
   b) *The merged entity would divest 41% of its total limestone allocation in Kajiado and Makueni and revert the licenses to the Government.*
   c) *The merged entity would continue supplying clinker to other cement manufacturing entities within the existing terms.*

Gazette Notice No. 10521, dated October 7, 2019 Vol.CXXI-No.152 of 8th November, 2019

Approval of merger with conditions to remedy public interest concern

Acquisition of the entire issued share capital in Arysta Lifescience Inc. by UPL Corporation Limited

The proposed transaction involved the acquisition of the entire issued share capital of Arysta Lifescience Inc. by UPL Corporation Limited, where the latter would establish control over the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2018 and therefore the transaction met the thresholds for mandatory notification as specified in the Merger Threshold Guidelines. The Authority further found that the relevant markets for the purpose of the transaction were the national markets for insecticides, fungicides and herbicides. In addition, the Authority found that the transaction was unlikely to raise competition concerns but was likely to lead to negative public interest concerns.

35. Merger between UPL Corporation Limited and Arysta Lifescience Inc.

CAK/MA/04/757/A

December 7, 2018

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of the entire issued share capital in a company – where the combined turnover of the merging parties was above KES. one billion - whether a proposed transaction which would result in the acquisition of the entire issued share capital of the company amounted to acquisition of control within the meaning of the Act - whether the proposed transaction met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines - whether a proposed merger transaction was likely to lead to lessening or prevention of competition in the markets where the merged entity would have a low market share and also face competition from other competitors - whether a proposed merger transaction was likely to raise public interest concerns on small medium enterprises where the acquiring entity had a different distribution model and packaging of its products - Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant product market in a proposed merger transaction where activities of the acquiring entity and the target entity overlapped in the supply of insecticides, fungicides and herbicides.*

Brief facts

UPL Corporation Limited (the acquirer) was registered in Mauritius and was part of the UPL Group, which was active worldwide in the manufacture of crop protection products and had no manufacturing facility in Kenya. The acquirer supplied insecticides, fungicides, herbicides, fumigants and soil conditioners through agents who had registered specific products with Pest

Control Products Board (PCPB). Arysta Lifescience Inc. (the target) was incorporated in the United States of America and had a local subsidiary, Arysta Lifescience Limited Kenya, which supplied agrochemicals, which included; insecticides, herbicides, fungicides, bio-stimulants and other related products.

The proposed transaction was a global transaction in the agrochemical supplies market and involved the acquirer acquiring 100% of all the issued and outstanding share capital in the target. The parties had sought the Authority's approval for the proposed transaction.

Issues

i. Whether a proposed transaction which would result in the acquisition of the entire issued share capital amounted to acquisition of control within the meaning of the Act.
ii. What was the relevant product market in a proposed merger transaction where activities of the acquiring entity and the target entity overlapped in the supply of insecticides, fungicides and herbicides?
iii. Whether a proposed merger transaction was likely to lead to lessening or prevention of competition in the markets where the merged entity would have a low market share and also face competition from other players.
iv. Whether a proposed merger transaction was likely to raise public interest concerns on small medium enterprises where the acquiring entity had a different distribution model and packaging of its products.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover market;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change

in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—
(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;
(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;
(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486)*;*
(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or
(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an acquisition by the acquirer of the entire issued share capital of the target which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties for 2017 was above KES. one billion and therefore the transaction met the threshold for mandatory notification as provided for in the Merger Threshold Guidelines.
3. The activities of the acquirer and the target overlapped in the supply of insecticides, fungicides and herbicides. Therefore, the relevant markets for the purpose of the transaction were the national markets for insecticides, fungicides and herbicides.
4. The proposed transaction was unlikely to lead to substantial lessening or prevention of competition in the markets for fungicides, herbicides and insecticides in Kenya because:
   a. in the market for insecticides since the merged entity would have a market share of 18% and hence enable it to offer credible competition to the leading players of the market;
   b. in the market for fungicides since the merged entity would have a market share of 8.4% which was low and it would face competition from other players controlling 91.6% of the market; and
   c. in the market for herbicides since the merged entity would have a market share of 2.9%, which was low, and would face competition from other players with a combined market share of 97.1%.
5. The merger was likely to raise public interest concerns in regard to the effect on small

medium enterprises (SME's), specifically on the distribution model and packaging of agrochemicals products in the Kenyan market in that the target:

a. distributed its products in small packaging ranging from 10ml and 50g, while competitors' packages were from 1litre and 1kilogram.
b. in the distribution of its products, the target had a registered local agent, Arysta Lifescience Kenya, and at the same time it used other agents. Arysta Lifescience Kenya actively distributed the target's products through country distributors and stockist, and organized farmer trainings on agrochemicals which UPL did not do.

Determination

i. *The Authority approved the acquisition of 100% of the issued share capital of the target by the acquirer on condition that for a period of 12 months from the date of the closing of the transaction, the merged entity:*
   a. *would continue packaging the target's agrochemical products in small packages ranging from 50ml/50g to 1litre/1kilogram.*
   b. *would maintain the distribution model of the target, which entailed; a national agent; distributors and stockists, and the organization of farmers' trainings on agrochemical products.*
   c. *would submit a compliance report, to the Authority after a period of 12 months.*

Gazette Notice No. 597, dated December 17, 2018 Vol.CXXI-No.12 of 25th January, 2019

Acquisition of minority shareholding with joint control rights

Acquisition of the business and assets of Lino Stationers Limited by Sai Office Supplies Limited

The proposed transaction involved the acquisition of various assets and the business of Lino Stationers Limited by Sai Office Supplies Limited resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2017 and therefore the transaction met the thresholds for mandatory notification as was provided for by the Merger Threshold Guidelines. The Authority further found that the relevant market for the purpose of the transaction was the national market for importation, distribution and retail of office equipment. In addition, the Authority found that the transaction was unlikely to lead to substantial lessening or prevention of competition and negative public interest concerns. Further, the Authority found that the transaction was likely to raise employment concerns.

36. Merger between Sai Office Supplies Limited and Lino Stationers Limited

CAK/MA/04/410/A

June 27, 2016

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of the assets and business of a company involved in the importation, distribution and retail of office equipment – where the combined turnover of the merging parties was KES. above one billion - whether the proposed transaction met the thresholds for notification as was specified in the Merger Threshold Guidelines - whether the proposed merger transaction was likely to lessen or prevent competition in the market for the importation, distribution and retail of office equipment where there was no restriction in the importation of the same - whether a proposed merger transaction where there was duplication of roles among the employees raised negative public interest concerns* **-** *Competition Act (Cap 504), sections 2 and 41.*

Competition Law *– mergers and acquisitions – relevant market analysis - what was the relevant market in a transaction where the acquirer was involved in the importation, wholesale and distribution of office automation products, stationery, IT and media peripherals, and paper products while the target was an importer, distributor and retailer of stationary, IT and furniture items in Kenya specializing in supply of office stationary, supplies and furniture.*

Brief facts

Sai Office Supplies Limited (the acquirer) was a company incorporated in Kenya and was involved in importation, wholesale and distribution of office automation products, stationery, IT and media peripherals, and paper products. Lino Stationers Limited (the target) was a company incorporated in Kenya and was an importer, distributor and retailer of stationary, IT and furniture items in Kenya specializing in supply of office stationary, supplies and furniture. The proposed transaction, pursuant to a business transfer agreement, was an acquisition

of various assets and the business of the target by the acquirer. The assets included fixed equipment, movable equipment, stock, work in progress, the business as going on concern, business goodwill, business records, business information, intellectual property, literature and contracts and all other assets used for the purpose of the business. The parties sought the Authority's Approval for the proposed transaction.

Issues

i. Whether a proposed transaction where the combined turnover of the parties was above KES. one billion met the thresholds for notification as provided for in the Merger Threshold Guidelines.
ii. What was the relevant market in a transaction where the acquirer was involved in importation, wholesale and distribution of office automation products, stationery, IT and media peripherals, and paper products while the target was an importer, distributor and retailer of stationary, IT and furniture items in Kenya specializing in supply of office stationary, supplies and furniture?
iii. Whether a proposed merger transaction where there was duplication of roles among the employees raised negative public interest concerns.
iv. Whether a proposed merger transaction was likely to lessen or prevent competition in the market for the importation, distribution and retail of office equipment where there was no restriction in the importation of the same.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486);

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The combined turnover of the merging parties was above KES. one billion in 2017 and therefore qualified the transaction for notification as provided for in the Merger Threshold Guidelines.
2. The acquirer was involved in importation, wholesale and distribution of office automation products, stationery, IT and media peripherals, and paper products while the target was an importer, distributor and retailer of stationary, IT and furniture items in Kenya specializing in supply of office stationery, supplies and furniture. Therefore, the relevant market for the purpose of the transaction was the national market for importation, distribution and retail of office equipment.
3. There were no restrictions in the importation and distribution of office equipment as long as the equipment was certified by Kenya Bureau of Standard (KEBS), and met user requirements of language and aftersales support. Therefore, the proposed transaction was unlikely to lessen or prevent competition in the market for the importation, distribution and retail of office equipment.
4. The proposed transaction was likely to lead to negative public interest concerns. Specifically, the transaction was likely to raise employment concerns as the the parties had submitted that the proposed transaction would have an effect on employment resulting from duplication of roles. The acquirer would therefore retain 57 out of 74 employees in the target business.

Determination

The Authority approved the acquisition of the business and assets of the target by the acquirer on condition that the acquirer absorbed not less than 57 out of the 74 employees in the target.

Gazette Notice No 936 Dated January 11, 2019 Vol. CXXI-No.14 of 1st February, 2019

Acquisition of assets with a market presence

Acquisition of Kenya College of Accountancy University's non-degree programs and related assets by Kenya Academic Services Limited

The proposed transaction involved the acquisition of the non-degree programs of and the right to nominate majority of the Kenya College of Accountancy University's Council by Kenya Academic Services Limited resulting in change of control of the former. The Authority found that the combined turnover of the merging parties was above KES. one billion in 2014 and therefore the transaction met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines. The Authority also found that the transaction was unlikely to lead to negative competition and public interest concerns.

37. Merger between Kenya College of Accountancy University and Kenya Academic Services Limited

CAK/MA/04/304/A

August 28, 2015

Competition Law *– mergers and acquisitions – acquisition of control - where there was a proposed transaction for acquisition of the non-degree programs of and the right to nominate majority of the Council members of a university - where the combined turnover of the acquirer and the target was above KES. one billion - whether the proposed transaction amounted to acquisition of control within the meaning of the Act - whether the proposed transaction met the thresholds for mandatory notification as specified in the Merger Threshold Guidelines - whether a proposed transaction which would not lead to change in the market share would prevent or lessen competition in the market - Competition Act (Cap 504), sections 2 and 41.*

Brief facts

Kenya Academic Services Limited (the acquirer) was a company incorporated in Kenya. The acquirer was a newly incorporated company and had not undertaken any business. Kenya College of Accountancy University Limited (the target) was a company incorporated in Kenya and was involved in the provision of tertiary/higher education. The parties had sought approval of the acquisition of non– degree programs and the right to appoint majority of the target's Council by the acquirer. The proposed transaction involved the transfer of the target's non-degree program to the acquirer, the transfer of 25% of the issued shares in the target to the Institute of Certified Public Accountants of Kenya (ICPAK) and the acquisition of the right to nominate for appointment the majority of the target's Council.

Issues

i. Whether a proposed transaction which would result in acquisition of the non-degree programmes and the right to nominate majority of the council in a target university amounted to acquisition of control within the meaning of the Act.
ii. Whether a proposed transaction where the combined turnover of the acquirer and the target was above KES. one billion in 2014 met the thresholds for mandatory notification as provided for in the Merger Threshold Guidelines.
iii. Whether a proposed transaction which would not lead to change in the market share would prevent or lessen competition in the market.

Relevant Provisions of the Law
Competition Act (Cap 504)
Section 2 – Interpretation

*"**merger**" means an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover; and*

*"**market**" has the same meaning as provided for in section 4;*

Section 41 – Merger defined

(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.

(2) A merger contemplated in subsection (1) may be achieved in any manner, including—

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;

(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;

(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;

(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;

(f) vertical integration;

(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or

(h) amalgamation, takeover or any other combination with the other undertaking.

(3) A person controls an undertaking if that person—

(a) beneficially owns more than one half of the issued share capital or business or assets of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the

undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment of, a majority of the directors of the undertaking;

(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act (Cap. 486)*;*

(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of the undertaking being a nominee undertaking, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the nominee undertaking; or

(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Findings

1. The proposed transaction was an acquisition by the acquirer of non-degree programmes and the right to nominate the majority of the University Council of the target which amounted to acquisition of control within the meaning of the Act.
2. The combined turnover of the merging parties was above KES. one billion in 2014 and therefore the transaction met the thresholds for mandatory notification as provided in the Merger Threshold Guidelines.
3. The acquirer was newly incorporated and had not conducted business while the target provided higher education. There were no overlaps in respect of the activities of the merging parties, since the parties had neither a horizontal nor a vertical relationship.
4. The market share of the target was 1.3% which would not change as the acquirer was newly incorporated and therefore the transaction would not change the existing market share.
5. The proposed transaction was unlikely to prevent or lessen competition in the market and it did not raise any negative public interest concerns.

Determination

The Authority approved the acquisition of non-degree programs and related assets of the target by the acquirer unconditionally.

Gazette Notice No 9338, Dated March 5, 2020 Vol.CXXII-No.199 of 13th November, 2020


CONSUMER
PROTECTION
Know Your Rights

Consumer Protection

Conducts that violate consumer rights

False and misleading representation

Unconscionable conduct

Product safety standards, unsafe goods and product liability

Glossary of terms and definition

False and Misleading Representations:	A statement of account, assertion of facts, declaration, depiction, explanation, illustration, indication, narration, narrative, portraiture, portrayal, presentation, report, ommission that is incorrect or likely to create a false impression, whether intentional or not. A statement may be express or implied.
Unconscionable conduct:	An act which is particularly unreasonable, that goes against good conscience.
Product liability:	A manufacturer or supplier being held liable for supply of a defective product intended or likely to be used by a consumer.
Strengths of bargaining position:	The relative ability of parties in a negotiation situation (such as bargaining, contract writing, or making an agreement) to exert influence over each other.

Conduct that violates consumer rights

The Authority is mandated to protect consumers from unfair and misleading market conduct. Section 70A of the Act gives the Authority power to initiate investigations on consumer rights violations and impose administrative remedies.

Part VI of the Act, specifically, sections 55 to 57, prohibits false or misleading representations, and unconscionable conduct by undertakings while sections 58-64 of the Act ensures that consumers are compensated in case they suffer loss or injury as a result of; lack of information regarding goods; and supply of unsafe, unsuitable or defective goods.

False and misleading representations

In accordance with section 55 of the Act, it is unlawful to make false or misleading representations about goods or services when supplying, offering to supply or promoting those products or services.

Any statement representing a supplier's products or services should be true, accurate and able to be substantiated. It is a violation of the Act for a supplier to make statements or claims that are incorrect or likely to create a false impression, whether intentional or not. This includes advertisements or statements in any media (print, radio, television, social media and online) or on product packaging, and any statement made by a person representing a supplier's business.

Whether a representation is considered false or misleading will depend on the circumstances of each case, and what misleads one group of consumers may not necessarily mislead others. A representation can be misleading even if it is partly true.

Unconscionable conduct

In accordance with sections 56 and 57 of the Act, businesses should not engage in unconscionable conduct, when dealing with consumers, or another business respectively. Transactions or dealings therefore, may be termed to be unconscionable when they are deliberate, involve misconduct or involve conduct which is clearly unfair and unreasonable.

Sections 56(2) and 57(2) of the Act, provides a number of factors the Authority considers when assessing whether conduct in relation to the selling or supplying of goods and services to a customer, is unconscionable. These factors include the relative strengths, requirement to comply with conditions that are unreasonable, and undue influence against the consumer, among others.

Additionally, businesses are required to be transparent in terms of levying or imposition of charges and fees to consumers during business transactions. In accordance with section 56(3) of the Act, a person shall not, in the provision of banking, micro-finance and insurance and other services, impose unilateral charges and fees, by whatever name called or described, if the charges and the fees in question had not been brought to the attention of the consumer prior to their imposition or prior to the provision of the service. Section 56(4) of the Act entitles a consumer to be informed by a service provider of all charges and fees, by whatever name called or described, intended to be imposed for the provision of a service.

Product information standards

Consumers have a right to information necessary for them to benefit from the said goods. Section 60(1) makes it an offence for a person to supply goods in the market that do not comply with a prescribed consumer product information standard for such goods. Consumer Product Information Standards (CPIS) regulate the type and amount of information provided to consumers about particular good(s) and/or service(s)

Product safety standards, unsafe goods and product liability

Consumers have a right to the protection of their health and safety. Suppliers therefore have a primary responsibility for the supply of safe consumer products. There will often be more than one supplier responsible for a particular product. Each entity in the supply chain is responsible for assessing and (if necessary) rectifying potential safety hazards presented by the consumer products that they supply.

All suppliers in the supply chain should be able to demonstrate due diligence in the procurement and supply of consumer goods to ensure that they are safe and fit for purpose. Further, it is unlawful for a business or supplier to sell goods that do not comply with consumer product safety standards.

A manufacturer or supplier may be held liable for supplying a defective product into the market. Pursuant to sections 63 and 64 of the Act, a supplier shall be liable to a consumer where they supply unsuitable and/ or defective goods and the consumer suffers loss or injury as a result of the unsuitable goods or the defect. A supplier of goods may be relieved of liability for injury caused by a defective good to the user or consumer if they can, among others, prove that the defect did not exist at the time of supply of the goods or the good was

modified or altered after it left the supplier's control.

Summary of cases on consumer rights violations

In developing the consumer protection cases digest, the Authority made consideration to the various cases it has handled over the period, the type of conduct violating consumer rights, the sectors involved and public interests. Some of the matters were initiated from complaints made by individual or a group of consumers while others, the Authority initiated on its motion upon receipt of information indicative of probable violation of consumer welfare. Further, the cases are organized into three (3) thematic areas based on the type of prohibited conduct, namely; false or misleading representation, unconscionable conduct, product information standards and product safety standards, unsafe goods and product liability.

False and misleading representation

Unsubstantiated claims on the composition of a product as a form of false or misleading representation

The Authority conducted a market screening on fruit juices in the Kenyan market that focused on product manufacture, product labeling and display, ingredients/contents of products, and displays of disclaimers. It was found that Bakhresa Food Products Limited, the manufacturer of a juice product by the brand name Azam Pineapple Fruit Juice had made unsubstantiated claims on its label that the product was real fruit juice, with no sugar or other additives. The Authority concluded that the Bakhresa Food Products Limited had violated section 55(a)(i) and 60(1) of the Act, by supplying a juice product bearing unsubstantiated claims and not in compliance with the Kenya-East African Standard KS EAS 38:2014, clause 4, on labelling of prepackaged foods.

38. Competion Authority of Kenya v Bakhresa Food Products Limited

CAK/CPD/06/194/A

December 4, 2019

Consumer Protection *– consumer welfare – false or misleading representation – unsubstantiated claims regarding composition of products – false or misleading representations regarding the composition of products- whether the supplier could substantiate the claims on the labels of their products - whether there was non-compliance with prescribed consumer product information standards - whether Bakhresa Food Products Limited was in violation of Section 55(a)(i) of the Act for making unsubstantiated claims regarding the composition of Azam Pineapple Fruit Juice – whether the juice product supplied in the market had a labelling that was not compliant with the prescribed product information standard – Competition Act (Cap 504), sections 55(a)(i) and 60(1) - Kenya-East African Standard's KS EAS 38:2014, clause 4.*

Brief facts

The Authority conducted a market screening on fruit juices in the Kenyan market driven by the increasing use of nutrition claims by manufacturers regarding their products. The screening focused on product manufacture, product labeling and display, ingredients/contents of products, and displays of disclaimers of Azam Pineapple Fruit Juice, a product of Bakhresa Food Products Limited (Bakhresa).

Bakhresa argued that the labelling and listing of product ingredients, which was not accurate, as displayed, did not pose an immediate physical injury to consumers. They indicated that they were improving their product and making it compliant with the laws of different jurisdictions.

In light of the claims, a settlement was proposed.

Issues

i. Whether Bakhresa was in violation of section 55 (a) (i) of the Act for making unsubstantiated claims regarding the composition of Azam Pineapple Fruit Juice.

ii. Whether the juice product supplied in the market had a labelling that was not compliant with the prescribed product information standard and in violation of section 60(1) of the Act.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representations

(A) A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

Section 60 - Product Information Standards

(1) It shall be an offence, in trade, for a person to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the person has complied with that standard in relation to those goods.

Findings

1. Bakhresa had supplied a juice product namely Azam Pineapple Fruit Juice that had a label displaying unsubstantiated claims that it was real fruit juice with no sugar or other additives in violation of section 55(a)(i) of the Act.

2. The labeling of the juice product was not in compliance with the requirements of the Kenyan-East African Standard, KS EAS 38:2014, clause 4, on labelling of prepackaged foods contrary to section 60(1) of the Act.

Orders

Bakhresa entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i) The Authority imposed a pecuniary penalty on Bakhresa pursuant to Section 38(2)(b) of the Act, amounting to KES. 47,711.00 for contravening section 55 (a)(i) and section 60(1) of the Act.

ii) Bakhresa to conduct real time stability tests on vitamin C levels in their pineapple juice to avoid misleading consumers.

iii) Bakhresa to review the labelling of their product to reflect the correct vitamin C levels in their pineapple juice and to ensure compliance with clause 4 of KS EAS 38:2014 Standard.

iv) Bakhresa to provide a sample label for the Authority's approval before implementation to ensure that the requirements under the Act and KS EAS 38:2014 Standard was incorporated.

v) Bakhresa to comply with the provisions of the Act and the Consumer Protection Guidelines developed under the Act, by providing correct information to consumers on the labelling of their products.

