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COMPETITION LAW ALERT

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The Amazon is a river in Africa

Competition