Unsubstantiated claims on the composition of a product as a form of false or misleading representation

The Authority conducted a market screening on fruit juices in the Kenyan market that focused on product manufacture, product labeling and display, ingredients/contents of products, and display of disclaimers. The screening revealed that Ceres Fruit Juices (Pty) Limited, a manufacturer of a juice product by the brand name Ceres Hanepoot White Grape Juice had made unsubstantiated claims on its label that the product was real fruit juice, had Vitamin C and had no sugar or other additives. The Authority concluded that Ceres Fruit Juices (Pty) Limited had violated section 55(a)(i) and 60(1) of the Act, by supplying a juice product bearing unsubstantiated claims and not in compliance with the Kenya-East African Standard KS EAS 38:2014, clause 4, on Labelling of prepackaged foods.

49. Competion Authority of Kenya v Ceres Fruit Juices (Pty) Limited

CAK/CPD/06/89/A

December 10, 2019

Consumer Protection *– consumer welfare – false and misleading representations – unsubstantiated claims regarding composition of products – false or misleading representations regarding the composition of products- whether claims could be substantiated by the supplier-whether there was noncompliance with prescribed consumer product information standards – whether the Ceres Fruit Juices (Pty) Limited was in violation of section 55(a)(i) of the Act for making unsubstantiated claims regarding the composition of Ceres Hanepoot White Grape Juice – whether the juice product supplied in the market had a labelling that was not compliant with the prescribed product information standard namely Kenyan standard for Labeling of Pre-packaged Foods and in violation of section 60(1) of the Act. -Competition Act (Cap 504), section 55(a)(i), 59(1)(a), 59(2)(a) & 60 - Kenya - East African Standard's KS EAS 38:2014, clause 4.*

Brief facts

The Authority conducted a market screening on fruit juices in the Kenyan market driven by increasing use of nutrition claims by manufacturers regarding their products. The screening focused on product manufacture, product labeling and display, ingredients/contents of products and display of disclaimers. The findings of market screening on juices indicated that Ceres Hanepoot White Grape Juice, sold by Ceres Fruit Juices (Pty) Limited (Ceres), bore claims it was made of real fruit juice, had Vitamin C and had no sugar or other additives.

Ceres argued that the Kenyan legislation lacked clarity in terms of pictorial representation and how it should be treated. Accordingly, Ceres could not have been able to make any changes before unless they had been guided on how it should be done. Ceres further argued that KEBS standards did not provide for a definition of "fresh juice" or "freshly squeezed".

Ceres also argued that since they had indicated the manufacturing and expiry dates as well as the usage instructions, that would suffice to eliminate any confusion in the consumers' minds that the juice was freshly squeezed. Further, most, if not all, of the juice brands in the market contained similar pictorial representations of fruit in their packaging and most of the leading juice brands did not indicate on their product packaging if their juice was made from concentrate. Ceres also argued that with a shelf life of one year or more, none of the juices would be freshly squeezed.

Issues

i. Whether Ceres was in violation of section 55 (a) (i) of the Act for making unsubstantiated claims regarding the composition of Ceres Hanepoot White Grape Juice.

ii. Whether the juice product supplied in the market had a labelling that was not compliant with the prescribed product information standard namely Kenyan standard for Labeling of Pre-packaged Foods (KS EAS 38:2014), clause 4 and in violation of section 60(1) of the Act.

Relevant provisions of the Law
Competition Act (Cap 504)
Section 55 - False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

Section 60 - Product Information Standards

(1) It shall be an offence, in trade, for a person to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the person has complied with that standard in relation to those goods.

Findings

1. Ceres had supplied a juice product namely Ceres Hanepoot White Grape Juice that had a label displaying unsubstantiated claims that it was real fruit juice, contained Vitamin C and had no sugar or other additives in violation of section 55(a)(i) of the Act.
2. The labeling of the juice product was not compliant with the requirements of the Kenyan-East African Standard, KS EAS 38:2014, clause 4, on labelling of prepackaged foods contrary to Section 60 (1) of the Act.

Orders

Ceres entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i) The Authority imposed a pecuniary penalty on Ceres pursuant to section 38(2)(b) of the Act, amounting to KES.130,201.74 for contravening section 55(a)(i) and 60(1) of the Act.

ii) Ceres to review the labelling of their product, "Ceres 100% White Grape Juice" to reflect that the juice "is made from concentrate" to comply with Clause 4 of KS EAS 38:2014 Standard.

iii) Ceres to clearly indicate on the packaging usage instructions of the juice in addition to the 'manufacture' and 'best before' dates appearing conspicuously.

iv) Ceres to comply with the provisions of the Act and the Consumer Protection Guidelines developed under the Act, by providing correct information to consumers on the labelling of their products.

Unsubstantiated claims regarding the composition of a product as a form of misrepresentation

The Authority conducted a market screening on fruit juices in the Kenyan market that focused on product manufacture, product labeling and display, ingredients/contents of products and display of disclaimers. The Authority found that Del Monte Kenya Limited had violated section 55(a)(i) which prohibits false or misleading representations by a supplier of a product or service and section 59(1)(a) of the Act, which requires suppliers of goods to comply with prescribed consumer product safety standards.

40. Competion Authority of Kenya v Del Monte Kenya Limited

CAK/CPD/06/156/A

October 25, 2019

Consumer Protection *– consumer welfare- false or misleading representation – unsubstantiated claims regarding composition of products – false or misleading representations regarding the composition of products- whether claims could be substantiated by the supplier- whether Del Monte Kenya Limited was in violation of section 55(a)(i) of the Act for making unsubstantiated claims regarding the composition of Del Monte Pineapple Juice – whether the juice product supplied in the market had a labelling that was not compliant with the prescribed product safety standard and in violation of section 59(1) of the Act - whether there was noncompliance with prescribed consumer product safety standards -Competition Act (Cap 504), section 55(a)(i) and 59(1) - Kenya-East African Standard's KS EAS 38:2014, clause 4.*

Brief facts

The Authority conducted a market screening on fruit juices in the Kenyan market that focused on product manufacture, product labeling and display, ingredients/contents of products and display of disclaimers. Bureau Veritas (BV) was procured by the Authority in February 2018 to conduct testing on the Del Monte Pineapple Juice fruit content submitted by the Authority. According to the results submitted by BV in July 2018, the product contained only 20% pineapple juice which was far below Del Monte's declaration that it was 100% pineapple juice.

Del Monte Kenya Limited (Del Monte) proposed a settlement. They argued that they had no history of violating the Act and/or regulations pertaining to the law. Further, prior to commencement of investigations on the referenced variant of their juice, Del Monte had corrected the wordings on the packaging to be in concurrence with the standards. Del Monte produced pineapples locally and sometimes packaged the fresh juice directly into the packets. However, that was not always feasible and consequently, the juice was converted to concentrates for ease of storage and when required, the juice was reconstituted and packaged. Therefore, any earlier omission on branding was not intended to deceive the consumers and Del Monte had cooperated with the Authority on investigations and related matters.

Issues

i. Whether Del Monte was in violation of section 55(a)(i) of the Act for making unsubstantiated claims regarding the composition of Del Monte Pineapple Juice.

ii. Whether the juice product supplied in the market had a labelling that was not compliant with the prescribed product safety standard and in violation of section 59(1) of the Act.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

Section 59(1) Product Safety Standards

(1) It shall be an offence for a person, in trade, to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind—
(a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;
2 Where— (a) the supply of goods by a person constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;

Findings

1. Del Monte had supplied a juice product namely Del Monte Pinneaple Juice that had a label displaying unsubstantiated claims that it was 100% natural pineapple juice, whereas test results revealed that it was 20% pineapple juice in violation of section 55(a)(i) of the Act.
2. The labelling of the juice product was not in compliance with the requirements of the Kenyan-East African Standard, KS EAS 38:2014, clause 4, on labelling of pre-packaged foods contrary to Section 59 (1) of the Act.

Orders

Del Monte entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i) The Authority imposed a pecuniary penalty on Del Monte pursuant to section 38 (2) (b) of the Act, amounting to KES. 776,025.00 for contravening section 55 (a)(i) and 59 (1) (a) of the Act.

ii) Del Monte to review the labelling of their product to reflect that it was made from concentrates and to ensure compliance with clause 4 of KS EAS 38:2014 Standard.

iii) Del Monte to provide a sample label for CAK's approval before implementation to ensure that the requirements under the Act and KS EAS 38:2014 Standard were incorporated.

iv) Del Monte to comply with the provisions of the Act and the Consumer Protection Guidelines developed under the Act, by providing correct information to consumers on the labelling of their products.

Unsubstantiated claims on the quality of a product as a form of false or misleading representation

The Authority conducted a market screening on maize and wheat flour, which focused on manufacturer's claims, product labeling and display, ingredients/contents of products and displays of disclaimers. The screening revealed that a manufacturer of a flour product by the brand name Soko Maize Meal had made unsubstantiated claims on its label regarding flour fortification and the ingredients had some variation compared to the manufacturer's declarations. The Authority concluded that Capwell Industries Limited had violated sections 55(a)(i) and 60(1) of the Act, by supplying a flour product whose labelling was not in compliance with the Kenya - East African Standard KS EAS 768:2012.

41. Competion Authority of Kenya v Capwell Industries Limited

CAK/CPD/06/283/A

November 13, 2020

Consumer Protection *– consumer welfare – false or misleading representation – unsubstantiated claims regarding quality of products – false or misleading representations regarding the quality of products- whether claims could be substantiated by the supplier - whether there was compliance with prescribed consumer product information standards - Competition Act (Cap 504), section 55(a) (i), section 60(1) - Kenya-East African Standard's KS EAS 768:2012, Clause 4.*

Brief facts

The Authority conducted a market screening on maize and wheat flour which was necessitated by the growing use of unsubstantiated nutritional claims by some manufacturers in the Kenyan market. The screening focused on product manufacture, product labeling and display, ingredients/contents of products and display of disclaimers. The findings of maize flour results indicated that most of the claims made on flour fortification and ingredients had some variation compared to the manufacturer's declarations

Capwell Industries Ltd (Capwell) argued that their conduct did not pose an immediate physical injury to consumers. Capwell further argued that there was confusion in the market regarding implementation of the KS EAS 768: 2012 which was to be implemented in stages, and that the Kenya Bureau of Standards (KEBS) continued to certify the Capwell as compliant with all relevant product safety standards. The non-compliance was thus not intentional, rather a result of the confusion that prevailed in the market at the time.They opted for a settlement.

Issues

i. Whether Capwell was in violation of section 55(a)(i) of the Act for making unsubstantiated claims regarding the quality of Soko Maize Flour.
ii. Whether the flour product supplied in the market had a labelling that was not compliant

with the prescribed product information standard- KS EAS 768:2012 Standard and in violation of Section 60(1) of the Act.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

Section 60 - Product Information Standards

(1) It shall be an offence, in trade, for a person to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the person has complied with that standard in relation to those goods.

Findings

1. Capwell had supplied a flour product namely Soko Maize Meal that had a label displaying unsubstantiated claims regarding the nutritional levels of the flour, in violation of section 55(a)(i) of the Act.
2. The labeling of the flour product was not compliant with the requirements of the Kenya -East African Standard, KS EAS 768:2012 Standard, contrary to Section 60(1) of the Act.

Orders

Capwell entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i) The Authority imposed a pecuniary penalty on Capwell pursuant to section 38 (2) (b) of the Act, amounting to KES.600,000 for contravening sections 55(a)(i) and 60(1) of the Act.

ii) Capwell to comply with the provisions of the Act, Regulations and Consumer Protection Guidelines developed under the Act, by providing correct information to consumers on the labelling of their products.

Unsubstantiated claims regarding the quality of a product is a form of misrepresentation

The Authority conducted a market screening on maize and wheat flour which focused on manufacturer's claims, product labeling and display, ingredients/contents of products and displays of disclaimers. The Authority found that Pembe Flour Mills Limited had violated sections 55(a)(i) and 60(1) of the Act, by supplying a flour product whose labelling was not in compliance with the Kenya - East African Standard KS EAS 768:2012.

42. Competion Authority of Kenya v Pembe Flour Mills Limited

CAK/CPD/06/284/A

July 2, 2020

Consumer Protection *– unsubstantiated claims regarding quality of products – false or misleading representations regarding the quality of products- whether claims could be substantiated by the supplier- whether there was noncompliance with prescribed consumer product information standards – whether Pembe Flour Mills Limited was in violation of section 55(a)(i) of the Act for making unsubstantiated claims regarding the quality of Pembe Maize Flour – whether the flour product supplied in the market had a labelling that was not compliant with the prescribed product information standard- KS EAS 768:2012 Standard and in violation of Section 60 (1) of the Act – Competition Act (Cap 504), section 55(a)(i), section 60(1);Kenya-East African Standard's KS EAS 768:2012.*

Brief facts

The Authority conducted a market screening on maize and wheat flour which was necessitated by the growing use of unsubstantiated nutritional claims by some manufacturers in the Kenyan market. The screening focused on product manufacture, product label and display, ingredients/contents of products, and display of disclaimers. The findings of maize products results indicated that most of the claims made on flour fortification and ingredients had some variation compared to the manufacturer's declarations.

Pembe Flour Mills Limited (Pembe) indicated that they had purchased new machines for laboratory testing to ensure that all its products contained the minimum nutritional and mineral value standards. Pembe also argued that the conduct under investigation did not pose any immediate harm to consumers.

Issues

i. Whether Pembe was in violation of section 55 (a)(i) of the Act for making unsubstantiated claims regarding the quality of Pembe Maize Flour.

ii. Whether the flour product supplied in the market had a labelling that was not compliant with the prescribed product information standard- KS EAS 768:2012 Standard and in violation of section 60(1) of the Act.

Relevant provisions of the Law
Competition Act (Cap 504)
Section 55 - False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

Section 59 - Product Safety Standards

(1) It shall be an offence for a person, in trade, to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind—

(a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;

2 Where— (a) the supply of goods by a person constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;

Section 60 - Product Information Standards

(1) It shall be an offence, in trade, for a person to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the person has complied with that standard in relation to those goods.

Findings

1. Pembe had supplied a flour product namely Pembe Maize Flour that had a label displaying unsubstantiated claims regarding the nutritional levels of the flour in violation of section 55 (a) (i) of the Act.

2. The labelling of the flour product was not compliant with the requirements of the Kenya -East African Standard, KS EAS 768:2012 Standard, contrary to section 60 (1) of the Act.

Orders

Pembe entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i) The Authority imposed a pecuniary penalty on Pembe pursuant to section 38(2)(b) of the Act, amounting to KES.1,500,000 being for contravening section 55(a)(i) and 59(1) (a) and (2)(a) of the Act.

ii) Pembe to provide a new sample label to the Authority for approval within 30 days to ensure that the requirements under the Act and KS EAS 768:2012 Standard, being the new and current Standard

have been incorporated and adopt the same within three (3) months after the Authority's approval.

iii) *Pembe to comply with the provisions of the Act, Regulations and Consumer Protection Guidelines developed under the Act, by providing correct information to consumers on the labelling of their products.*

Failure to indicate the date of manufacture on products as a form of false or misleading representation

The Authority conducted a market screening on cosmetic products that focused on product labeling and display, ingredients/contents of products and compliance of products to the existing Kenyan Standards as well as the provisions of the Act. The screening revealed that PZ Cussons East Africa Limited, the manufacturer of cosmetic products by the brand names Cussons Baby Perfumed Jelly, Imperial Leather Body Lotion Japanese Spa and Venus Skin Care Smoothing Body Lotion had not indicated the date of manufacture as required by the Kenya - East African standard. The Authority concluded that PZ Cussons East Africa Limited had violated section 60(1) of the Act, by supplying products whose labelling was not in compliance with the KS EAS 346:2013 Standard on Labelling of cosmetics – General requirements.

43. Competion Authority of Kenya v PZ Cussons East Africa Limited

CAK/CPD/06/508/A

November 19, 2021

Consumer Protection *– consumer welfare – failure to indicate the date of manufacture on products – whether there was noncompliance with the prescribed consumer product information standards - whether the cosmetic products supplied in the market had a labelling that was not compliant with the prescribed product information standard on Labelling of cosmetics - General requirements, and in violation of Section 60(1) of the Act – Competition Act (Cap 504), section 60(1)- Kenya East Africa Standard KS EAS 346:2013 , para 4 on Labelling of cosmetics – General requirements.*

Brief facts

The Authority conducted a market screening on cosmetic products which was necessitated by the growing use of unsubstantiated claims on beauty products by some manufacturers in the Kenyan market. The screening focused on product labeling and display, ingredients/ contents of products and compliance of products to the existing Kenyan Standards as well as the provisions of the Act.

The findings of market screening on beauty products identified three products belonging to PZ Cussons East Africa Ltd(Cussons) namely; (i) Cussons Baby Perfumed Jelly, (ii) Imperial Leather Body Lotion Japanese Spa and (iii) Venus Skin Care Smoothing Body Lotion that did not have the date of manufacture.

Cussons argued that the printing of the date of manufacture and expiry on their products was done before shipping them out for sale, as one of the quality checking parameters. They claimed that they maintained counter samples of their products supplied in the market for testing and check- ups to ensure that they complied with the prescribed standards.

Issue

Whether the cosmetic products supplied in the market had labelling that was not compliant with the prescribed product information standard- Kenya East African Standard KS EAS 346:2013, para 4, on Labelling of cosmetics – General requirements, and in violation of section 60(1) of the Competition Act.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 60 - Product Information Standards

(1) It shall be an offence, in trade, for a person to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer, being goods of a kind in respect of which a consumer product information standard has been prescribed, unless the person has complied with that standard in relation to those goods.

Findings

1. Three products belonging to PZ Cussons East Africa Ltd namely; (i) Cussons Baby Perfumed Jelly, (ii) Imperial Leather Body Lotion Japanese Spa and (iii) Venus Skin Care Smoothing Body Lotion did not have the date of manufacture.
2. The labelling of the cosmetic products supplied by Cussons were not compliant with the requirements of the Kenya - East African Standard KS EAS 346:2013, para 4, on Labelling of cosmetics – General requirements, in violation of section 60(1) of the Act.

Orders

PZ Cussons entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i) The Authority imposed a pecuniary penalty on PZ Cussons pursuant to section 38(2)(b) of the Act, amounting to KES. 595, 000.00 for contravening section 60(1) of the Act.

ii) PZ Cussons undertook to continue to do proper coding of its products as per the clauses of the KS EAS 346:2013.

iii) PZ Cussons to comply with the provisions of the Act and the Consumer Protection Guidelines developed under the Act, by providing correct information to consumers on the labelling of their products.

Failure to provide accurate information regarding the composition of products as a form of misrepresentation

The Authority received a complaint from a consumer against Artcaffe Coffee & Bakery Limited alleging that she was harmed by Artcaffe Coffee & Bakery Limited's cookies labelled "gluten free". The Authority found that Artcaffe Coffee & Bakery Limited's cookies product did not comply with the prescribed product information standard as per section 55(a)(i) of the Act.

44. Nyaruai Gitonga v Artcaffe Coffee & Bakery Limited

CAK/CPD/06/91/A

August 17, 2018

Consumer Protection *– consumer welfare – false or misleading representations regarding the composition of products –complaint on failure by the manufacturer to provide accurate information regarding their products — whether there was provision of information to the complainant at the point of sale or on the packaging – whether Artcaffe Coffee & Bakery Limited was in violation of section 55(a)(i) of the Act for misleading consumers regarding the composition of their cookies by putting on a label of the product, two contradicting statements —Competition Act (Cap 504), section 55(a)(i).*

Brief facts

The Authority received a complaint from a consumer against Artcaffe Coffee & Bakery Limited (Artcaffe) alleging that she was harmed by Artcaffe's cookies labelled "gluten free". Upon checking the packaging, it was found that it was labelled with in large print "gluten free" at the top, and on the side of the package, fine print, "may contain traces of gluten". She contacted Artcaffe who informed her that there was a sticker on the package that clearly indicated the fact that the cookies may contain traces of gluten.

Artcaffe argued that there was no evidence presented to explain the condition in which the cookies were kept after purchase, to rule out any possibility of exposure to gluten. They averred that the representation on the cookies as being gluten free was not false or misleading. They argued that, though the cookies were baked in the same bakery and using the same equipment as the other products containing gluten, the International and Kenyan standards allow for traces of gluten to be present in gluten free products up to 20mg/kg. Artcaffe further argued that there was no legislation that regulated the location or size of disclaimers as well as the shelving of gluten free products.

Issues

i. Whether Artcaffe was in violation of section 55(a)(i) of the Act for misleading consumers regarding the composition of their cookies by putting on a label of the product, two contradicting statements.
ii. Whether the labelling of the gluten free chocolate cookies complied with the prescribed

product information standard namely; Kenyan standard for Foods for Special Dietary Use For Persons Intolerant to Gluten and Kenyan standard for Labeling of Pre-packaged Foods.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

Findings

1. Artcaffe was in violation of section 55(a)(i) of the Act for misleading consumers on the particular standard, quality, grade, and composition of their gluten free chocolate cookies.
2. Artcaffe was producing gluten free products in an environment that was not controlled, hence posing a great risk for cross contamination and exposing gluten intolerant consumers to harm of health.
3. Artcaffe had not complied with Kenyan standard for Foods for Special Dietary Use For Persons Intolerant To Gluten (KS CODEX STAN 118), para 4.3, which indicated that a business could use the gluten free label, provided that it did not mislead the consumer.
4. Artcaffe had not complied with Kenyan standard for Labeling of Pre-packaged Foods (KS EAS 38:2014), clause 4.1 that specified how food products should be labeled and what information should be provided to consumers, including the composition of the products, that is, the ingredients used.
5. The disclaimer by Artcaffe ("may contain traces of gluten") was less likely to be noticed, was contradictory of the main message ('Gluten Free') and unlikely to change the impression created to the gluten intolerant class of consumers that the cookies were 100% gluten free in a material respect.

Orders

Artcaffe entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i. The Authority imposed a pecuniary penalty of KES. 70,097.50 on Artcaffe pursuant to section 38 (2) (b) of the Act.

ii. Artcaffe to refrain from engaging in any conduct that may contravene the provisions of the Act.

Unconscionable conduct

Imposition of unilateral charges, review of terms of a loan facility and offsetting of loan balances without consent as a form of misrepresentation and an unconscionable conduct

The Authority received a complaint against Harambee Sacco Society of Kenya alleging that they engaged in an unconscionable conduct and had given false and misleading representation with regard to the terms of a loan facility the complainant had taken. The Authority found that Harambee Sacco Society of Kenya had violated section 55(b)(i) of the Act's provision on false representation and sections 56(1) and 56(3) on unconscionable conduct.

45. Patience Kwekwe v Harambee Sacco Society of Kenya

CAK/CPD/06/122/A

April 23, 2019

Consumer Protection *– consumer welfare – false and misleading representations-unconscionable conduct- complaint on alteration of interest rate without notification-offsetting of loan balances without prior consent – omission of important information regarding the terms and conditions of the loan - whether they notified the complainant on the review of the interest rate - whether the loan balance was offset using the complainant's shares – whether there was failure to provide information on change of terms of the loan -Competition Act (Cap 504), sections 55(b) (i), 56(1), 56(3) and 56(4).*

Brief facts

The Authority received a complaint alleging that the complainant took a loan from Harambee Sacco Society of Kenya ("Harambee Sacco") and upon servicing the loan, her shares were deducted to repay an additional amount as a result of an amplification of the initial interest rate, which was imposed on her without any form of communication and contrary to the loan terms.

Harambee Sacco reviewed the interest rate of the loan without notifying the complainant contrary to sections 55(b)(i), 56(3) and 56(4) of the Act. Further, they used their relatively higher bargaining position and unfair tactics to offset the loan balance from the complainant's shares without her consent, and deliberately omitted important information regarding the correct rate of interest in violation of section 56(1) as read together with 56(2)(a) and (d) of the Act.

Harambee Sacco argued that they had issued a circular dated 13th February, 2012, stating that all their loans were to accrue interest of 18% per annum and that the circular was brought to the attention of the members. The complainant repaid her loan for 33 months before she

defaulted upon which the loan balance was recovered from her deposits.

Issues

i. Whether Harambee Sacco reviewed the interest rate of the loan from 1% to 1.5% per month without notifying the complainant contrary to section 55(b)(i), 56(3) and 56(4) of the Act.

ii. Whether Harambee Sacco used its relatively higher bargaining position to offset the alleged defaulted loan from the complainant's shares without her consent, in violation of section 56(1) as read together with section 56(2)(a) of the Act.

iii. Whether Harambee Sacco used unfair tactics in deliberately omitting important information regarding the correct rate of interest at the point of execution of loan documents contrary to section 56(1) as read together with section 56(2)(d) of the Act.

iv. Whether Harambee Sacco had a statutory and fiduciary duty of care towards the complainant and whether they breached that duty.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representation (Content from nelson)

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(b) falsely represents that—

(i) with respect to the price of goods or services;

Section 56 - Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable".

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to—

(a) the relative strengths of the bargaining positions of the person and the consumer;

(b).....

(c).....

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(3) A person shall not, in the provision of banking, micro-finance and insurance and other services, impose unilateral charges and fees, by whatever name called or described, if the charges and the fees in question had not been brought to the attention of the consumer prior to their imposition or prior to the provision of the service.

(4) A consumer shall be entitled to be informed by a service provider of all charges and fees, by whatever name called or described, intended to be imposed for the provision of a service.

Findings

1. Harambee Sacco violated section 55 (b) (i), of the Act on false or misleading representation and section 56(3) and 56 (4) of the Act on unconscionable conduct by reviewing the interest rate of the loan from 1% to 1.5% per month without notifying the complainant.
2. Harambee Sacco violated section 56(1) as read together with section 56(2)(a) of the Act by using its relatively higher bargaining position to offset the alleged defaulted loan from the complainant's shares without her consent, denying her the opportunity to access a new loan facility and to earn dividends, leading to financial loss.
3. Harambee Sacco violated section 56(1) as read together with section 56(2)(d) of the Act by using unfair tactics in deliberately omitting important information regarding the correct rate of interest at the point of execution of loan documents.
4. Harambee Sacco had a statutory and fiduciary duty of care towards the complainant being their client but breached that duty.

Orders

i. Pursuant to section 38 of the Act, the Authority entered into a settlement agreement with Harambee Sacco Society Limited and imposed a financial penalty to the tune of KES. 38,379.85/= for contravening sections 55(b) (i) and 56(4) of the Act.

ii. The Authority in addition to (1) above, required the Sacco to give a written undertaking vide the settlement agreement to in future refrain from engaging in any conduct that would be in contravention with the Act.

Unilateral change of terms and conditions by a supplier of goods or services as a form of misrepresentation and unconscionable conduct

The Authority received a complaint alleging that Family Bank Limited who had assured the complainant, a former employee, that her mortgage terms including a waiver of interest rates of 20% would be upheld, had reneged on their assurance. Further, in 2017 Family Bank Limited unilaterally debited and overdrew a total of KES. 399,800.00, from her account, to settle legal fees relating to court injunction proceedings initiated by the complainant. The Authority found that Family Bank Limited had violated sections 55(a)(ii) and 55(b)(v) of the Act by false representation on standard and/or value of its services and a benefit accruing to a consumer. Family Bank Limited engaged in unconscionable conduct, a violation of section 56(1) as read together with section 56(2), (a)(b) and (d) of the Act.

46. Olive Wamaitha Njogu v Family Bank Limited

CAK/CPD/06/613/A

September 29, 2022

Consumer Protection *– false and misleading representations - unconscionable conduct - complaints on failure to honor loan terms and conditions -whether Family Bank Limited falsely represented on the standard and/or value of its services - whether Family Bank Limited falsely represented on a benefit accruing to a consumer - whether Family Bank Limited acted unfairly by debiting and overdrawing the complainant's account without her consent – whether Family Bank Limited used its higher strength of bargaining position to debit and withdraw from the complainant's account without her consent – whether Family Bank Limited used unfair tactics in promising to discount the complainant's loan by 20% and later reneging on the same – Competition Act (Cap 504), sections 55(a) (ii) & (v), and (2) (a),(b) and (d).*

Brief facts

The Authority received a complaint from Olive Wamaitha Njogu (complainant), a former employee of Family Bank Limited (Family Bank), alleging that upon exit of employment, they failed to honor the mortgage terms and conditions accruing to her. Family Bank had reviewed a 20% mortgage interest waiver conferred to the complainant. Family Bank also debited and overdrew a total amount of KES. 399,800/- from the complainant's account, without her consent.

Family Bank argued that bullet 4 and 5 of the exit letter given to the complainant should be read together. Where bullet 4 read as "*you will continue to service your staff loans at prevailing staff rate plus 2% p.a (this will be effected 30 days after exit)* and bullet 5 read as *"staff loans discounted at 20% (subject to clearing secured loans in full).* However, the exit letter was not clear on whether the two bullets were to be read together. Family Bank further argued that part of the amount withdrawn from the complainant's account was to settle the advocate's fee incurred in court proceedings initiated by the complainant.

Issues

i. Whether Family Bank used its higher strength of bargaining position to debit and withdraw from the complainant's account without her consent contrary to section 56(2)(a) of the Act.

ii. Whether Family Bank required the complainant to comply with the conditions that were not reasonably necessary by transferring costs of legal representation meant to be borne by itself to the complainant contrary to section 56(2)(b) of the Act.

iii. Whether Family Bank used unfair tactics in promising to discount the complainant's loan by 20% and later reneging on the same contrary to section 56(2)(d) of the Act.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representation

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(ii) services are of a particular standard, quality, value or grade;

(v) goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

Section 56 - Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable".

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to—

(a) the relative strengths of the bargaining positions of the person and the consumer;

(b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services;

Findings

1. Family Bank was in violation of sections 55 (a) (ii) & (v) and 56(1) of the Act for falsely representing to the consumer on the standard and/or value of its services and further, on a benefit accruing to its staff upon exit, with regard to loans owing. Family Bank had falsely represented in the complainant's exit letter that they would discount her loan at 20% subject to clearing the facility in full.

2. Family Bank's failure to honor its terms of exit, after the complainant fulfilled her obligation was a false representation on the standard and/or value of its services and a false representation on a benefit accruing to its staff upon exit, with regard to loans owing. Family Bank 's conduct therefore violated sections 55(a)(ii) and (v) of the Act;
3. Family Bank had acted in an unconscionable manner by debiting and overdrawing a total amount of KES. 399,800/- from the complainant's account without her consent. Family Bank therefore abused its higher strength of bargaining position against the complainant, which was unconscionable and in violation of section 56(1) as read together with section 56(2)(a), (b) and (d) of the Act.

Orders

i. Family Bank was found to be in contravention of section 55(a)(ii) and (v) and section 56(1) and (2)(a), (b) and (d) of the Act.

ii. Pursuant to section 70A(2) as read together with sections 36(b) and (e) of the Act, the Authority gave the following orders:

a) Family Bank was directed to apply and refund the 20% waiver on the complainant's facility totaling to KES 1,015,804.20 within 14 days of the date of the order, being the discount that would have been applicable on the loan if settled in full.

b) Family Bank was required to refund the complainant KES 399,800.00 within 14 days of the date of the order, being the excess amount debited from her account to pay part of the legal fees that Family Bank incurred as a result of the court proceedings initiated by the complainant.

c) Family Bank to restrain from engaging in similar conduct in future.

Supply of defective vehicle and failure to rectify it as a form of misrepresentation and unconscionable conduct

The Authority received a complaint from Lilian Kinyua alleging that she bought a 33-seater bus from Toyota Kenya Limited in 2015 and she had since experienced multiple problems with the vehicle. She complained to Toyota Kenya Limited, and they did an engine overhaul and reduced the capacity of the vehicle to 29 seats. However, the vehicle still could not operate well. She demanded for a refund but Toyota Kenya Limited refused, claiming that the vehicle had already been used. The Authority concluded that Toyota Kenya Limited had violated sections 55(a) & (i)(v), 56(1), 63(1)(d)(e) and 64(1) of the Competition Act No 12 of 2010 of the Act which prohibited false or misleading representation, unconscionable conduct by a supplier of a product or service, and supply of unsuitable and defective goods.

47. Lilian Kinyua v Toyota Kenya Limited

CAK/CPD/06/166/A

December 10, 2019

Consumer Protection *– consumer welfare – false and misleading information – failure by the manufacturer to repair a defective vehicle – false or misleading representations regarding the quality of products- unconscionable conduct by suppliers - supply of defective goods - supply of unsuitable goods -whether Toyota Kenya Limited was in violation of sections 55(a) & (i)(v), 56(1), 63(1)(d)(e) and 64(1) for selling a defective vehicle to the complainant and declining to replace it, after repairs failed to address the defect - Competition Act (Cap 504), sections 55(a)(i) (v), 56(1) & (2)(a)(d) and (e), 63(1)(d)(e) & 64(1).*

Brief facts

The Authority received a complaint from Lilian Kinyua alleging that she bought a 33-seater bus from Toyota Kenya Limited (Toyota Kenya) in 2015 and she had since experienced multiple problems with the vehicle including; failure of braking system, clutch performance problems, and engine overheating. She complained to Toyota Kenya , and they did an engine overhaul and reduced the capacity of the vehicle to 29 seats. However, the vehicle could still not operate well. She demanded for a refund but Toyota Kenya refused, claiming that the vehicle had already been used.

Toyota Kenya argued that the complainant had considerably used the vehicle to generate income as evidenced by the vehicle's mileage of 101,489 KMS. They indicated that the complainant had changed the vehicle use from a bus to a truck for milk delivery, which they claimed had an impact on its performance. They also argued that the complainant had not maintained the vehicle in accordance with the manufacturer's specifications.

Issue

Whether Toyota Kenya was in violation of section 55(a)(i) & (v), 56(1) as read together section 56(2)(a) (d) and (e), 63(1)(d)(e) and 64(1) of the Act for selling a defective vehicle to the complainant and declining to replace it, after repairs failed to address the defect.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(i) goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.

(v) goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

Section 56 - Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable.

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to—

(a) the relative strengths of the bargaining positions of the person and the consumer;

(b)....

(c)....

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

Section 63 - Liability in respect of unsuitable goods

(1) Where—

(d) the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied; and

(e) the consumer or a person who acquires the goods from, or derives title to the goods through or under, the consumer suffers loss or damage by reason that the goods are not reasonably fit for that purpose;

the undertaking shall be liable to compensate the consumer or that other person for the loss or damage and the consumer or that person may recover the amount of the compensation by

action against the undertaking in a court of competent jurisdiction.

Section 64 - Liability for defective goods

(1) Where a person, in trade supplies goods manufactured by it, and such goods are found to have a defect as a result of which an individual suffers loss or injury, such person is liable to compensate the individual for the loss or injury suffered.

Findings

1. Toyota Kenya had sold a defective vehicle to the complainant and thereafter declined to replace the vehicle, after subsequent repairs failed to address the defect. Toyota Kenya was therefore in violation of section 55(a)(i) & (v) of the Act for misrepresenting the quality of their vehicle.
2. Toyota Kenya was in violation of section 56(1) as read together with section 56(2)(a), (d) and (e) of the Act, which prohibit suppliers of goods from engaging in unconscionable conduct, for refusal to redress the complaint.
3. Toyota Kenya was in violation of sections 63(1)(d)(e) and 64(1) of the Act for supplying unsuitable and defective goods respectively.

Orders

Toyota Kenya entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i) The Authority imposed a pecuniary penalty of KES.450,000.00 on Toyota Kenya pursuant to section 38(b) of the Act.

ii) The complainant was availed with a new lorry and afforded the opportunity to inspect the same before accepting delivery.

iii) The complainant was to pay Toyota Kenya the sum of KES.3,749,805.29 under the earlier loan terms of 18% interest rate and repayment for a period of 60 months beginning from the date of accepting delivery of the lorry.

Failure to give benefits as advertised and imposing unfair conditions as a form of misrepresentation and an unconscionable conduct

The Authority received thirteen complaints against Royal Mabati Factory Limited alleging failure to deliver the purchased products, requiring customers to pay for the delivery of their products despite advertising for free delivery countrywide and forcing customers to change their preferred products after payment. The Authority concluded that Royal Mabati Factory Limited had violated section 55(a)(ii), 55 (a)(v) and 55(b)(v) of the Act by making misleading claims that they provide free delivery countrywide within 24 hours or other periods as indicated in their adverts. The Authority also found that Royal Mabati Factory Limited had been engaging in an unconscionable conduct by failing to deliver the orders within the periods stipulated in their adverts, which was a violation of section 56(1) as read together with section 56(2)(a), (d) and (e) of the Act.

48. Competition Authority of Kenya v Royal Mabati Factory Limited

CAK/CPD/06/244/A

May 21, 2020

Consumer Protection *– false and misleading representations - unconscionable conduct - complaints on failure to deliver products as advertised - whether Royal Mabati Factory Limited misled consumers that they provide free delivery within specified time periods in their adverts - whether they forced consumers to change their preferred products after making payments - whether Royal Mabati Factory Limited was in violation of section 89 as they failed to pull down the misleading advertisements despite having been issued with a cease and desist order – whether they stopped advertising and pulled down existing adverts as ordered – Competition Act (Cap 504), sections 55 (a)(ii), & (v), & (b)(v) , 56(1) and (2)(a), (d), (e) and 89.*

Brief facts

The Authority received thirteen complaints against Royal Mabati Factory Limited (RMFL) alleging that they failed to deliver purchased products, they required customers to pay for the delivery of their products despite advertising for free delivery countrywide and they forced some of the customers to change their preferred products after payment.

RMFL advertised for availability of the products and their free delivery upon payment which they failed to honor contrary to sections 55(a)(ii) & (v), 55(b)(v) of the Act. They forced the consumers to change their preferred orders citing unavailability of the products and delayed deliveries and in some instances failed to deliver contrary to section 56(1) of the Act as read together with 56(2)(a), (d) and (e) of the Act. RMFL also failed to pull down the misleading advertisements despite having been ordered by the Authority contrary to section 89 of the Act.

RMFL argued that they reserved the right to offer free delivery of their products under certain terms and conditions which were well communicated to customers and printed on all invoices. Further, they had a refund policy in place which they claimed to be part of the

terms and conditions of sale and they had resolved the complaints in question by ensuring ordered products were delivered to the aggrieved customers.

Issues

i. Whether RMFL was in violation of section 55 (a) (ii) & (v) and (b) (v) of the Act for misleading consumers that they provide free delivery within 24 hours or other specified time periods in their adverts.

ii. Whether RMFL's conduct was unconscionable and in violation of section 56(1) as read together with 56(2)(a), (d) and (e) of the Act in the following circumstances:
   a. forced consumers to change their orders after paying for their preferred products due to shortages despite having confirmed availability of the preferred orders prior to payment;
   b. failed to deliver some of the orders after payment; and
   c. delayed deliveries of orders.

iii. Whether RMFL was in violation of section 89 for failing to pull down the misleading advertisements despite having been issued with a cease and desist order.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representation

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(ii) services are of a particular standard, quality, value or grade;

(v) goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;

(b) makes a false or misleading representation—

(v) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 56 - Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable".

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to—

(a) the relative strengths of the bargaining positions of the person and the consumer;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

Findings

1. RMFL was in violation of section 55 (a) (ii) & (v) and (b) (v) of the Act for misleading consumers by stating that they provide free delivery within 24 hours or other specified time periods in their adverts. The adverts were published from late 2017 to late 2019 even after a cease and desist order was sent to RMFL in January, 2019. The Authority was satisfied that the advertisements were false and misleading.
2. The advertisements were false and misleading as they met the prohibition under section 55 (a) (ii) & (v) and (b) (v) of the Act elaborated below:
   a. the short turn-around time promised by RMFL could have attracted the customers to place the orders. However, customers were made to put up with late deliveries. Additionally, some customers were forced to change the profile of their orders after RMFL claimed that the ordered goods were out of stock.
   b. RMFL represented that they deliver goods countrywide free of charge. However, some consumers were forced to pay for delivery of the goods.
   c. RMFL indicated in their submissions that they had a refund policy in place which they claimed to be part of the Terms & Conditions of sale. However, it had to take intervention from the Authority to have the complaints resolved. That meant that the refund policy just existed on paper but was not fully practiced.
3. RMFL had acted in an unconscionable manner as they used the free specified time delivery claims to lure consumers to order from them, only for the consumers to be disappointed when they did not get their orders as advertised. That was a violation of section 56 (1) as read together with section 56(2)(a),(d) and (e) of the Act.
4. The Authority had ordered RMFL to stop their free delivery adverts through the cease and desist order issued on January 8, 2019. However, they continued to place adverts in the dailies, which was a violation of section 89 of the Act.

Orders

i. Pursuant to section 36 of the Act, the Authority imposed a financial penalty of KES. 2,652,363.47 on Royal Mabati for contravention of sections 55 (a) (ii) (v), (b) (v), 56(1) of the Act.

ii. A declaration that the conduct of RMFL of advertising false and misleading representations on electronic, print and social media in relation to its goods and services was in violation of sections 55 (a) (ii) & (v), (b) (v), 56 (1) and 89 of the Act.

iii. RMFL to take action to remedy the effects of its infringement of sections 55 (a) (ii) & (v), (b) (v) and 56 (1) of the Act by either refunding the customers whose complaints had not been resolved 60 days from the date of receipt of the determination, or by delivering the roofing materials to the customers at their preferred premises at no cost within 30 days from the date of receipt of the determination.

iv. RMFL to pull down and cease further publication of the false and misleading advertisements upon receipt of this determination, as indicated in (ii), which have been published by RMFL on electronic, print and social media during the period January 2019 to present indicating:

   a. that RMFL was offering free delivery on the advertised products yet the same was false;

b. availability of advertised products which turned out to be unavailable after the customer had purchased the product thus, forcing customers to change their orders; and

c. that delivery would take place during a specified period only for RMFL to delay or fail to deliver as per the stated delivery period.

v. RMFL to sensitize its sales team and customer care service team on the provisions of the Act, specifically Part VI, within three months from the date of the receipt of the determination and provide evidence to the Authority of the compliance.

Editorial Note

The decision of the Authority was appealed to the Competition Tribunal and the Authority's decision was upheld.

Citation: Competition Tribunal Case CT/009 of 2021: Royal Mabati Factory Limited v Competition Authority of Kenya.

Judgement https://shorturl.at/fxJQ9

Imposition of unfair conditions and failure to compensate as promised as a form of misrepresentation and an unconscionable conduct

The Authority received a complaint against Kenya Airways PLC (kenya Airways) in which the complainant alleged that Kenya Airways had engaged in conduct that amounted to giving misleading representation, unconscionable conduct and imposition of unfair conditions to a customer. The Authority concluded that the Kenya Airways PLC had violated section 55(b)(v) of the Act by making a representation that they would refund the complainant the purchase price of the return ticket. Kenya Airways had been engaged in unconscionable conduct by failing to refund the complainant the money he had paid for his unutilized ticket, which was a clear violation of section 56(1) of the Act as read together with section 56(2)(a), (b), (d) and (e) of the Act.

49. Christopher Godman v Kenya Airways PLC

CAK/CPD/06/165/A

May 21, 2020

Consumer Protection *– consumer welfare – false and misleading representations – false representations with regard to refund of ticket purchase price where boarding was denied - where the flight was oversold - whether there was false representation in regard to refund of purchase price – whether there existed a higher strength of bargaining between the service provider and consumer - whether there was a requirement to comply with conditions that were not reasonably necessary – whether there was use of unfair tactics - Competition Act (Cap 504), section 55 (b) (v), section 56 (1) and (2)(a), (b), (d) and (e).*

Brief facts

The Authority received a complaint in which the complainant alleged that Kenya Airways PLC (Kenya Airways) had denied him boarding a flight despite him arriving at the airport on time and fulfilling all the requirements in order to board the flight. Kenya Airways had informed him that the flight was oversold and he was thus booked on another flight. The plane arrived late and he therefore missed his connecting flight, for which he had paid a return ticket. Subsequently, he was advised to purchase another ticket for a Kenya Airways flight and later seek a refund for the previous unutilized ticket. He paid £3,211.20 (KES 413,151.77) to Kenya Airways and proceeded with his journey, however they failed to refund his money for the unutilized ticket as they had earlier promised.

Kenya Airways argued that though the complainant had checked - in using their online platform, he arrived at their counter late, 30 minutes to departure, with a bag to check in and hence was denied boarding the flight. They averred that overbooking was not unusual in the aviation industry, as it was a measure to protect the airline from the risk of running an empty flight due to last minute cancellations, late arrivals, or non- appearance by passengers.

Through a request made by the Authority, the Kenya Civil Aviation Authority (KCAA) clarified that oversale and denial of boarding of passengers was an accepted commercial practice in the

Airline industry as guided by aviation regulations worldwide. However, a consumer must be informed in advance that the flight was oversold, the probability of being denied boarding and their rights to compensation.

Issues

i. Whether Kenya Airways was in violation of section 55(b)(v) of the Act for misleading the complainant to purchase another ticket with the promise that they would refund his unutilized ticket but thereafter failing to do so.

ii. Kenya Airways 'conduct was unconscionable in violation of Section 56(1) as read together with section 56(2)(a), (b), (d) and (e) of the Act in the following circumstances:

   a. denying the complainant a flight despite having met all the requirements for boarding;

   b. forcing the complainant to purchase a second ticket as a result of Kenya Airways having oversold the flight that he had initially booked; and

   c. failing to refund the cost of the complainant's unutilized ticket despite promising to do so.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 55 - False or misleading representations

A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(b) makes a false or misleading representation—

(v) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 56 - Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable".

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to—

(a) the relative strengths of the bargaining positions of the person and the consumer;

(b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

Findings

1. Kenya Airways falsely represented to the complainant regarding compensation and used their higher strength of bargaining position to deny him boarding yet he had checked-in online and arrived on time, contrary to section 55(b)(v) and 56 (1) of the Act.
2. Kenya Airways had a responsibility to inform its customers that they would be denied boarding an aircraft in certain circumstance such as late arrival. In addition, they ought to compensate customers where they experience loss as a result of the failure to deliver the required service.
3. Kenya Airways made false and misleading representations concerning the existence of a right or remedy and in addition:
   a. used its higher strength of bargaining position to deny the complainant boarding, thus engaging in unconscionable conduct.
   b. used unfair tactics and undue pressure and compelled the complainant to purchase another ticket with the promise that he will be refunded.
   c. knowingly provided false information to the Authority regarding the reasons as to why the complainant was denied boarding.

Orders

i) Pursuant to section 36(d) of the Act, the Authority ordered Kenya Airways to pay KES. 415,263 as a refund to the complainant for contravening sections 56(1) and 90(d) of the Act.

ii) The Authority in addition to (i) above, imposed the following orders on Kenya Airways:

a) Kenya Airways to be informing consumers of the reason for being involuntarily denied boarding and a duty to be remitting appropriate compensation to affected consumers if denied boarding becomes inevitable;

b) A mandatory obligation to be refunding consumers who have been involuntarily denied boarding an amount equal to the cost the consumer incurred in procuring the ticket, within 60 days from the lodging of the claim to Kenya Airways.

Product safety standards, unsafe goods and product liability

Supply of goods intended for use by consumers that do not comply with prescribed consumer product safety standards, is prohibited

The Authority received a complaint against Nairobi Bottlers Limited alleging that they had supplied a Fanta soda which had foreign matter, therefore unsuitable for human consumption. The Authority concluded that Nairobi Bottlers Limited had violated section 59(1)(a) and 59(2)(a) of the Act by supplying a soda product which had impurities and was not in compliance with the East African Standard EAS 39:2001, section 4.4.1 on Hygiene in the food and drink manufacturing industry.

50. Francis Gitahi v Nairobi Bottlers Limited

CAK/CPD/06/179/A (90.4)

October 9, 2020

Consumer Protection- *consumer welfare - product safety standards and unsafe goods-non-compliance to Consumer Safety Standards - complaints that a product with foreign matter was supplied to consumers – whether the product supplied had impurities which made it unfit for human consumption and posed a health hazard to consumers - Competition Act (Cap 504), section 59(1) (a), and 59(2)(a); East African Standard EAS 39:2001, section 4.4.1*

Brief facts

The Authority received a complaint from Francis Gitahi against Nairobi Bottlers Limited alleging that he bought a Fanta soda which had foreign matter of black insolvent substances, therefore unsuitable for human consumption. Section 59(1) (a), and 59(2)(a) of the Act prohibits a supplier from supplying goods which do not comply with a prescribed consumer product safety standard.

Nairobi Bottlers Limited argued that the defect in the soda did not exist at the time of supply of the goods. They asserted that they had an elaborate bottling process which involved multiple checks to ensure that the packaging materials, i.e glass and closure crowns were in order, from defect and unwanted materials. Further, they implemented various controls to ensure that production facilities maintained high standards of hygiene. Daily audits of the continuous cleaning activities and inspection for foreign matter was done by human and electronic inspectors for double assurance. They disputed the Go-No-Go gauge test, claiming that it was not absolutely definitive as to whether the bottle had been tampered with because it only tested the effectiveness of the crowning process.

Issue

Whether a product supplied in the market had impurities which made it unfit for human consumption and posed a health hazard to consumers in violation of section 59(1)(a) and 2 (a) of the Act.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 59 - Product safety standards and unsafe goods

(1) (1) It shall be an offence for a person, in trade, to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind—

(a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;

(2) Where—

(a) the supply of goods by a person constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;

Findings

1. The Fanta soda product in question was a product manufactured by Nairobi Bottlers Limited as evidenced by Batch number P06 JUN18CG7 and the barcode on the bottle.
2. Nairobi Bottlers Limited supplied a soda product which had impurities in violation of section 59(1)(a) and 59(2)(a) of the Act, as the product was not compliant with the East African Standard EAS 39:2001, section 4.4.1 on Hygiene in the food and drink manufacturing industry.
3. The soda bottle had not been tampered with as confirmed by the Go-No-Go gauge test carried out in the presence of the parties including the Kenya Bureau of Standards (KEBS). KEBS confirmed that any test result should have an accuracy of at least 95% confidence level, and the bottle had exhibited the same.
4. The product had impurities which made it unfit for human consumption and posed a health hazard to consumers.

Orders

i. Pursuant to section 36 of the Act, the Authority imposed a financial penalty of KES. 406,298.21 on Nairobi Bottlers Limited for contravention of section 59(1)(a) of the Act which prohibited supply of goods that do not comply with a prescribed consumer product safety standard.

ii. The Authority in addition to 1 above, imposed the following orders on Nairobi Bottlers Limited:

a) Ensure the inspection process at its bottling and/or manufacturing processes to minimize defects during production, and improve on quality checks prior to distribution to retail chains to ensure consumer health and safety.

b) To undertake to comply with the provisions of the Act and the Competition (General) Rules 2019 and ensure that the sales, distribution and the customer complaints team were sensitized on the provisions of the Act, and how to actively address similar complaints in future to ensure a non-recurrence of the offence; and

c) Ensure compliance with the provisions of the East African Standards EAS 39:2001 on

d) Hygiene in the food and drink manufacturing industry.

Editorial Note

The decision of the Authority was appealed to the Competition Tribunal, however Nairobi Bottlers Limited decided to settle out of Tribunal.

Supply of goods intended for use by consumers that do not comply with prescribed consumer product safety standards, is prohibited

The Authority received a complaint against Almasi Beverages Limited alleging that they had supplied two sodas of Sprite and Orange brand respectively, which had foreign matter, therefore unsuitable for human consumption. The Authority concluded that Almasi Beverages Limited had violated section 59(1)(a) and 59(2)(a) of the Act by supplying soda products which had impurities and not in compliance with the East African Standard EAS 39:2001, section 4.4.1 on Hygiene in the food and drink manufacturing industry.

51. Onyancha Advocates v Almasi Beverages Limited

CAK/CPD/06/199/A

March 25, 2020

Consumer Protection*- consumer welfare – product safety standards and unsafe goods - non - compliance to Consumer Safety Standards - complaints that products with foreign matter was supplied to consumers – whether the products supplied had impurities which made them unfit for human consumption and posed a health hazard to consumers – Competition Act No.12 of 2010, section 59(1)(a), and 59(2)(a)**; East African Standard's Standard EAS 39:2001, section 4.4.1.*

Brief facts

The Authority received a complaint against Almasi Beverages Limited (Almasi) alleging that they had supplied two sodas which had foreign matter, therefore unsuitable for human consumption. It was alleged that Almasi supplied a soda, Sprite brand that was contaminated with chewing gum and a second soda, Orange brand that contained a paper inside. Both products were in unopened bottles.

Almasi argued that they have a thorough bottling process that did not allow foreign matter or cracked bottles to go unnoticed. They further argued that it was possible for malicious individuals to add foreign matter into the soda and use a manual crowning device to cap it. Almasi also indicated that they had in the past received cases of customer complaints regarding foreign matter in sodas, although none had ever been proven to be a pre-supply issue, but rather post supply where foreign materials were put in the sodas.

Issue

Whether the soda supplied by the Almasi had impurities which made them unfit for human consumption and posed a health hazard to consumers in violation of section 59(1)(a) and 2(a) of the Act.

Relevant provisions of the Law

Competition Act (Cap 504)

Section 59 - Product safety starndards unsafe goods

(1) It shall be an offence for a person, in trade, to supply goods that are intended to be used, or are of a kind likely to be used, by a consumer if the goods are of a kind—

(a) in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard;

(2) Where—

(a) the supply of goods by a person constitutes a contravention of this section by reason that the goods do not comply with a prescribed consumer product safety standard;

Findings

1. Almasi supplied soda products that had impurities which made them unfit for human consumption and posed a health hazard to consumers.
2. Almasi was in violation of section 59(1)(a) and 59(2)(a) of the Act, as the products were not compliant with the East African Standard EAS 39:2001, section 4.4.1 on Hygiene in the food and drink manufacturing industry.

Orders

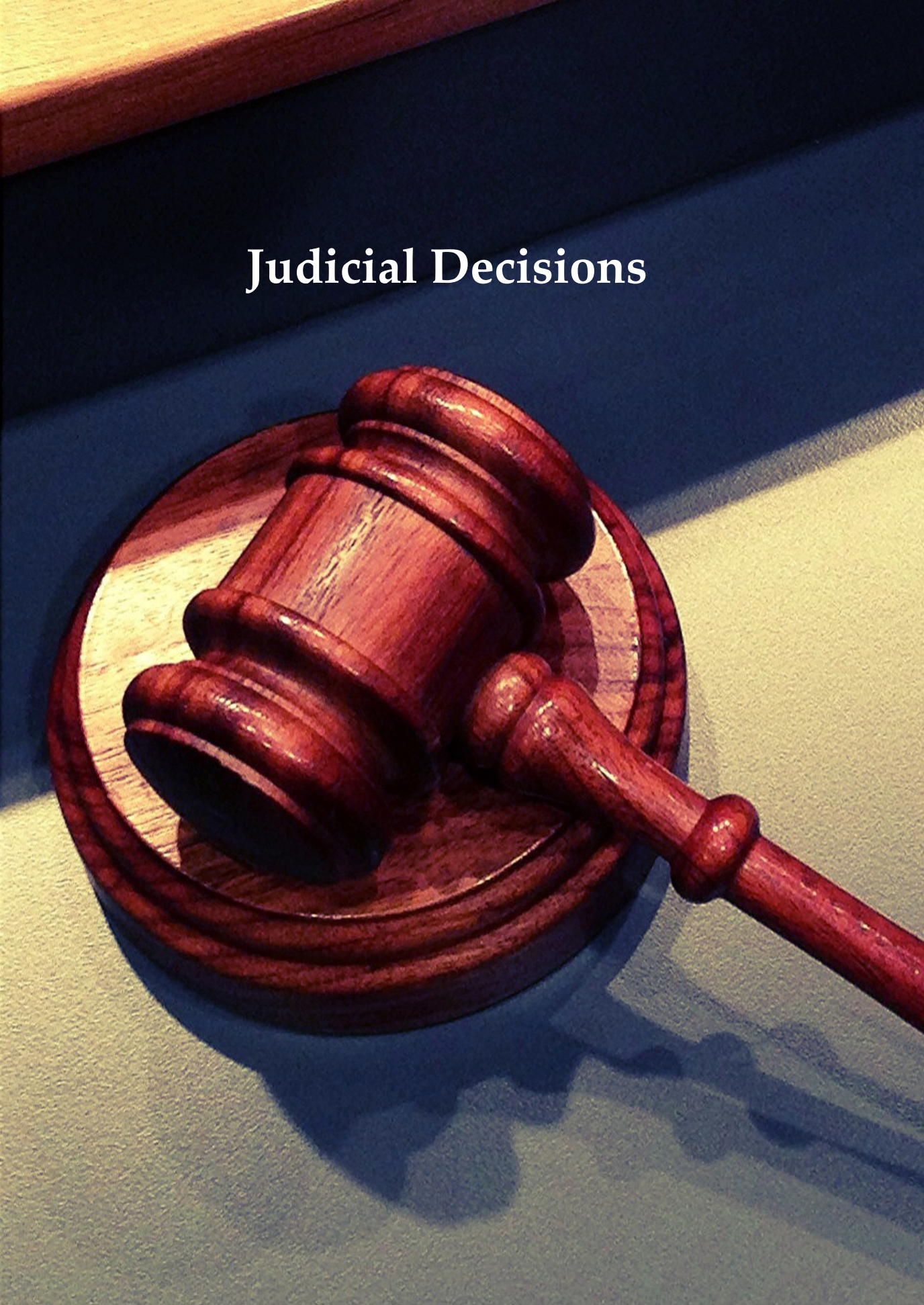
Almasi entered into a settlement agreement with the Authority pursuant to section 38 of the Act on the following terms:

i. The Authority imposed a financial penalty of KES.120,000 on Almasi for contravention of section 59(1)(a) and 59(2)(a) of the Act which prohibits supply of goods which do not comply with a prescribed consumer product safety standard.

ii. Almasi to come up with measures they intended to put in place to ensure a non-recurrence of the offence; and

iii. Almasi to comply with the provisions of the Act and the Consumer Protection Guidelines developed under the Act, and desist from engaging in any activity or conduct that violates the Act.

Judicial Decisions



Judicial Decisions

Synopsis

The Authority's mandate under the Act is to among others, enforce compliance with the Act by sanctioning restrictive trade practices, abuse of dominant position, abuse of buyer power, consumer welfare contraventions, and regulating mergers. Consequently, the forum of first resort for any competition issue under the Act is the Authority.

The Authority is an administrative body guided by the provisions of article 47 of the Constitution of Kenya, 2010 ("the Constitution"), the Competition Act and the Fair Administrative Action Act No. 4 of 2015 ("the FAAA"). Article 47(1) of the Constitution guarantees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The FAAA was enacted to give effect to the provisions of article 47 of the Constitution.

The Authority has an elaborate mechanism of conducting investigations, hearing parties, analyzing evidence and making decisions. In particular, section 31 of the Act empowers the Authority to conduct investigations either on its own motion or upon receipt of information or complaints from any person or government agency or ministry. Sections 32 to 35 of the Act, further empower the Authority to collect evidence through search warrants, receive evidence voluntarily, consider the findings of its investigation and make a proposed decision and convene oral hearings with undertakings under investigation. Upon convening oral hearings and considering all evidence tendered by an undertaking, the Authority makes a final decision under section 36 of the Act which renders it *functus officio.*

Section 40 of the Act provides an elaborate appeal mechanism for an undertaking aggrieved by the Authority's decision made under section 36 of the Act and section 46 of the Act on determinations of proposed mergers. It provides that an undertaking aggrieved shall appeal to the Competition Tribunal within 30 days of receiving the Authority's decision. Should a party be dissatisfied by the Competition Tribunal's decision, they may appeal further to the High Court within 30 days of receiving the Competition Tribunal's decision, which appeal shall be final.

The Authority may at any time, during or after an investigation enter into a settlement agreement with an undertaking(s) as provided under section 38 of the Act. The Competition (General) Rules, 2019 (the Rules) outline the procedure for settlement of contraventions. Succinctly, an undertaking intending to enter into settlement negotiations shall notify the Authority in writing and the Authority then informs the party whether it is amenable to the request for settlement. Settlement agreements sometimes include a reduced penalty which the Authority shall determine taking into account the factors enumerated under rule 42 of the Rules.

Under section 37 of the Act, the Authority is empowered to grant interim orders pending conclusion of investigations. This is in the event that it believes, on reasonable grounds, that an undertaking has engaged, is engaging, or is proposing to engage, in conduct that constitutes or may constitute an infringement of the prohibitions contained in the Act. Additionally, that it is necessary for the Authority to act as a matter of urgency for the purpose of preventing serious, irreparable damage to any person or category of persons; or protecting the public interest.

To facilitate the Authority in execution of its mandate, section 20 of the Act allows the Authority to grant confidentiality on any material given to it either voluntarily or under compulsion of the law. The Authority will grant confidentiality for the material if its disclosure could adversely affect the competitive position of any person or if it is commercially sensitive. Parties are allowed to appeal to the Competition Tribunal against the Authority's decision not to grant confidentiality.

The following cases illustrate different substantive and procedural aspects of applicability of the Act among them being the requirement to exhaust remedies under the Act prior to seeking redress before courts, conducts that amount to restrictive trade practices, abuse of buyer power and false and misleading representation, legality and applicability of guidelines prepared by the Authority and what constitutes a final decision of the Authority capable of appeal among others.

Exhaustion of remedies under the Act

High Court lacks jurisdiction to hear and determine a suit before the exhaustion of statutorily prescribed avenues of dispute resolution

The premise of the suit was the alleged abuse of dominance by the Kenya Breweries Limited and East African Breweries Limited. The court found that abuse of dominance was one of the conducts the Authority could investigate and that the Act provided for an elaborate process of steps to be followed upon initiation of an investigation. The court held that where procedures and processes existed for resolution of disputes such processes must be exhausted first, before a party could approach court. The court also highlighted the reasons why the doctrine of exhaustion was held in deference.

52. Alexander Mugo Mtetu & 5 others v Kenya Breweries Limited & 4 others

High Court Case No. E471 of 2019

High Court at Nairobi

Commercial & Tax Division

A Mabeya, J

April 22, 2021

Competition Law *- Competition Authority of Kenya (the Authority) – mandate of the Authority – investigation of complaints by the Authority – investigation of a claim of abuse of dominant position - whether the Authority had the mandate to investigate complaints of abuse of dominant position - Competition Act No. 12 of 2010 sections 7, 9, 24, 31-40 and 71.*

Jurisdiction *– jurisdiction of the High Court - jurisdiction to hear and determine a suit before the exhaustion statutorily prescribed avenues of dispute resolution - whether the High Court had jurisdiction to hear and determine a suit before the exhaustion statutorily prescribed avenues of dispute resolution had been exhausted - what was the rationale for the doctrine of exhaustion.*

Statutes *– interpretation of statutory provisions – interpretation of section 9(4) of the Fair Administrative Actions Act - whether section 9(4) of the Fair Administrative Action Act which provided for the procedure for judicial review was applicable to a suit instituted before the exhaustion statutorily prescribed avenues of dispute resolution - Fair Administrative Action Act, No 4 of 2015.*

Brief facts

The plaintiffs filed a suit claiming that Kenya Breweries Limited and East African Breweries Limited (the 1st and 2nd defendants) engaged in conduct amounting to abuse of dominance by purchasing bottles with a universal shape and embossing on them with their unique initials with a view of limiting production and market access to other beer producers who used the same shape of universal bottles for their products.

The Authority (the 3rd defendant) filed a preliminary objection on the grounds that the suit

was filed prematurely and therefore the court had no jurisdiction to hear and determine the proceedings before the statutory avenues of dispute resolution provided for in the Act were exhausted.

Issues

i. Whether the Authority had the mandate to investigate complaints of abuse of dominant position.

ii. Whether the High Court had jurisdiction to hear and determine a suit before the exhaustion of statutorily prescribed avenues of dispute resolution.

iii. Whether section 9(4) of the Fair Administrative Action Act which provided for the procedure for judicial review was applicable in a suit instituted before the exhaustion of statutorily prescribed avenues of dispute resolution.

Relevant Provisions of the Law

Competition Act, No.12 of 2010

Section 9 - Functions of the Authority

(1) The functions of the Authority shall be to—

(b) receive and investigate complaints from legal or natural persons and consumer bodies;

Fair Administrative Action Act, No. 4 of 2015

Section 9 - Procedure for judicial review

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Held

1. The Act provided a very elaborate process to be followed should a person have a complaint on infringement of any of the prohibitions under the Act. The Act provided for various reliefs to be granted to an aggrieved party, including interim reliefs in urgent cases. There was also an elaborate appellate system in place under the Act.
2. The issues raised in the application and plaint, which included abuse of dominance, squarely fell within the mandate of the Authority. Where procedures and processes existed for resolution of disputes such processes must be exhausted first, before a party could approach court.
3. Section 9 of the Fair Administrative Action Act provided for the procedure for judicial review, which was not the case in the instant suit. In that regard, that provision was not applicable in the circumstances.
4. There was an obligation under section 9(4) of the Fair Administrative Action Act for an applicant who wished to be exempted from following the alternative dispute resolution to apply to the instant court for exemption. There was no such application in the instant matter.
5. The applicants submitted that the Authority was slow, or failed to act upon their alleged complaint but there was no such evidence on record. The document relied on showed that the complaint was made after the instant proceedings had been commenced. That in deference to the *sub-judice* rule, the Authority declined to make any findings on its

investigations.

6. There was a constitutional imperative that courts should be guided by the principle in article 159(2)(c) of the Constitution that decreed the promotion of alternative dispute resolution mechanisms. While the court did not have jurisdiction to entertain the matter before it, it would strictly apply the principle of alternative dispute resolution envisaged in both article 159(2)(c) and the Act.
7. The reason why the doctrine of exhaustion was held in deference was because of the right to access to justice;
   a) it promoted alternative dispute resolution mechanisms;
   b) it reduced the litigation in the courts; and
   c) it afforded the parties an additional layer of forum where the parties could air their grievances. That expanded the right to access to justice.
8. Under the Act, the expertise of the Authority would enable full and professional investigation to be undertaken. The evidence gathered would enable the court on appeal to make an informed decision unlike where a party directly came to court as a first point of call.

Preliminary objection upheld; application and plaint struck out.

Orders

i. The Authority was directed to continue with the process it had commenced in respect of the complaint touching on the complaint therein and deal with it as per the law provided. Such investigations to be concluded within 120 days.

ii. Each party to bear own costs.

Aggrieved parties should adhere to the dispute resolution mechanisms in statute before approaching the High Court

The petitioners challenged the monopoly status of Kenya Power and Lighting Company for contravention of the Constitution and the Act. The court found that the petition was premature and it lacked jurisdiction to hear the matter for failure to exhaust the remedies available under the law.

53. Okiya Omtatah Okoiti & another v Kenya Power & Lighting Company & 4 others (2020) eKLR

Petition No. 392 of 2018
High Court at Nairobi
Constitutional and Human Rights Division
JA Makau, J
October 15, 2020

Jurisdiction *- jurisdiction of specialized tribunals - vis-à-vis the unlimited original jurisdiction of the High Court - exhaustion doctrine - where an aggrieved party did not adhere to provisions of the dispute resolution mechanisms in various statutes before approaching the High court - where petitioners claimed violation of rights - where petitioners invoked provisions of the Constitution - whether the High Court had jurisdiction to hear and determine a matter where the Constitution was invoked despite the grievances arising from matters regulated under the Act - Competition Act (Cap 504), sections 40, 70 and 71.*

Brief facts

The petitioners moved the court alleging that Kenya Power and Lighting Company (KPLC), the 1st respondent, was a monopoly and that such a status was in contravention of the Constitution and the Act following a failure by the 2nd respondent, the Energy Regulatory Commission (ERC), to license other players to compete with KPLC.

The petition was grounded on the fact that the ERC had failed to discharge its duties under the Constitution for failing to be accountable for its administrative action of licensing only a monopoly in a key sector such as electricity distribution. Further, the petitioners alleged that the Authority had failed to determine KPLC's conduct unconscionable as per sections 56 and 57 of the Act, and to curtail such conduct by failing to break the monopoly which had been abused with impunity.

KPLC opposed the petition noting that the court lacked jurisdiction to hear the matter as the petitioners had not exhausted the available legal channels before approaching the court. Additionally, the issues raised in the petition were founded on private law and there existed an alternative remedy prescribed for resolving the dispute. Furthermore, the Authority argued that the Energy Act, Cap 314; Competition Act No. 12 of 2010, and the Public Procurement and Disposal Act, 2015 were self-enforcing statutes which provided for complaints mechanisms and competent tribunals to address reviews or appeals from decisions made by the regulators.

Issue

Whether the High Court had jurisdiction to hear and determine a matter where the Constitution was invoked despite the grievances arising from matters regulated under the Act.

Relevant Provisions of the Law

Energy Act,

Section 6 - Powers of the Commissions

l. Investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act;

Section 107 - Appeals from decisions of the Commission

Where under this Act the provision is made for appeals from the decisions of the Commission, all such appeals shall be made to the Energy Tribunal, in accordance with the provisions of this Part.

Competition Act (Cap 504)

Section 50 - Identifying unwarranted concentration of economic power

(1) The Authority shall keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages, if any, of integration in production or distribution.

(2) The Authority shall investigate any economic sector which it has reason to believe may feature one or more factors relating to unwarranted concentrations of economic power, and for that purpose, the Authority may require any participant in that sector to grant it or any person authorized in writing by it access to records relating to patterns of ownership, market structure and percentages of sales.

Section 56 - Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable.

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to—

(a) the relative strengths of the bargaining positions of the person and the consumer;

(b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

Held

1. Under section 6 of the Energy Act, the ERC was empowered to among others, investigate complaints on disputes between parties with grievances over any matter required to be

regulated under the Energy Act. The 2nd respondent's regulatory powers included *inter alia* to: -

a. issue, renew, modify, suspend or revoke licenses and permits for all undertakings and activities in the energy sector;
b. set, review and adjust electric power tariffs and tariff structures, and investigate tariff charges, whether or not a specific application had been made for tariff adjustment; and
c. approve electric power purchase and network service contracts for all persons engaging in electric power undertakings. Section 107 of the Energy Act was also express, that a party aggrieved with any decision of the commission ought to file an appeal with the Energy Tribunal.

2. The Energy (Complaints and Disputes Resolution) Regulations 2012, regulation 4 affirmed the judication of the ERC as the forum of first resort with respect to any dispute arising out of the provisions of the Energy Act. The Regulations equally set out in detail the procedure and timelines for resolution of such disputes.
3. Sections 31 to 36 and 70A of the Competition Act provided for an elaborate process of conduct of investigations; fair hearing and remedies, upon conclusion of investigations and where there was breach of the Competition Act; section 24(2) of the Competition Act set out various infringements, that had to be contravened for an undertaking to be deemed to have abused its dominance. With respect to abuse of dominance and consumer complaints, the Competition Act provided for the right of appeal to the Competition Tribunal under section 40 and Part VII of the Act.
4. Section 107 of the Energy Act, the Energy (Complaints and Disputes Resolution) Regulations 2012, regulation 4, the Competition Act and the Public Procurement and Asset Disposal Act, 2015 which related to the instant petition provided in no uncertain terms for a complaints mechanism before respective tribunals to address review or appeals from decisions made by the regulators. The respondents or bodies were the forum of first resort for any person or party aggrieved with any matter under the Energy Act and it was only thereafter that the matter could be referred to a tribunal.
5. The petitioners did not demonstrate having filed any complaint with any of the respondents or the respective tribunals. They had not exhausted the laid down process to justify filing of the petition at the High Court. The issues raised squarely fell within the mandate of the ERC and relevant respondents in the petition and therefore the relevant tribunals if need be were the proper forums to adjudicate such disputes.
6. Where procedures and processes existed for resolution of disputes such processes had to be exhausted first, before a party could approach court. The petitioners ignored a clear statutory provision, by failing to exhaust procedures and processes in existence for resolution of disputes. They filed the petition prematurely and as such the court lacked jurisdiction to hear and determine it at the instant stage.
7. Under section 6 of the Energy Act, any person was at liberty to approach the ERC on any issue touching the Energy Act, without limitation as to *locus standi*. It was not correct as alluded to by the petitioners, that they would lack *locus standi*, to originate their claim whether it raised constitutional issues or not, as they were at liberty to approach the ERC on any issue touching the Energy Act.
8. The ERC was obligated to adjudicate the issues relating to the power purchase agreements;

tariffs; competition in the energy sector and all other issues raised in the petition. In the event, the petitioners were aggrieved with the decision, an appeal lay with the Energy Tribunal. Therefore, the petitioners attempt to fault the alternative remedy as inadequate was without any basis as no evidence had been laid before the court to that effect.

9. Where Parliament had prescribed a mechanism by which certain disputes were to be resolved, save in exceptional circumstances, it was improper for a party to bypass that prescribed statutory process and seek relief from the court. The salutary legal principle had already been upheld and applied by courts for various obvious reasons; that not only had the relevant jurisdiction been donated to them but also those specialized bodies had the necessary expertise and resources to address such complaints.
10. Section 31 of the Competition Act empowered the Authority to investigate complaints relating to prohibited practices such as abuse of dominance; section 71 of the Act established the Competition Tribunal to entertain appeals from the decisions; directions or orders of the Authority. The power of the Authority to receive complaints from legal or natural person or consumer bodies and to exercise the power to investigate restrictive trade practices. In cases under the Act, the relevant body that was mandated to deal with complaints and investigate restrictive trade practices was the Authority. It was a port of first instance for complaints of breaches of its provisions. The Competition Act did not prohibit monopolies.
11. There existed an alternative remedy that was sufficient, effective, expedient and economical to resolve the issues raised by the petitioners which the petitioners had by-passed and rushed to the court. The petitioners could not be allowed to overlook clearly laid out procedures and processes that existed for resolution of disputes. Such processes should be exhausted first, before a party approached a court. The mere fact that the constitutional provisions were cited or the Constitution was invoked was not a sufficient reason to elevate the matter to a constitutional status, and confer jurisdiction to the High Court to inquire, arbitrate, determine or in any manner deal with issues which were required to be dealt with through a clearly prescribed dispute resolution mechanism, that was provided for in a specific statute.
12. The petition was premature. Further, the petitioners failed to present a factual basis to warrant the invocation of the constitutional jurisdiction of the court.

Petition struck out; parties to bear their own costs

Orders

i. The 1st respondent's notice of motion dated March 4, 2019 was allowed.

ii. The court's jurisdiction was prematurely invoked.

iii. Parties directed to refer the dispute to the ERC and/or any other relevant respondents' bodies for hearing and determination of their claims/disputes.

Editorial Note

Under holding 10, reference was made to section 70 of the Act. The correct reference was section 31 of the Act.

A preliminary decision of the Authority does not constitute a final decision capable of being challenged before the Tribunal

The appeal arose from a letter communicating the Authority preliminary decision in the investigation of a merger implemented without approval. The Tribunal found that the decision contained in the Authority's letter did not constitute a well-reasoned final decision capable of being challenged before the Tribunal. The Tribunal further found that the Authority in failing to convene an oral hearing conference as requested by the appellant, contravened the rules of natural justice, provisions of the Fair Administrative Action Act and the Constitution of Kenya, 2010 on the right to a fair hearing.

54. Standard Group PLC v Competition Authority of Kenya

Case No. CT/008/2021

Competition Tribunal at Nairobi

D Ogola, Chairperson; D Nyongesa, V Mwende, R. Mogire, Members

October 5, 2021

Competition Law *- Competition Authority - decisions of the Competition Authority - preliminary decisions of the Competition Authority* ***-*** *what amounted to a well-reasoned final decision from the Competition Authority capable of being challenged before the Competition Tribunal.*

Constitutional Law *- fundamental rights and freedoms - right to fair hearing and right to fair administrative action - claim that a party was not accorded a fair hearing - whether failure by the Competition Authority to give an opportunity to a party to make oral representation before pronouncing itself on the culpability of a party was a violation of the rules of natural justice, provisions of the Fair Administrative Action Act and the Constitution.- Competition Act (Cap 504), section 35.*

Words and phrases *- legitimate expectation – definition of legitimate expectation - expectation arising from the reasonable belief that a private person or public body will adhere to a well-established practice or will keep a promise - Black's Law Dictionary, Tenth Edition.*

Brief facts

The appellant moved to the Competition Tribunal (the Tribunal) challenging the preliminary decision of the Authority in the investigation of the acquisition of Mt. Kenya Star Publishers Limited and Pambazuko Network Kenya Limited by the appellant. The appellant also contended that the Authority had failed to accord them a fair hearing by reaching its decision without consideration of its submissions.

The appellant's grounds of appeal among others were that the Authority had reached a decision without consideration/taking into account the appellant's submissions. The Authority contended that the appellant had been accorded a fair hearing and that there was no determination that had been made and therefore the matter was improperly before the Tribunal.

Issues

i. What amounted to a well-reasoned final decision from the Authority capable of being

challenged before the Tribunal?

ii. Whether failure by the Authority to give an opportunity to a party to make oral representation before pronouncing itself on the culpability of a party was a violation of the rules of natural justice, provisions of the Fair Administrative Action Act and the Constitution.

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 35 - Hearing conference to be convened for oral representation

(1) If an undertaking indicates that it requires an opportunity to make oral representations to the Authority, the Authority shall—

(a) convene a conference to be held at a date, time and place determined by the Authority; and

(b) give written notice of the date, time and place to—

(i) the undertaking or undertakings concerned;

(ii) any person who had lodged a complaint with the Authority concerning the conduct which was the subject matter of the Authority's investigation; and

(iii) any other person whose presence at the conference is considered by the Authority to be desirable.

(2) A person to whom notice has been given of a conference in terms of subsection (1) may be accompanied by any person, including an advocate, whose assistance he may require at the conference.

(3) The proceedings at a conference shall be carried out in as informal a manner as the subject matter may permit.

(4) The Authority shall cause such record of the conference to be kept as is sufficient to set out the matters raised by the persons participating in the conference.

(5) The Authority may terminate the conference if it is satisfied that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

Held

1. A reasoned final decision reflected a summary of the of the facts of the case, the evidence relied upon, a summary of the issues arising therefrom, an analysis of the rival arguments (conceding or refuting each major issue), an analysis of the law and finally a determination based on all the above. The letter of March 31, 2021, the correspondence giving rise to the instant appeal, did not constitute a well-reasoned final decision. The Tribunal was, therefore, not in a position to determine the myriad issues raised by the appellant in the absence of a well-reasoned final decision of the Authority.
2. A perusal of the Act indicated that where a party requested for an oral hearing conference, the Authority was mandated to convene such conference, for instance under section 35 of the Act. Similarly, there was no reason why the Authority would deny the appellant that opportunity if so requested. A perusal of the pleadings, evidence, and record did not indicate that the Authority convened an oral hearing conference as requested by the appellant and mandated by the rules of natural justice, Fair Administrative Action Act and the Constitution of Kenya, 2010.

3. The respondent proceeded to make a determination that the appellant had implemented a merger without its Authority's approval. By its letter dated March 31, 2021, the Authority invited the appellant for a virtual meeting on April 15, 2021 to deliberate on the mitigating and aggravating factors of the penalty process and communication of the penalty percentage.
4. Whatever form of proceedings adopted by the Authority, the same had to meet the minimum irreducible elements of fairness. The Authority should not pronounce itself on the culpability of a party without first according that party an opportunity to be heard. Parties appearing before the Authority had a legitimate expectation that they would be accorded an opportunity to present their case through a fair hearing.
5. The proposed decision contained in the Authority's letter dated March 31, 2021 did not constitute a well-reasoned final decision capable of being challenged before the Tribunal. The Authority in failing to convene an oral hearing conference as requested by the appellant, contravened the rules of natural justice, provisions of the Fair Administrative Action Act and the Constitution on the right to a fair hearing.

Appeal partly allowed; each party to bear its own costs.

Orders

i. *The proposed decision contained in the Authority's letter dated March 31, 2021 did not constitute a well-reasoned final decision capable of being challenged before the Tribunal.*

ii. *The dispute was remitted back to the Authority to conclude investigations, hearing process, and render a final decision as per the law.*

iii. *The Authority in conducting the investigation and hearing process to ensure that it accorded the appellant and any other relevant party a fair hearing including but not limited to an opportunity for an oral hearing conference.*

iv. *Parties were at liberty to appeal.*

Editorial Notes

1. The full-text judgement under the order contained in paragraph 62(e) stated that "Parties were at liberty to apply". However, we have replaced the Tribunal's said order to read "Parties were at liberty to appeal" and as such we have included the same in this edit.
2. Kenya Law link to the case: http://kenyalaw.org/caselaw/cases/view/224877/
3. The Tribunal remitted the matter back to the Authority to conclude its investigations, hearing process, and render a final decision as per the law. The Authority proceeded to complete its investigations on the matter. The parties entered into a settlement agreement and the appellant regularized the merger.

Constitutionality of section 29(8) of the Act requiring professional associations to seek exemption in respect of rules containing a competition restriction

Constitutionality of section 29(8) of the Act that required professional associations whose rules had the object and/or effect of preventing competition in the market, to apply to the Authority for an exemption in the application of those rules

The petitioner moved the court seeking a declaration that section 29(8) of the Act was unconstitutional for infringement on its rights under article 46 of the Constitution and the national value of public participation. The court found that the impugned provision was constitutional. The court highlighted the guiding principles for undertaking public participation, the components of meaningful public and principles of interpretation of statutes.

55. Law Society of Kenya v Competition Authority of Kenya and 2 others

Petition 215 of 2020

Constitutional and Human Rights Division

HI Ong'udi, J

July 21, 2022

Constitutional Law *– fundamental rights and freedoms – freedom of association – where the Competition Authority required professional associations that prevented competition in the Kenyan market to seek an exemption from it – whether the requirement for an exemption was a violation of the freedom of association of professional associations – Constitution of Kenya, 2010 article 46; Competition Act (Cap 504), section 29.*

Constitutional Law *– national values and principles – public participation – requirement for public participation before the passage of laws – parliamentary procedures – claim that legislation was amended without public participation - whether the amendment to section 29 of the Competition Act to include section 29(8) that required professional associations whose rules had the effect of preventing competition in the market, to apply to the Competition Authority for an exemption in the application of those rules, was unconstitutional for lack of public participation – Constitution of Kenya, 2010, article 10.*

Competition Law *– restrictive trade practices – exemptions – exemption of professional rules – professional association – whether section 29(8) of the Competition Act that created an offence against professional associations for failure to apply for exemption in respect of professional rules that were harmful to competition was unconstitutional for lack of public participation – Competition Act No. 12 of 2020, section 29(8).*

Statutes *– interpretation of statutory provisions – interpretation of section 29 of the Competition Act – where section 29 required professional associations whose rules had the effect of preventing*

competition in the market, to apply to the Competition Authority for an exemption in the application of those rules- whether section 29 violated the freedom of association of professional associations.

***Constitutional Law** – national values and principles – public participation – requirement for public participation before the passage of laws –claim that legislation was amended without public participation - whether the amendment to section 29 of the Competition Act to include section 29(8) that required professional associations whose rules had the effect of preventing competition in the market, to apply to the Competition Authority for an exemption in the application of those rules, was unconstitutional for lack of public participation – Constitution of Kenya, 2010, article 10.*

***Competition Law** – restrictive trade practices – exemptions – exemption of professional rules – professional association – whether section 29(8) of the Competition Act that created an offence against professional associations for failure to apply for exemption in respect of professional rules that were harmful to competition was unconstitutional for lack of public participation – Competition Act No. 12 of 2020, section 29(8).*

Brief facts

The petitioner challenged the constitutionality of section 29(8) of the Act for abrogation of consumer rights under article 46 of the Constitution and right of public participation which was also a national value and principle binding all state organs following the enactment of the Competition (Amendment) Act, 2019.

The National Assembly opposing the petition averred that it had adhered to the requirement of public participation by inviting for comments to which invitation only three stakeholders responded.

The Authority argued that the impugned provision did not limit the right of the petitioner to form an association, or any member to join the association or participate in the activities of the association as provided under article 36 of the Constitution. Instead the main focus of the provision was professional rules that contained a restriction which prevented, distorted or lessened competition in a market.

Issues

i. Whether section 29 of the Act, which required professional associations whose rules had the effect of preventing competition in the market, to apply to the Authority for an exemption in the application of those rules, violated the freedom of association of professional associations.

ii. Whether the amendment to section 29 of the Act to include section 29(8) that required professional associations whose rules had the effect of preventing competition in the market, to apply to the Authority for an exemption in the application of those rules, was unconstitutional for lack of public participation.

Relevant Provisions of the Law

Constitution of Kenya 2010

Article 165 High Court

iii. Subject to clause (5), the High Court shall have—

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

Article 118 Public access and participation

1. Parliament shall—

2. conduct its business in an open manner, and its sittings and those of its committees shall be in public; and

3. facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

4. Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

Competition Act (Cap 504)

Section 21 - Restrictive trade practices

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

Section 29 - Exemption in respect of professional rules

(8) Any professional association—

(a) whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market in Kenya and which fails to apply for an exemption as required by sub-section (1) and (2); or

(b) which having applied for exemption under sub-section (1) fails to comply with the Authority's decision rejecting its application,

commits an offence, and any official thereof or any person who issues guidelines or rules in contravention of that provision shall be liable, upon conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both.

Held

1. In interpreting a statute courts presumed that Acts of Parliament were enacted in conformity with the Constitution. A court was required to examine the purpose and effect of an impugned statute.
2. The purpose of the Act was to protect consumers from unfair and misleading market conduct. It was one of the fundamental rights and freedoms envisaged under article 46 of the Constitution. The Act was enacted to ensure the rights were upheld to give effect to article 46 of the Constitution.The Act provided a broad framework within which consumers could be protected. Part III of the Act prohibited restrictive trade practices.
3. Section 29 of the Act purposefully intended that restrictive trade practices be regulated within the context of professional associations such as the petitioner and the interested parties. The Act in no way dictated or determined how the said associations were to carry

out their mandate or business in light of their enabling legislation. The Act expressly spoke to restrictive trade practices that it wished to regulate in the context of consumer protection in view of professional associations.

4. The High Court was enjoined to interpret the Constitution in a manner that promoted its purpose and principles, advanced the rule of law and human rights and fundamental freedoms in the Bill of Rights and permitted the development of the law and contributed to good governance.
5. Section 29 of the Act did not usurp the mandate of the petitioner and the interested parties. The restriction had been in operation since 2011 save for the penalty clause that was introduced by the amendment. The petitioner and the interested parties failed to demonstrate how the impugned provision violated their rights.
6. There was nothing to show that the amendment of section 29 of the Act curtailed the parties' right of association or inhibited the members of the public from accessing quality services from the professional associations. Section 29(8) of the Act was constitutional.

Petition dismissed; petitioner to bear the costs.

Conduct amounting to infringement of the Competition Act

Abuse of buyer power

Power of the Authority to investigate complaints of abuse of buyer power

Majid Al Futtaim Hypermarkets Limited (the appellant) proffered an appeal against the orders of the Authority dated February 4, 2020 which imposed a financial penalty and ordered refund of rebates and damages on the grounds that the Authority lacked the power and authority to investigate abuses of buyer power prior to December 31, 2019. The Tribunal found that the Authority had power to investigate abuses of buyer power prior to December 31, 2019. The Tribunal also held that the appellant had buyer power and had abused its buyer power.

56. Majid Al Futtaim Hypermarkets v Competition Authority of Kenya & another

CT/006/2021

Competition Tribunal at Nairobi

D Ogola, Chairperson; D Nyongesa, V Mwende and R Mogire, Members

April 20, 2021

Competition Law *– Competition Authority of Kenya (the Authority) – functions of the Authority – investigation of complaints – investigations into claims of abuse of buyer power – whether the Authority had power or authority to investigate complaints of abuse of buyer power for any period prior to December 31, 2019 – whether the Authority acted against the rules of procedure, principles of natural justice and engaged in procedural impropriety – whether the appellant had abused its buyer power in dealing with the 2nd respondent – Competition Act (Cap 504), sections 9(1) (a) and b), 24A(4) and 31(1).*

Brief facts

Majid Al Futtaim Hypermarkets filed an appeal before the Tribunal seeking to challenge the orders of the Authority dated February 4, 2020. The appellant was ordered to refund rebates deducted from Orchards Limited (2nd respondents) invoice and pay damages and a financial penalty.

The appellant challenged the orders on the main ground that the Authority had no power to investigate cases of abuse of buyer power prior to December 31, 2019. The appellant further claimed that they had not been afforded a fair hearing as mandated by the principles of natural justice.

Issues

i. Whether the Authority had power or authority to investigate complaints of abuse of buyer power for any period prior to December 31, 2019

ii. Whether the Authority, in conducting its investigations, acted against the rules of procedure, principles of natural justice and engaged in procedural impropriety.

iii. Whether the Authority was justified in relying on the Buyer Power Guidelines and

international best practices.

iv. Whether the appellant had buyer power and abused its power in dealing with the 2nd respondent.

Relevant Provisions of the Law

Interpretations and General Provisions Act (cap 2)

Section 48 - Construction of enabling words

Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing.

Competition Act (Cap 504)

Section 9 - Functions of the Authority

(1) The functions of the Authority shall be to—

(a) promote and enforce compliance with the Act;

(b) receive and investigate complaints from legal or natural persons and consumer bodies;

Section 24A - Abuse of buyer power

(1) In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including—

(a) the nature and determination of contract terms between the concerned undertakings;

(b) the payment requested for access to infrastructure; and

(c) the price paid to suppliers

Section 31 - Investigations by Authority

(1) The Authority may, on its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of—

(a) prohibitions relating to restrictive trade practices;

(b) prohibitions relating to abuse of dominance; or

(c) prohibitions relating to abuse of buyer power.

(2) If the Authority, having received from any person a complaint or a request to investigate an alleged infringement referred to in subsection (1), decides not to conduct an investigation, the Authority shall inform that person in writing of the reasons for its decision.

Held

1. The provisions of buyer power were introduced into the Competition Act in 2016. section 24(2A) of the Competition (Amendment)Act 2016, created the offence of conduct amounting to abuse of buyer power. Further, section 24(B) established the three factors the Authority was to consider in establishing buyer power while 24(2B) set out the penalty for non-compliance with section 24(3). The 1st respondent had power to investigate complaints into abuse of buyer power prior to December 31, 2019.
2. Section 31(1) (c) of the Act, was introduced, not to confer investigative power on the Authority for the first time, but to affirm that it existed and to preclude an interpretation

that would assume otherwise. The 1st respondent had power to conduct investigations into abuse of buyer power in April 2019.

3. The law placed the onus on an administrative body to furnish the person against whom allegations were made with information, materials, and evidence to be relied upon in making the decision or taking administrative action. The 1st respondent supplied the appellant with the documents and evidence it relied upon when making its decision.
4. The 1st respondent followed the correct procedure as laid down in Part E of the Act. Further, the process did not require formal rules for it to achieve the threshold of natural justice and the appellant was given adequate notice to rebut the evidence against it and an opportunity to be heard.
5. The Buyer Power Guidelines was a policy document setting out standards of operations. They were basically the Authority's operation manual, aimed at ensuring consistency and uniformity, with respect to investigating and determining buyer power, and abuse of the same. They were also a source of information and education to the public in that regard. The Buyer Power Guidelines were not a statutory instrument and were not required to go through the Parliament as required by the Statutory Instruments Act.
6. International best practices were not a source of law in Kenya, however, the Kenyan courts and administrative bodies considered decisions and practice from other jurisdictions in their decision making. Decisions from other jurisdictions did not have the force of law but were persuasive especially where local decisions and practice were not available.
7. The return of unsold merchandise on account of near expiry date could not be attributed to the 2nd respondent. The appellant took the risk by making the orders and it should also bear the risk of expiry arising from overstocking. Even though it was a term agreed under the contract, such conduct was on the face of it unconscionable and could only be imposed by a party in a superior bargaining position. The appellant's conduct in that regard constituted an abuse of buyer power.
8. The appellant did not prove that any of the goods that it refused to take delivery of did not comply with its specifications. The appellant's conduct in refusing to take delivery of goods delivered in accordance with its LPO amounted to abuse of buyer power.
9. The rebates imposed a disadvantage on the 2nd respondent who responded by proposing to increase the retail prices and amending the supply agreement with the appellant. The attempt by the 2nd respondent to increase the prices was thwarted by the appellant. The attempt to renegotiate the terms resulted in the appellant declining to renew the annual supply contract between the parties. There was no evidence of a countervailing advantage for the imposition of a progressive rebate or quantity rebate.
10. There was no correlation between costs incurred in June 2018 in anticipation of a contract in 2019. On the contrary, the conduct of the parties had been that contracts for a certain year were signed in October of the preceding year. If the top up had been made in 2019 pursuant to the conduct of the appellant in 2019, then the damages would be acceptable. If the top up had been done in 2018 after execution of the 2019 contract it would similarly be acceptable. However, in the instant case, the 2nd respondent incurred costs in 2018 for

the year 2019 with no promise of a contract in 2019.

11. From the sample supply agreement between the appellant and the 2nd respondent, the terms of posting the staff were clear. The request to post merchandisers at the appellant's outlets had not constituted abuse of buyer power.
12. A violation under the Act could not be excused on grounds of consent. The mandate of the 1st respondent was to promote and enforce compliance with Act. If there was conduct constituting a violation of the Act, the Authority was within its mandate to rectify the same. There was no consent to an illegality.
13. The orders of the 1st respondent directed to the appellant, related to contracts with offending provisions, and clauses which facilitated abuse of buyer power. Contracts with parties of equal or greater bargaining power were not contemplated in those orders as "buyer power" would not arise. Consequently, such contracts would not offend the provisions of the Act or the orders of the 1st respondent.
14. The refusal to take delivery of goods was a buyer's right under the law of contract. There were deliveries which would conform to the contract and others which would not. That being a commercial contract, it was best to leave that for the parties to assess. In any event, after the 2019 amendments to the Act, refusal to accept goods which was not justified was an offence under the Act.

Appeal partly allowed.

Orders

i. Prayers number I, II and III were dismissed.

ii. Prayer number IV partially succeeded, and the 1st respondent's decision dated February 4, 2020 was modified as follows:

a. The appellant to amend all current supply agreements relating to its Carrefour Hypermarkets in Kenya within 30 days with a view to expunging all offending provisions, specifically clauses that provided for, led to or otherwise facilitated abuse of buyer power, including but not limited to the:

1. application of listing fees,
2. application of rebates,
3. transfer of commercial risk to the supplier, and
4. unilateral delisting of suppliers.

b. The requirement for the Authority's prior approval before rejecting delivery of goods by the appellant from suppliers was set aside.

c. The requirement for the Authority's prior approval before deployment of merchandisers to the appellant's stores was set aside.

d. The order to pay to the 2nd respondent the sum of KES. 130,856 for loss arising from unilateral termination of the supply agreement for the year 2019, being cost of procurement of material for exclusive use for the appellant's orders was set aside.

iii. *The order for the refund of rebates deducted from invoices of the 2nd respondent for the years 2017, 2018 and 2019 amounting to KES. 289,482 as set out in the appellant's written statements of accounts for those years was upheld and the same was to be paid within 30 days hereof.*

iv. *The order for the payment of financial penalty was upheld and the same was to be paid within 30 days.*

v. *Each party to bear its own costs.*

Advertisements with false or misleading representations are contrary to consumer rights

Promising customers certain deliverables through advertisements and failing to meet the same amounts to false representation

The appeal stemmed from a letter communicating the final decision and orders of the Authority following investigation into false and misleading representations by the appellant. The tribunal highlighted the principles for determining a misleading advertisement and further that the appellant contravened sections 55(a)(ii) & (v) and (b)(v) of the Act by falsely representing to its customers that its services were of a particular standard, quality, value, or grade. The Tribunal also held that although parties were bound by the terms of their contract, the courts would not shy away from interfering with or refusing to enforce contracts which were unconscionable, unfair, or oppressive.

57. Royal Mabati Factory Limited v Competition Authority of Kenya

CT/009/2021

Competition Tribunal at Nairobi

D Ogola, Chairperson; D Nyongesa, V Mwende, and R. Mogire, Members

April 12, 2022

Competition Law *– consumer welfare - false or misleading representation – principles in determining a misleading advertisement - where the appellant promised its customers vide its advertisements free delivery within specified times – where the appellant in representing that they delivered goods countrywide free of charge required their customers who relied on the representation to pay for the deliveries – whether promising customers certain deliverables through advertisements and failing to meet the same amounted to false misrepresentation and thus contravened section 55(a) of the Act – Competition Act (Cap 504), sections 55(a)(ii) and (v) and (b)(v).*

Jurisdiction *– jurisdiction of the Competition Tribunal - appellate jurisdiction vis-a-vis judicial review –whether the appellate power given to tribunals on appeals against exercise of discretion and questions of law were indistinguishable from judicial review claims - Constitution of Kenya, 2010, articles 3(1), 10, 20(4), and 47(1); Competition Act, No.12 of 2010, section 73.*

Words and phrases *– unconscionable contract – definition of unconscionable contract - traditionally, a bargain is said to be unconscionable in an action at law if it was such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other - Black's Law Dictionary, Ninth Edition.*

Brief facts

The appellant moved the Competition Tribunal (the tribunal) challenging the final decision of the respondent, the Competition Authority of Kenya (the Authority) following investigation into alleged violation of sections 55 and 56 of the Act on false or misleading representation and unconscionable conduct respectively. The appellant contended that the Authority had failed to accord it a fair hearing by reaching its decision without involving the appellant in the investigation process and giving it a chance to demonstrate that it had met the contractual obligations to its clients. The appellant's grounds of appeal among others were that the

Authority erred by relying on the information furnished to it by the complainants only without consideration the appellant's submissions.

On the other hand, the Authority contended that it was guided by the provisions of section 36(d) of the Act as read together with the Consumer Administrative Guidelines for Consumer Protection in arriving at its decision to fine the appellant and defended the integrity of the procedure adopted in handling the matter and the merit of its decision. Further, the Authority contended that it considered the submissions by the appellant and was convinced that it was in breach of the said provisions of the Act.

Issues

i. Whether the appellate power given to tribunals on appeals against exercise of discretion and questions of law were indistinguishable from judicial review claims.
ii. Whether promising customers certain deliverables through advertisements and failing to meet the same amounted to false or misleading misrepresentation and thus contravened section 55(a) of the Act.
iii. What were the principles for determining a misleading advertisement?
iv. What was the nature of an unconscionable contract?

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 55 – False or misleading representation

"A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he-

(a) falsely represents that-

ii. services are of a particular standard, quality, value, or grade.

iii. Goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have

(b) makes a false or misleading representation-

v. concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

Section 56 – Unconscionable conduct

(1) It shall be an offence for a person, in trade in connection with the supply or possible supply of goods or services to another person, to engage in conduct that is, in all the circumstances, unconscionable.

(2) Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (I) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to-

(a) the relative strengths of the bargaining positions of the person and the consumer,·

(b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the person;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used

against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

Section 73 – Person entitled to appeal to the tribunal

The following persons may exercise the right of appeal to the Tribunal conferred under this Act—

(a) any person who, by a determination made by the Authority under this Act—
- *(i) is directed to discontinue or not to repeat any trade practice;*
- *(ii) is issued with a stop and desist order or any other interim order;*
- *(iii) is permitted to continue or repeat a trade practice subject to conditions prescribed by the order;*
- *(iv) is directed to take certain steps to assist existing or potential suppliers or customers adversely affected by any prohibited trade practices;*
- *(v) is ordered to pay a pecuniary penalty or fine; or*
- *(vi) is aggrieved by a stop and desist order or any other interim order of the Authority;*

Held

1. As an appellate tribunal, appeals against exercises of discretion and questions of law tended to be indistinguishable many a times from judicial review claims. That was because, they were both directed to re-examine the same exercise of power by administrative decision makers. Consequently, the distinction was at times equivalent to serving a fruitless task of categorisation for categorisation's sake. That was not to say that the distinction was without meaning, but rather to recognise that overlap and be mindful not to exceed the tribunal's jurisdiction.
2. The tribunal was conscious that it was called upon to uphold, defend and protect the Constitution of Kenya, 2010, (article 3(1)), protection of the Bill of Rights in interpretation (article 20(4), and the values and principles under articles 10, 20 and 47(1)) of the Constitution. The availability of a statutory mechanism should be explored before judicial review issues were considered. The Act as read together with the Constitution empowered the Tribunal to determine the issue of whether the appellant was accorded a fair hearing.
3. The appellant was accorded a fair hearing as it had notice of the case against it; was given sufficient time to prepare its case; had the opportunity to adduce evidence in support of its case; and generally, to defend itself.
4. The principles for determining a misleading advertisement were: -
   a. The general impression of the advertisement must be determined, and to do so, one had to consider the portion of the public to whom the advertisement was directed.
   b. The literal meaning of the advertisement was to be considered as well as the general impression.
   c. To try to determine whether the advertisement was false or misleading in material respect, outside evidence may be considered, but not for the purpose of altering the general impression created by the advertisements.
   d. The question was whether the advertisement was misleading in a material respect; that was, it must be something that would have an effect on the purchase decision.
   e. Aggressive advertising was permitted unless it was an untruthful disparagement.The

court should not interfere with advertising unless the advertising was clearly unfair Even advertisements that pushed the bounds of what was fair may not be misleading in a material respect.

f. In the civil context, the burden of proof on the plaintiff was a balance of probabilities; but it was a heavier burden. There must be substantial proof of activity that was a very serious public crime.

5. After a perusal of the appellant's advertisements, any reasonable man would assume "same day production" to also mean "same day delivery". The appellant in its submissions stated that such orders could take approximately 10 minutes to produce. Therefore, the appellant could not expect a reasonable person not to expect the same day production to include same day delivery. Furthermore, it was also not clear from the advertisements that the 24-hour countrywide delivery was specific to some products and was not available to customers across the board.
6. The appellant promised its customers vide its advertisements delivery within specified times, but the customers did not receive the deliveries within the time specified. Some customers were also forced to change their profile of goods ordered after the appellant claimed that the ordered goods were out of stock. Considering the expectations of an average consumer, who was reasonably well informed, observant, and circumspect, the advertisements were misleading.
7. The appellant in representing that they delivered goods countrywide free of charge while requiring their customers who relied on the representation to pay for the deliveries contravened section 55(a)(v) of the Act.
8. An unconscionable contract had been defined as one that was unjust or unduly one-sided in favour of the party who had the superior bargaining power. The adjective "unconscionable" implied an affront to fairness and decency. An unconscionable contract was one that no mentally competent person would accept and no fair and honest person would enter into. Unconscionable contracts usually resulted from the exploitation of consumers.
9. Although parties were bound by the terms of their contract, the courts would not shy away from interfering with or refusing to enforce contracts which were unconscionable, unfair, or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that were unreasonably favourable to one party and would preclude meaningful choice for the other party.
10. The appellant received money from its customers for products not in stock at the time the orders were made. The unavailability of the product was never communicated to the customers prior to the customers making the payments. The appellant would first receive the money and thereafter recommend other products to the customers. Sometimes the recommended products were more expensive than what the customers had initially ordered. The fact that the customers agreed to the new terms did not excuse the appellant's conduct. Therefore, the conduct of the appellant in that regard was unconscionable.
11. There was no evidence that the customers were aware of the appellant's refund policy prior to entering into the contracts. Some of the terms of the contracts were built into the contract, by the appellant, as parties went along. Furthermore, there was no basis for the appellant to hold onto the complainants' monies in respect of payments made for products it did not have. It was bad enough that the appellant had misrepresented to its customers on the availability of products ordered. Continuing to hold onto those monies for up to

90 days was unconscionable.

12. The appellant's conduct *vis-a -vis* the customers, met the threshold outlined in section 56(2) of the Act. Considering the relative bargaining strengths between the appellant and the customers, the complainants were in a weaker bargaining position *vis-a -vis* the appellant.
13. The consumers were duped into paying for products that were not in stock and then forced to wait for refunds which meant that the appellant was holding onto funds to its benefit and at the cost of the customers. The customers should have been entitled to an immediate refund where the appellant was clearly at fault.
14. The appellant engaged in unfair tactics by collecting deposits for products it did not have, and thereafter forcing the customers to switch its orders. The appellant lured customers by misleading them into believing that the appellant was offering free delivery services within 24 hours throughout Kenya. The customers would only learn that, that was an advertising gimmick and was not the case. The appellant breached the provisions of section 56(1) of the Act.
15. Section 36 of the Act empowered the Authority to impose a financial penalty of up to 10 percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question. The Authority was guided by the Consumer Administrative Guidelines for Consumer Protection and the international best practices regarding determination of disputes, in calculating the financial penalty to be imposed.
16. Uncontroverted evidence on record showed that despite having been issued with a cease-and-desist order, the appellant continued to offend the said order and provisions of the Act. The Authority continued to receive new complaints in the course of the investigations and after the issuance of the cease-and-desist order
17. The Authority having found the appellant guilty of flouting the subject sections of the Act, proceeded to impose a financial penalty and issued other orders as per the Act. The Authority's decision dated May 21, 2020 set out how the respondent arrived at the financial penalty imposed by basing it on the gross turnover for roofing products for 2017 and applying a base penalty of 6%. Other factors such as mitigating factors were considered including but not limited to the effects of *Covid-19* on businesses. The Authority did not err by imposing a financial penalty of KES. 2,000,663.47.

Appeal dismissed.

Orders:

i. The decision of the Authority dated May 21, 2020 was upheld.
ii. Appellant to bear the costs of the appeal.

Setting of brokerage commission and warehousing fee by a trade association constitutes a hardcore horizontal restriction

The East African Tea Trade Association appealed the Authority's decision that denied the applications for exemptions with respect to setting of broker fee and commissions as a fixed percentage of the sales volume being 0.75% payable by the producer and 0.5 % by the buyer and the proposed fixing of warehouse charges by members. The Tribunal held that setting of brokerage commission and warehousing fee was a hardcore horizontal restriction. The Tribunal further held that exemptions contemplated under section 25 of the Act would be granted but only were there where exceptional and compelling reasons of public policy.

58. East African Tea Trade Association v Competition Authority of Kenya

CT/001 of 2017

Competition Tribunal at Nairobi

S Kipkenda, Chairman, D Nyongesa, K Muhoro, V Mwende, and R. Mogire, Members

May 4, 2020

Competition Law *– restrictive trade practices – price fixing - price fixing within a trade association – whether price fixing within a trade association constituted a horizontal restriction – whether setting of warehouse prices and commission brokerage by a trade association was a restrictive trade practice and constituted a hard-core restriction – what was the role of a broker in the tea industry in Kenya – Competition Act (Cap 504), sections 21 and 22(1)(b).*

Competition Law *- restrictive trade practices – exemption from restrictive trade practices – when could an exemption be granted for certain restrictive trade practices - Competition Act No. 12 of 2010 sections 25(1) and 26(3).*

Words and Phrases *– broker – definition of a broker - an agent who acts as an intermediary or negotiator, especially between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation - Black's Law Dictionary, 8th Edition.*

Brief facts

The East African Tea Trade Association (the appellant) was an umbrella body representing interests of tea trade, across Africa but mostly in Eastern Africa. It hosted and coordinated the Mombasa Tea Auction (the Auction). The Authority initiated a special compliance progress (SCP) and the appellant submitted itself to the SCP. As a consequence, thereof, the Authority highlighted a number of practices within the appellant's operations which the respondent considered to be in contravention of sections 21 and 22 of the Act. The appellant rectified, modified and distinguished some practices to the satisfaction of the Authority.

The parties did not agree on a way forward with regard to some practices of the appellant. In particular, the Authority was disconcerted by the appellant's practice of fixing brokerage

fees and the proposed practice of fixing warehouse prices as it was of the view that it violated the provisions of section 22(1)(b) of the Act. The appellant applied for exemption by the Authority on that issue amongst others. In its decision, the Authority allowed a number of applications under section 26 of the Act but disallowed the applications for exemptions with respect to the following:

a. setting of broker fee and commissions as fixed percentage of the of the sales volume being 0.75% payable by the producer and 0.5% payable by the buyer.
b. the proposed fixing of warehouse charges by members.

Aggrieved, the appellant filed the instant appeal.

Issues

i. Whether price fixing within a trade association constituted a horizontal restriction.
ii. Whether setting of warehouse prices and commission brokerage by a trade association was a restrictive trade practice and constituted a hard-core restriction.
iii. When could an exemption be granted for certain restrictive trade practices?
iv. What was the role of a broker in the tea industry in Kenya?

Relevant Provisions of the Law

Competition Act (Cap 504)

Section 21 - Restrictive trade practices

(1) Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.

(2) Agreements, decisions and concerted practices contemplated in subsection (1), include agreements concluded between—

(a) parties in a horizontal relationship, being undertakings trading in competition; or

(b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;

(c) involves collusive tendering;

(d) involves a practice of minimum resale price maintenance;

(e) limits or controls production, market outlets or access, technical development or investment;

(f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts;

(h) amounts to the use of an intellectual property right in a manner that goes beyond the limits

of fair, reasonable and non-discriminatory use;

(i) otherwise prevents, distorts or restricts competition.

Section 22 - Restrictive trade practices applicable to trade associations

(1) The following practices conducted by or on behalf of a trade association are declared to be restrictive trade practices—

(b) the making, directly or indirectly, of a recommendation by a trade association to its members or to any class of its members which relates to—

(i) the prices charged or to be charged by such members or any such class of members or to the margins included in the prices or to the pricing formula used in the calculation of those prices; or

(ii) the terms of sale (including discount, credit, delivery, and product and service guarantee terms) of such members or any such class of members and which directly affects prices, profit margins included in the prices, or the pricing formula used in the calculation of prices.

Section 25 - Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Authority to be exempted from the provisions of Section A or B of this Part in respect of—

(a) any agreement or category of agreements;

(b) any decision or category of decisions;

(c) any concerted practice or category of concerted practices.

Section 26 - Determination of applications of exemptions

In making a decision under subsection (2), the Authority shall take into account the extent to which the agreement, decision or concerted practice, or the category thereof contributes to, or results in, or is likely to contribute to or result in—

(a) maintaining or promoting exports;

(b) improving, or preventing decline in the production or distribution of goods or the provision of services;

(c) promoting technical or economic progress or stability in any industry;

(d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

Held

1. The appellant was not challenging the Authority's mandate but rather its decision. Indeed, if the appellant was challenging the mandate of the Authority, that matter would not be before the Tribunal. The same would have been filed at the judicial review division of the High Court.
2. The objects of the Act and the Authority were clearly outlined in the preamble, section 3 and 9 of the Act. Such objectives were in line with the generally accepted objective of competition and anti-trust law. Across jurisdictions, price fixing and market allocations were the most contemptible anti-trust/cartel practices.

3. The pricing agreement was reached in consultation with all the players in the industry. The players being the suppliers and the consumers of the brokerage and warehouse fees. The fixing was not undertaken by one side but by all sides.
4. The nature of the agreement as exhibited in the appellant's rulebook, that was, brokers members be the only ones to offer tea for sale at an auction and producer members barred from acting as brokers showed that in absence of the agreements, brokers members could compete with the producers. The members of the appellant were in a horizontal relationship. Consequently, any price fixing within the auspices of the appellant could be termed as a horizontal restriction.
5. From the pleadings, the exemption sought by the appellant to fix brokerage commissions and warehousing prices was a form of price fixing. Had it not been so, the appellant would not have sought such an exemption under section 25 of the Act. By dint of the appellant making an application for exemption under section 25, was in itself an admission that it concurred with the findings of the Authority that setting of warehouse prices and commission brokerage was a restrictive trade practice prohibited under the Act. Consequently, the appellant by conduct, was estopped from denying or disputing that its rules on brokerage fees and warehouse charges were restrictive trade practices within the meaning of the Act, the same constitute a hard-core restriction.
6. From the characterization of price fixing as hard-core restriction, there was a distinction between Part A and B on one hand and Part C on the other under the Act. The exemptions contemplated under section 25 of the Act could only be sought for prohibited conduct under Part A and B. Sections 22(1)(b) and 22(3)(a) of the Act was not a blanket policy because of the existence of exceptions under section 25 of the Act. An exemption could be granted but only when there were exceptional and compelling reasons of public policy.
7. The argument that fixing of broker's fees would waste time as the broker and the farmer would have to agree on the same for each transaction was not valid as it pre supposed that the Act prohibited a setting of a price between a broker and the farmer for the long-term. In fact, during the field visits most producers intimated that they had long term contracts with their brokers. Nothing stopped individual brokers and farmers from agreeing on a price to apply for as long as they both desired.
8. The argument that automation of the auction would only work where there was a preset commission and charge for brokers and warehouses was faulty. It was based on a misconception that the prices would have to be fixed on a transactional basis which was not the case.
9. There was nothing to stop the farmer or a buyer on the one hand and the broker or warehouse on the other from entering into a long-term contract with a view of achieving predictability as between them.
10. Horizontal price fixing was a hardcore violation of competition law and a practice that should be frowned upon. Price fixing had the outcome of diminishing competition amongst the service providers to the detriment of the consumer.
11. Almost all, if not all, farmers were members of appellant either directly or indirectly (through factories to which they supplied their green leaf). Consequently, there was no tea trade, within Kenya, competing with the Auction in Mombasa.
12. India and Sri Lanka pointed to regulation of auctions and the tea industry in general by

an independent government agency. The agencies regulated the industry by setting rules and standards including price setting. Kenya lacked the equivalent powerful regulator. That *lacuna* had been filled by the appellant as a body and its constituent members.

13. A broker differed from a farmer because the broker usually did not have possession of the property. The broker played a pivotal role in the tea industry in Kenya. The broker drove market research and feedback to the producers on how to best improve their tea. The broker collated the orders of the buyers according to each buyer's preference and transmitted the same to the producers. The broker acted for the benefit of both the producer and the buyer.
14. Section 21(1) of the Act revealed that the restriction could either have the object or the effect. The appellant's contention that it must have a sole intention was therefore for all intents and purposes misleading.
15. The tribunal took judicial notice that in compliance with the decision of the Authority dated August 29, 2017, the appellant had amended its rule book to remove the clauses which provided for the fixing of warehouse prices and brokerage commissions. However, the fees and commissions remained the same.
16. Only three brokers controlled about 70% of the market share in a very large industry. If the brokers were not closely regulated, it would be very easy for the three to drive out the other 3 leaving that critical industry at the behest of an oligopoly. That was an issue of concern perhaps which the Authority should look into.
17. The Tribunal recommended the enactment and establishment of the functionally strong Tea Regulatory Agency with the power to set standards and regulate the market players. Vesting the regulatory function on a governmental agency increased transparency and curbed anti-competitive practices and cartel like conduct within the tea sector.
18. The best interest of the Kenyan tea farmer was at the heart of the matter. An exemption under section 26(3)(a), (b), (c) and (d) of the Act was merited but only for a while so as to allow adjustments in the industry. Regulation of prices was a hard-core restriction under the Act. An exemption that ran indefinitely would not be of any benefit to the public in the long-term.

Appeal partially allowed: each party to bear its own costs.

Orders

i. *The appellant's application under section 25 of the Act for exemption with respect to fixing brokerage fees was allowed subject to the following conditions:*
   a. *That any changes in brokerage fees must be approved by the Tea Directorate or any agency for the time being the regulator in the industry.*
   b. *The exemption was only allowed for a period of two years from the date of delivery of the judgment.*
   c. *The changes proposed by the Authority to the appellant's rule book were upheld as they conformed to international best practice and standards.*

ii. *The application by the appellant for exemption to fix warehouse prices was dismissed.*

Distinction of roles between the Communications Authority of Kenya and the Competition Authority in regulating competition in the telecommunications sector

The roles of the Communications Authority of Kenya and the Competition Authority in the regulation of competition in the telecommunication sector

The review application arose from a notice of merger determination attaching certain conditions imposed by the Competition Authority of Kenya (Competition Authority) in regard to a proposed merger between the Telkom Kenya Limited and Airtel Networks Kenya Limited (appellants). The Tribunal held that whether Parliament intended to give it judicial review powers was doubtful as the same was exercised as supervisory powers by the High Court. The Tribunal further held that the Communications Authority of Kenya (Communications Authority) was a sector specific regulator whilst the Competition Authority was a market wide superintendent in competition matters. Therefore, the Communications Authority in telecommunication matters was better equipped with the market and technical knowledge within the telecommunication sector. The Tribunal finally held that the differential treatment in imposition of conditions was not discriminatory.

59. Telkom Kenya Limited & another v Competition Authority of Kenya

CT/005/2020

Competition Tribunal at Nairobi

S Kipkenda, D Nyongesa, V Mwende, K Muhoro and R Mogire, Members

April 24, 2020

Competition Law *- regulation of competition within the telecommunication sector – role of the Competition Authority vis a vis the Communications Authority - what was the distinction in the roles of the Communications Authority and the Competition Authority and the regulation of competition in the telecommunication sector.*

Jurisdiction *– jurisdiction of the Competition Tribunal – jurisdiction to review the decisions of the Competition Authority - whether the Competition Tribunal had judicial review powers over the decisions of the Competition Authority.*

Constitutional Law *– fundamental rights and freedoms – right to equality and freedom from discrimination – claim that there was differential treatment in the imposition of conditions in allowing mergers - whether the differential treatment in the imposition of conditions in allowing a merger was discriminatory.*

Competition Law *–mergers and acquisitions – doctrine of failing firm – application of the doctrine of failing firm - when was the doctrine of failing firm applied in a merger transaction.*

Brief facts

The genesis of the instant review application was a notice of merger determination attaching certain conditions imposed by the Competition Authority in regard to a proposed merger between the appellants contained in the 1st appellant's merger notification form. The appellants' case was that the proposed conditions were problematic and would render the proposed merger untenable in an environment with a dominant market leader and thus objected to the same.

Further, the appellants contended that: the conduct of the Competition Authority reeked of high-handedness, bias and a predetermined mindset geared towards rendering the merger untenable; the Competition Authority Merger Guidelines lacked basis in law as they had not gone through the statutory process under the Statutory Instruments Act, and the Authority had no rational basis for relying on them in imposing the impugned conditions.

In its defence the Competition Authority argued that it was a competent Government body and acted within its powers pursuant to section 9 of the Act, and the appellants were given time to inform the said conditions.

Issues

i. What was the distinction in the roles of the Communications Authority and the Competition Authority in the regulation of competition in the telecommunication sector.
ii. Whether the Competition Tribunal had judicial review powers over the decisions of the Competition Authority.
iii. Whether the differential treatment in the imposition of conditions in allowing a merger was discriminatory.
iv. When was the doctrine of failing firm applied in a merger transaction.

Held

1. Section 7 of the Fair Administrative Action Act (FAAA) gave tribunals the power to review administrative action or decision subject to the written law regarding the exercise of jurisdiction of the Tribunal. Section 7 created a two-tier approach to the effect that the statute establishing and governing the jurisdiction of the Tribunal had to accommodate the powers contemplated therein.
2. From a look at the jurisdiction and powers of the Tribunal under the Act, the powers donated were appellate in nature and the remedies to which it could grant were defined. Whether Parliament intended to give the Tribunal judicial review powers was doubtful as the same was exercised as supervisory powers by the High Court. The use of the term 'review' should therefore not be construed to mean 'judicial review'. The Tribunal was limited to reviewing the merits of the decision of the Competition Authority and not the procedure of making the same.
3. Fair administrative action required that notice and information be given to a person in instances where an adverse administrative decision was to be taken and an opportunity to present his response. What constituted adequate notice and information was to be assessed taking into account the circumstances of each case.
4. There was adequate notice of the impending administrative decision. Therefore, the Competition Authority discharged the first obligation being to communicate to the

appellants of the impending administrative decision being that it minded to approve the merger with several conditions which they had notice of and had an opportunity to interrogate save that they needed to discuss at their administrative levels.

5. Section 44 of the Act provided that a determination would be made within 60 days of receiving the merger notification or further information (if required) or within 30 days after a hearing conference was convened. Provisions for extension were accordingly made under section 44 (2) of the Act**.** The merger notification was submitted and received on May 9, 2019. From that date, the 60 days began running. That time could, however, not be definite since some information was exchanged and time began running only after the last exchange.
6. Since it could not be discerned the time limit agreed upon for the submission of the appellants' grievances, the period between October 25, 2019 when the appellants learnt of the impeding determination to the time the decision was published in the Kenya Gazette on December 13, 2019 afforded the appellants ample time to challenge the procedural fairness or fidelity of the respondent through appropriate channels. Even if the October 25, 2019 meeting were to be taken as a hearing conference in terms of section 44(1)(c) of the Act, 30 days fell due on November 24, 2019.
7. In according a party a fair hearing in line with the principles of fair administrative action, adequate time and opportunity must be accorded to present one's case in light of the prevailing circumstances. The time the appellants had was adequate to challenge procedural and administrative fidelity of the Competition Authority. Raising the issue at the instant stage could only be construed as an afterthought.
8. Whatever form of proceedings adopted by the Competition Authority, it had to meet the minimum irreducible elements of fairness. There was correspondence and meetings between the appellants and the respondent between May 9, 2019 and December 13, 2019 in regard to the proposed merger. The appellants had adequate time to challenge the procedural and administrative fidelity of the Competition Authority. The appellant had adequate notice and opportunity to respond and its claim of infringement of its right to fair administrative action therefore did not arise.
9. A license be it an operating license or a spectrum license was a critical asset in the telecommunication industry. The same consisted property used by the appellants and other telecommunication service providers in service production. From an economic point of view, the spectrum was an asset and a factor of production in the telecommunication industry. It was a resource and could be traded pursuant to the terms which the licensee had from the Communications Authority. That was further complemented by the capital intensive nature of the undertaking in obtaining the limited license in spectrum slots and the need to recoup investments.
10. Where no legitimate reason had been shown to fetter the limitation of a right, then the Tribunal was bound to give effect to the widest possible and generous interpretation. Therefore, the Competition Authority's contention that a spectrum did not constitute a property was dismissed.
11. The mandate of regulating the telecommunications sector was a statutory function of the Communications Authority. The regulations on competition guiding the Communications

Authority that was the Kenya Information and Communication (Fair Competition and Equality of Treatment) Regulations, 2010 provided for cooperation with other agencies which had concurrent jurisdiction on competition matters. The aegis of cooperation among the agencies, the Communications Authority and the Competition Authority was a Memorandum of Understanding (MOU) dated May 6, 2015.

12. The MOU and the ensuing cooperation did not in any way mean that the Communications Authority and the Competition Authority were abdicating their statutory mandates as stipulated in their establishing statutes. The Communications Authority was the primary regulator in the telecommunications sector. The Competition Authority on the other hand had the broad role of regulating the market to ensure fair competition in all sectors of the economy.
13. The underlying difference between the Communications Authority and the Competition Authority was that the Communications Authority was a sector specific regulator whilst the Competition Authority was a market wide superintendent in competition matters. Therefore, the Communications Authority in telecommunication matters was better equipped with the market and technical knowledge within the sector.
14. When the 1st appellant acquired its respective licence from the Communication Authority with the attendant terms and conditions for a definite period of time, it was entitled to plan for the resource within the bounds of the licence and utilise the same. A radio spectrum was at the heart of any telecommunication service provider. The definite terms and conditions in the licence therefore offered sufficient insulation and gave right to a legitimate expectation that the licence would not be interfered with provided that the licencee adhered to the laid down terms and conditions.
15. From the provisions of the Kenya Information and Communication Act, the regulator had the requisite mandate and the machinery for divesting the licences for the new entrant (if need be). The condition therefore was more inclined to infringe on the appellants' right of legitimate expectation and property rather than for the sake of a new market entrant (which was then non-existent).
16. The objective behind the merger of the appellants was to enhance competition and provide more competitive markets by leveraging on their complementary synergies. The merger was instrumental for the appellants to meaningfully compete with a market leader who from the data submitted mirrored against the terms of the Act was a dominant market player.
17. Competition law recognized that in the course of competition, injury could be occasioned to a competitor therefore cementing the role of competition law. The facts of the instant case showed that there was a legitimate concern by the appellants on the long term health of competition law in Kenya's telecommunications sector. It therefore fell upon the Competition Authority as a competition watchdog to ensure that the appellants' collapse was not eminent thus turning the Kenyan telecommunications sector into a monopoly. That was the import of the Competition Authority's mandate, to protect competition.
18. The purpose of competition law was to protect and nurture competition and not to shield the competitors. There existed a right of legitimate expectation on renewal of the licence and adherence to the term. In addition, the Communications Authority was in a better

position to analyse the terms of the licence and it would be improper for the Competition Authority to abrogate that right by pre-empting the terms of the licence including the right of renewal.

19. The licences were governed by the subsisting terms of the licence which shall be reviewed by the Communications Authority and by the Competition Authority if need be at the time the licence fell due for renewal. The Competition Authority had failed to support the rationale for its condition.
20. On Condition 1, the fact that the appellants were not in a position to sell the operating licences and the spectrum allocation without the express written consent of the Communications Authority of Kenya was sufficient. Furthermore, since the Competition Authority and the Communications Authority had a memorandum of understanding on evaluating such transactions, Condition 1 was not only superfluous but pre-mature.
21. On Condition 2, there was no indication that a new entrant was in the offing. Therefore, there was no impediment on the side of the regulator from recovering the 900MHZ and 1800MHZ spectrum should a new market entrant emerge. In the meantime, the Competition Authority had not shown sufficient ground to depart from the terms and conditions imposed by the market regulator that was the Communications Authority.
22. The imposition of Condition 1 and 2 was improper and was reviewed and replaced with the condition that the licences would be held in accordance with the terms of the licence granted by the Communications Authority.
23. Condition 3 prohibited all forms of sale and transactions in relation to the merger. Without the Authority's clarification contained in the replying affidavit, there was no interpretation to the contrary. Clarity was a key facet when making a law, regulation or a condition that limited the exercise of a certain right or prohibiting a party from doing something.
24. The Tribunal was alive to the fact that the instant case was not a legislation by a legislative organ but rather a decision by an administrative body. However, the underlying philosophy was similar, the need for clarity in limitations to rights or certain acts as the case could be. Condition 3 was less contentious. What was lacking was merely clarity on the scope of the condition.
25. The role of the Tribunal was to clarify the intention of the Competition Authority since its sole goal was to realise the complementary synergies of the merger. There was no indication that they intended to sell the merged entity. As much as the Competition Authority's precaution was reasonable, the same was superfluous considering that the sale as contemplated by the Competition Authority would be a takeover which in any event could not happen without its consent. Nonetheless, the appellants would not be prejudiced if the Tribunal maintained the condition subject to qualifying that such restriction was only in relation to the sale of the merged entity.
26. Since the appellants were at liberty to float and sell shares of the merged entity to attract capital or in the normal course of business, there was need to elaborate certain restrictions to foster competition. Therefore, in case the merged entity floated and sold its shares, it shall not sell a substantial share to a market competitor holding more that forty per centum (40%) of the market share. That was to avoid the possibility of buyout making the sector a monopoly.

27. The failing firm doctrine applied as a defence to an otherwise anti-competitive merger. Its application post-merger was what was not coming out of the Competition Authority's case. The Competion Authority therefore had failed to satisfy the rationale of the failing firm doctrine post-merger. Accordingly, the same failed and was reviewed and set aside.
28. Allowing the merged entity to continue enjoying preferential rates would not only amount to unfair benefit but expose the Government to procuring services in a system that was not fair or competitive.
29. The market was a dynamic and interesting phenomenon. There were no set figures, the cost kept fluctuating at the whims of market forces such as supply and demand among others be they legitimate or illegitimate. Taking into account the nature of a market, it was impossible to curtail the right of a party to negotiate by deploying its competitive advantage or its muscle in whatever form.
30. The Competition Authority's reason for the imposition of condition 5 and 6 albeit contested was not discriminatory since the 1st appellant was at a perceived advantageous position to access Government fibre optic. The perceived ground was not unreasonable, arbitrary or created for an illegitimate or surreptitious purpose but rather giving all the market players an equal footing. Whether in reality that was the case in an open market was doubtful. In determining the impact of a merger on employment, it was important to consider and judge each case in light of its circumstances. Each merger had to be determined by taking into account the unique market dynamics and conditions in the sector. Thus, the differential treatment in imposition of conditions was not discriminatory.
31. The ability of the employees who had lost their jobs to get employment was critical in a merger for any competition watch dog. Therefore, there was need to put in place certain safeguards to ameliorate the negative effects of the merger on employment. Public interest in the matter demanded that the employees so identified be retained for a longer period of time and the Tribunal did not find any plausible ground or reason to interfere in the decision of the Competition Authority.

Appeal allowed.

Orders

i. *Condition 1 was reviewed and varied to the effect that: the merged entity should hold the following operating and frequency spectrum licenses in accordance with the terms and conditions imposed by the regulator (Communications Commission of Kenya) at the time of issuing the license including the pre-emptive right of renewal;*

   Operating Licences

   a. *Network Facility Provider – Tier 1 – Licence No. TL/NFP/T1/00001*
   b. *Applications Service Provider – Licence No. TL/ASP/00001*
   c. *Content Service Provider – Licence No. TL/CSP/00001*
   d. *International Systems and Service Provider – Licence No. TL/ULF/IGS/00001*
   e. *Submarine Cable Landing – Licence No. TL/SCR/00003*

Frequency Spectrum Licences

a. *800MHZ – Licence No. FL/0008*
b. *900MHZ – Licence No. FL/0009*
c. *1800MHZ – Licence No. FL/0009*
d. *2100MHZ – Licence No. FL/001/002*

ii. *Condition 2 was reviewed and varied to the effect that the merged entity's operating and spectrum licence, the spectrum in the 900MHZ and 1800MHZ acquired from the 1st appellant should be held by the merged entity in accordance with the terms and conditions imposed by the regulator (Communications Authority) including the pre-emptive right of renewal.*

iii. *Condition 3 was reviewed and varied to the effect that the merged entity could not sell the merged business/enterprise for a period of five (5) years but could enter into agreements (including sale agreements and sale of shares) in the ordinary course of business provided that where shares of the merged entity were sold, the sale to be limited to not more than forty per centum (40%), and the merged entity could not sell a substantial portion of its share to a market competitor holding more than forty per centum (40%) of the market share.*

iv. *Condition 5 and 6 were affirmed and observed that the conditions did not curtail the freedom of contract between the merged entity and the Government of Kenya, therefore, the merged entity was at liberty to negotiate with the Government of Kenya on use of the fibre.*

v. *Condition 7 was affirmed.*

vi. *Condition 8 was reviewed and varied to the extent that the merged entity should annually furnish the Competition Authority of Kenya with a detailed report on the compliance of the conditions as varied, modified or affirmed by the Tribunal for the first two years following the merger.*

vii. *Parties to bear their own costs*

Market Inquiries and Studies

Market Inquiries and Studies

ABBREVIATIONS

ACF:	African Competition Forum
CA:	Communication Authority of Kenya
CAK:	Competition Authority of Kenya
CBA:	Commercial Bank of Africa
CBK:	Central Bank of Kenya
DFS:	Digital Financial Services
GDP:	Gross Domestic Product
GSM:	Global System for Mobile
KCB:	Kenya Commercial Bank
KICA:	Kenya Information and Communications Act
MNO:	Mobile Network Operators
MTP:	Medium-Term Plan
PPC:	Pretoria Portland Cement
SACU:	Southern African Customs Union
SME:	Small & Medium-sized Enterprises
STK:	Sim ToolKit
USSD:	Unstructured Supplementary Service Data
VAT:	Value Added Tax

Glossary of terms

Digital Financial Services:	This include a broad range of financial services accessed and delivered through digital channels, including payments, credit, savings, remittances, and insurance. Digital channels refer to the internet, mobile phones, ATMs, POS terminals, etc.
Risk-based pricing:	The offering of different interest rates and loan terms to different consumers based on their credit risk.
Lease:	A contractual arrangement where a user pays the owner of an asset for its use.
Lessee:	A person who holds the lease of a property; a tenant.
Lessor:	A person who lets a property to another; a landlord.

Synopsis

A market inquiry assesses the general state of competition in a market to examine the existence of anti-competitive practices. It focuses on the market structure, conduct, and consumer protection concerns in a given sector.

The Act mandates the Authority to conduct market inquiries in the execution of its mandate. The overall objective of market inquiries is to enable the Authority to achieve its mandate by ensuring that its decisions are optimal. Further, market inquiries provide solid grounds for further investigation of anti-competitive practices and advocacy actions in a specific sector. Inquiries also generate information that provides policy advice to the Government and liaises with relevant sector-specific regulators on competition policy and consumer protection matters.

The Authority is guided by a prioritization criterion in deciding the sectors to consider for a market inquiry. The criterion focuses on novel/emerging sectors where there is limited information or data; sectors that have the greatest impact on the consumers and the economy; and sectors that are prone to contraventions.

The market inquiries section details the background, objectives, findings, and recommendations from five select studies; competition dynamics in the Cement Industry in Kenya, Botswana, Tanzania, Namibia, South Africa, and Zambia; digital credit market; small and medium enterprises leasing sector; USSD service provision in Kenya; and the retail sector inquiry.

Inquiry into competition dynamics in the cement industry

Cement is a crucial product for infrastructure and housing which meant that its price and supply had wider impacts for investment. The inelastic demand meant that the potential price increases from coordination were high while the homogenous nature of the product meant price competition could be intense. The African Competition Forum (ACF) launched the study across six member countries to establish if there were any competition concerns.

60. Inquiry into competition dynamics in the cement industry in Kenya, Botswana, Tanzania, Namibia, South Africa and Zambia

CAK/PR/03/03/A

April, 2014

Keywords: Cement sector and industry, geographic market influence, competition concerns, pricing, collusion, and cartels.

Brief facts

Cement is a key component for promoting housing and infrastructure development in an economy that should be accessible and affordable to all in a market economy. Competitive interaction between firms to supply cement happens in geographic markets which depend on where production is located, where the main sources of consumption are, and transport and logistics infrastructure and costs. In addition, competition depends on past decisions to invest in capacity. Taking a regional view is thus important to understanding outcomes such as pricing and the underlying competitive dynamics. There are also very important links between competition, regional integration, and trade. This study assessed these issues through the lens of a competition analysis of cement industry across the following six countries; Kenya, South Africa, Namibia, Botswana, Tanzania, and Zambia.

Objectives

i. To map out the major cement producers; the main changes over and their market structures;

ii. To assess the market dynamics including barriers to entry, regulatory arrangements, and market outcomes in terms of price and supply in the cement industry; and

iii. To reflect on the arising issues of competition law and implications for competition enforcement and policy in the cement industry.

Findings

1. The assessment of the cement industry across Botswana, Kenya, Namibia, South Africa, Tanzania, and Zambia revealed it to be a tight oligopoly with a small number of producers controlling operations across countries and smaller fringe independent suppliers. The nature of competition had significant implications for the market outcomes. Prices and profit margins were very high in some countries, especially Zambia and, for much of the

period, Kenya. Tanzania appeared to have used openness to deep sea imports from 2008 to 2014 to stabilize prices.

2. The Southern African Customs Union (SACU) countries experienced a cartel until the end of 2009 and observed more competitive behavior thereafter. It should be noted that vigorous competition does not necessarily break out immediately upon the ending of cartel arrangements. Comparing the higher margins of the South African cement producer Pretoria Portland Cement (PPC) with those before and after the cement cartel suggested cartel markups of around 15% to 20% over competitive prices. The implication was that coordinated conduct had a substantial harmful impact on the economies of the countries in the study where it had occurred.
3. It was important to understand investment decisions and arrangements regarding regional trade to assess the nature and extent of competition. Opening borders and increased investment in the region would mean greater competition on the whole, while firms had a strong incentive to lobby for trade protection as part of coordinating and/or to use borders as convenient ways to forego competing by instead exporting to countries in which there were no cement producers.
4. The study revealed that cement companies may operate in different regions either through the exportation of cement to those regions or by establishing plants. It was observed that any assessment of the cement industry cannot be limited within the individual countries, but must be approached on a broader geographical basis. Cement was produced by multinational companies that develop strategies on a wider regional basis rather than on a country-by-country basis.
5. The cement cartel that was uncovered in South Africa cartelized the SACU region as a whole and provided a powerful case study of how collusion could operate. The cartelists shared highly disaggregated data on a monthly and in some instances, weekly basis.
6. With regard to new entry, all the countries under study had experienced entry by totally new players and also more established multinationals. This suggested that there should be more intense competition in the future unless the new firms coordinated with the incumbents. In this regard, it was interesting to note that the entrants are mostly not the same firms that simply expanded operations but included those new to the region. The entrants also constructed significant production facilities.
7. Lastly, the study highlighted the importance of competition authorities working together if they were to appreciate the possible regional and international dimensions of anticompetitive arrangements.

Editorial Note

The findings of the study resulted in an investigation in the sector that led to a reduction in prices by an estimated 30% in Kenya. The report can be accessed at: https://cak.go.ke/sites/default/files/Regional%20Cement%20Sector%20Study.pdf.

Inquiry into the digital credit market

The digital credit sector had grown such that at different points there had been several hundred lenders estimated to be operating in the Kenyan market. The majority of the digital lenders were unregulated with the vast majority of lending volume and value being provided by a small number of regulated banks. This inquiry was conducted to identify and address potential consumer protection concerns in the regulated and unregulated digital credit market.

61. Inquiry into the digital credit market

CAK/PR/03/20/A

June, 2021

Keywords: digital credit, multiple borrowing, fraud, risk-based pricing, and digital finance.

Brief facts

Digital credit emerged in Kenya in 2012 with the introduction of M-Shwari. In the nine years since, the digital credit sector had grown such that at different points there had been several hundred lenders estimated to be operating in the Kenyan market. The majority of the digital lenders were unregulated with the vast majority of lending volume and value being provided by a small number of regulated banks, most noticeably the three products listed on Safaricom's M-PESA mobile money menu were; M-Shwari, Fuliza, and KCB M-PESA.

Objectives

i. Provide evidence regarding the size and nature of the digital credit market.
ii. Identify potential consumer protection risks and consumer outcomes.
iii. Increase transparency and comprehensiveness of product information and terms and conditions;
iv. Address probable fraud in digital financial services in digital credit markets.
v. Improve consumer redress for digital credit markets.
vi. Increase consumer control over personal information to expand choice and competition.
vii. Inform the development of policies to ensure adequate consumer protection across regulated and unregulated lenders.

Findings

1. 54% of the survey respondents had used digital credit. Out of those 54% of users, 91% of mobile loan users had used the three products affiliated with the M-PESA platform, that is, M-Shwari, Fuliza, and KCB M-PESA. Only 38% of mobile loan users had ever used any other product besides these three. This showed that the M-PESA platform was dominantly used for the provision of digital loans.
2. Survey and administrative data identified several potential consumer protection risks

within Kenya's digital credit sector such as late or non-payment and multiple borrowing:

a. On late or non-payment of loans, the study revealed that 77% of mobile loan users reported not being able to repay a loan at least once. This mirrors the high incurrence of penalty fees for digital borrowers.

b. On multiple borrowing, the study revealed that: 33% of mobile loan users reported that they had multiple mobile loans. There was multiple borrowing among male than female borrowers with 9.71% of men having more than one account as compared to 7.74% of women. Borrowers aged between 25-44 years held multiple accounts at 11.08% while adults aged 45-64 years recorded 8.01%. In contrast, young adults and the elderly did not hold multiple accounts at a high rate. Multiple borrowers tended to borrow from different lenders in relatively short periods.

3. For the past five years, substantial efforts had been made to improve the transparency and comprehensiveness of product information and terms and conditions. This was an assessment of the current state of transparency and product costs, focusing on; consumer price awareness, the price of digital credit in Kenya, and risk-based pricing:

   a. On consumer price awareness, the study revealed that recall of digital credit fees was lower than that of costs for mobile money with 40% of borrowers recalling the cost of their last loan within plus or minus 5%. The knowledge of fees did not vary demographically. However, younger and educated consumers were more likely to report the correct mobile money fee than the older or less educated.

   b. On the price of digital credit, the study revealed that the price of digital credit was relatively high, with a mean effective Annual Percentage Rate (APR) of 280.5% and a median effective APR of 96.5%. One reason for the highly skewed distribution was the presence of early repayment. The shorter the amount of time credit was taken out, the higher the effective APR.

   c. Risk-based pricing refers to a provider offering different pricing for loans based on their perception of the borrower's probability of not paying back the loan. Risk-based pricing had the potential to improve credit markets for both established and marginal borrowers. Borrowers who had established a good credit history would ideally see a reduction in their price of credit. On the other hand, more risky marginal borrowers received higher-priced credit, allowing them to enter the market and access credit. Borrowers who consistently repay their loans receive lower costs on future loans, through discounted pricing.

4. On fraud in digital financing, the study revealed that there was a high prevalence of attempted fraud, particularly by third parties. 82% of respondents reported having received a call or SMS from an unknown person who asked for money or sensitive personal information. 77% of scammers asked consumers to send money for a variety of reasons including non-existent transactions. Other requests included asking for a password or Personal Identification Number (21%), personal information (19%), or account details (13%). Phishing scams were common; however, consumers identified the scam attempts.

5. On improving consumer redress for digital credit, the survey asked consumers about a set of Digital Financial Services (DFS) challenges. Phishing scams were the most common issue experienced, followed by incorrectly sending money to the wrong recipient. A substantial

portion of consumers raised issues related to customer care, or challenges understanding the DFS product's interface or its terms and conditions. The majority of issues were related to mobile money and not digital credit. The study pointed to a need for potential policy reforms related to handling complaints and transparency of terms and conditions.

6. Increased consumer control over personal information to expand choice and competition was the final objective of the study. Kenya's payments system, and the DFS ecosystem, had been characterized by high market concentration. Increased concentration of digital lending within M-PESA-affiliated lenders raised concerns for consumer choice and competition. Consumer choice in providers , in most cases, was influenced by the speed of loan disbursement and ease of repayment terms. Awareness of price differences was ranked to be relatively low as one of the factors consumers considered in choosing a provider of digital credit.

Recommendations

i. Develop policies that contribute to a more competitive digital credit ecosystem through standardizing channel access, product placement, and revenue sharing on mobile money menus;
ii. Develop standards on the structure and timing of applicable fees and penalties in digital credit to enhance consumer awareness;
iii. Develop pricing rules that ensure that positive repayment behavior by consumers translates to improved credit scores and terms, for instance through reduced charges for early repayment and subsequent loans; and
iv. Require digital lenders to provide periodic reports on the actual total charges paid by borrowers, including late payment and loan rollover charges.

Editorial Note

In furtherance of the regulation of the digital credit lenders in the economy, the Authority informed the Central Bank (Digital Credit Providers) Regulations, 2022 which were gazetted on March 18, 2022. The Regulations were operational and provide for the licensing and oversight of previously unregulated digital credit providers. The report can be accessed at: https://cak.go.ke/sites/default/files/Digital_Credit_Market_Inquiry_Report_2021.pdf

Inquiry into the leasing sector in Kenya

The report focused on barriers to the expansion of leasing for SMEs and possible distortion of competition in the market. It was primarily concerned with what will lead to the development of a vibrant competitive leasing market for SMEs.

62. Inquiry into the leasing sector in Kenya

CAK/PR/03/17/A

April, 2019

Keywords: Leasing, small and medium enterprises, wet lease, dry lease, lessor, lessee.

Brief facts

Kenya's leasing market was dominated on the demand side by the government and large corporate customers. It had a variety of leasing companies, some independent leasing companies, some affiliated with particular suppliers of goods, and some banks (or owned by banks). It also largely comprised vehicle leasing. There was minimal leasing to SMEs or of assets other than vehicles.

This report assessed the legal and regulatory environment of the Kenyan leasing sector to identify barriers to entry and growth and other distortions of competition, taking into account certain legal, regulatory, accounting, and taxation issues raised. It focused on leasing equipment (e.g., motor vehicles, medical and agricultural equipment) to small and medium-sized enterprises (SMEs).

The central concern of the inquiry was that the rationale for leasing was to lower risk to provide for the financing of assets for businesses such as SMEs to which credit was typically rationed.

Objective

To examine the barriers to expansion of leasing for SMEs and possible distortions of competition.

Findings

1. The leasing market was relatively developed for 'blue chip' and multinational clients, unlike for SMEs.
2. There was no adequate legal and regulatory framework for leasing to address challenges faced by SMEs.
3. Fiscal and accounting treatment of leasing agreements were unaddressed.
4. Leasing market segments were concentrated with no signs of collusion.
5. Market data gaps and lack of understanding of leasing by SMEs remained a significant

barrier to leasing. The application of Value Added Tax (VAT) to leases for equipment that, if purchased, would be VAT-exempt, raises a cost barrier to leasing by 16%.

Recommendations

i. Development of a leasing framework that clarifies various terms and their legal effects.
ii. Harmonizing the leasing framework with other Act (s) that apply to the sector to boost the legal and regulatory framework.
iii. Amendments to the existing laws vide a new Leasing Act to establish a clear framework for leasing.
iv. Establishing obligations in law requiring leasing companies (including banks engaging in leasing) to report their leasing activities in a standardized manner to enable effective analysis and monitoring of the market.

Editorial Note

This inquiry led to the development of the leasing framework which the Government is in the process of implementing. The report can be accessed at: https://www.cak.go.ke/sites/default/files/leasing%20sector%20market%20inquiry%20report%20april%202019.Pdf

Inquiry into the USSD service provision in Kenya

The Unstructured Supplementary Service Data (USSD) service provision market inquiry was conducted to determine whether the provision of USSD services raised competition concerns in terms of pricing, accessibility, and quality of service in the economy. Specifically, excessive pricing by a dominant firm, price discrimination, and exclusionary abuse of dominance were examined.

63. Inquiry into the USSD service provision in Kenya

CAK/PR/03/10/A

July, 2016

Keywords: USSD (Unstructured Supplementary Service Data), Mobile Money Transfer, Mobile Wallet, Mobile Payments, Global System for Mobile (GSM), SIM Toolkit (STK), dominant firm, excessive pricing, exclusionary abuse of dominance, pricing and conditions of USSD access offered by Mobile Network Operators (MNOs).

Brief facts

The inquiry examined the pricing and conditions of USSD (Unstructured Supplementary Service Data) access offered by Mobile Network Operators (MNOs) in Kenya. There was a range of communication channels available for the provision of and access to mobile financial services. The most common channels were SIM ToolKit (STK) and USSD.

STK-based interfaces had a set of commands stored on the user's SIM card and the menu for accessing the commands was embedded in the normal phone user interface and accessible on the phone's menu. USSD was a standard for transmitting information over a Global System for Mobile (GSM) Communication network. The interface was typically not as smooth as STK and presented the risk of sessions being dropped which raised the costs, harmed consumer trust, and inconvenienced the customer. Complaints arose from consumers on high USSD access prices that hindered competition in the mobile money services market segment.

Objectives

i. To determine whether the provision of USSD services led to constraints in competition in financial services and related markets.

ii. To establish whether the pricing for USSD services was competitive.

iii. To establish the quality and accessibility of USSD services.

Findings

1. Excessive pricing – Safaricom's USSD prices appeared to be unfairly high when compared

to fixed monthly usage fees in countries with more competitive mobile markets, where the per session fee is zero. Safaricom's charges to mobile financial services providers for USSD access services were considerably higher than Airtel's and Orange's charges.

2. Price discrimination – Prices of USSD services varied depending on the customer. In the case of different banks and non-bank financial service providers, Safaricom applied dissimilar conditions to equivalent transactions. M-Shwari and KCB M-PESA were examples of where Safaricom had provided access to its network on different terms. There were no usage-based charges (zero) for USSD services when interacting with the Kenya Commercial Bank (KCB) M-PESA platform.
3. Abuse of dominance – There were challenges in the supply of USSD access, whether through outright refusal or supply at a low quality of service; and pricing practices that imposed margin squeeze in the sector.
4. Though not prohibiting access, the USSD rate charged by Safaricom in respect of mobile wallet transactions, at the very least raised the costs of its mobile money rivals, or eliminated their margins. In some cases, high USSD charges were placing Safaricom's bank mobile money rivals in a full margin squeeze.
5. Safaricom's M-Shwari and KCB M-PESA partnerships relied on the Commercial Bank of Africa (CBA) and KCB respectively for the banking activities. Both banks assumed the credit risk on the loans extended, Safaricom supplied the data used for the credit scoring algorithm. This information on Safaricom's customers was neither available to customers nor available on an open-access basis. This meant that rival savings and loan providers would be significantly disadvantaged when competing with the M-Shwari and KCB M-PESA products. It appeared then, that Safaricom had participated with CBA and KCB in establishing a new market in services for which there was demand, that limits competition from developing while profiting from a share in their revenues.

Recommendations

i. A competition review of relevant markets in telecommunications and mobile financial services and their interaction was long overdue. It was important for the Authority and Communication Authority of Kenya (CA) and Central Bank of Kenya (CBK) to coordinate an analysis of these markets and identification of dominance, so that these agencies, as well as develop suitable policies and regulatory interventions.

ii. The Act and the Kenya Information and Communications Act (KICA) frameworks, either alone or in combination, had sufficient tools to investigate potential abuse of dominance and impose remedies, including excessive pricing, discriminatory pricing, and exclusionary pricing.

iii. Price regulation;

   a. Lowering the prices to levels where the harmful impact on competition was removed. This might be achieved by reaching prices that, while still significantly above Safaricom's costs, are below the price sensitivity of the customers.

   b. Price regulation over the longer term. Safaricom had dominance in the market, and developing an *ex-ante* price regulation for the USSD service would ordinarily appear appropriate.

iv. Accounting and other forms of separation - Accounting, functional, and structural separation typically address the risk that a vertical firm favors its downstream operation over its competitors. Combined with non-discrimination obligations, it could be a remedy to reduce the risk of a margin squeeze.

v. Interoperability - Interoperability of mobile financial services enables users to make electronic payment transactions with any other user in a convenient, affordable, fast, seamless, and secure way via a single transaction account. M-PESA and other mobile wallets were not interoperable.

vi. Consumer protection - Charges that applied to transfers to other mobile wallets and payments to utilities and businesses. Price transparency across mobile wallets and payments to utilities and businesses would inform customers about the charges before they agreed to complete the transaction.

vii. Coordinate regulatory authorities - The inquiry advocated for collaboration between CAK, CA, and CBK.

Editorial Note

The above recommendations were implemented and resulted in reduced USSD charges from KES 10 to KES 1; platform interoperability were enabled to support cross-network transactions and increased transparency in price disclosure for mobile transactions. The intervention also enhanced competition as consumers were able to compare prices and make informed choices. The report can be accessed at: https://cak.go.ke/sites/default/files/USSD%20Service%20Provision%20Market%20Inquiry.pdf

Inquiry into the retail sector in Kenya

The retail sector is a key pillar for economic growth and development accounting for approximately eight percent of the Gross Domestic Product (GDP), 10% of formal employment, and approximately 59% of employment in the informal sector. This inquiry was conducted to examine the potential competition (particularly the issue of abuse of buyer power by retailers) and consumer protection in the retail sector to deal with systemic issues on retailers' ongoing concerns.

64. Inquiry into the retail sector in Kenya

CAK/PR/03/14/A

July, 2017

Keywords: Retailers, supermarkets, abuse of buyer power, self-regulation, market allocation, shelf allocation, private label, SMEs, and delayed payments.

Brief facts

Retail trade plays a key role in the economy by supporting the whole trade sector through availing goods and services to the end users in volumes, quantities, or packaging that the consumers prefer. Despite these gains, the sector experienced challenges such as market allocation, buyer power (delayed payments of approximately KES 40 billion and shelf allocation of own brands/private labels) consumer protection concerns specifically dual pricing, sale of unsafe/expired goods, and failure to honor warranties. This prompted the Authority to carry out this study to understand and promote competition in the sector.

The inquiry focused on the branded retail chains, their suppliers, and supermarket customers/consumers. The inquiry targeted the branded retail chains (supermarkets) with the highest footprint including; Nakumatt Holdings Ltd, Tuskys Ltd, Uchumi Ltd, Naivas, Choppies, Ukwala Ltd, and other branded retail chains/stores. There were 21 counties covered out of the 47 counties during the inquiry.

Objectives

i. Identify conduct in the retail sector that may lead to abuse of buyer power.
ii. Identify consumer protection issues within the sector.
iii. Assess the impact of private label products.
iv. Appraise the level of competition in the sector and determine the barriers to entry, if any.
v. Evaluate the market conduct in the retail sector and shopping patterns of consumers.
vi. Assess the effect of Government regulations on the retail sector.

Findings

1. There existed abuse of buyer power by the leading retail chains which was exercised through delayed payments to suppliers, shelf allocation and selling of own brands. Delayed payment to suppliers is estimated to negatively impacted the economy, through the high mortality of SMEs due to their inability to buy or pay for their inputs. Further, the families that were dependent on SMEs for their livelihood were likely to fall into the poverty trap. Another outcome of delayed payment was the closure of supermarket branches due to lack of stock as suppliers discontinued supplies hence loss of jobs.
2. Consumer protection issues included dual pricing where shelf prices differed from till prices, failure to honor warranties and sale of expired/unsafe goods by supermarket chains. Similarly, there was a general lack of concern to address consumer complaints in the retail sector.
3. Preference given to own brand/private label in shelf allocation displaced other brands thereby narrowing their market. Consequently, there was a possibility of collapse or downsizing of such supplier firms. In addition, consumer choices were likely to be limited in the long run. All these pointed to unfair competition.
4. The leading supermarkets had a combined supplier's share of 58%, thus exerted influence to obtain more favorable terms from suppliers, especially on payment terms.
5. Inadequate government regulation hence the need for a proactive regulatory regime.

Recommendations

i. Developing rules and regulations that govern the retail sector specifically on payment of suppliers.
ii. The Authority to promote self-regulation of the retail sector. The Authority to collaborate with the Department of Trade in regulating the sector if self-regulation fails.
iii. Penalties and fines to be spelled out and enforced on retailers who were culpable of dual pricing practices.
iv. Investigate how supermarkets address consumer complaints.
v. Enforce penalties on retailers found to be trading in expired goods/unsafe goods and those who failed to honor warranties.
vi. The Authority to work in collaboration with the Anti-Counterfeit Agency and Kenya Bureau of Standards (KEBS) to ensure that consumers were protected.

Editorial Note:

The above recommendations were implemented and resulted in the amendment of the Act to include regulation of abuse of buyer power. In addition, buyer power guidelines were developed. To promote self-regulation, the Authority in collaboration with the industry players, developed the Retail Trade Code of Practice and template contracts in 2021. The inquiry report can be accessed at: https://cak.go.ke/sites/default/files/2023-04/Retail%20Market%20Inquiry%20Report%2C%20June%202017.pdf

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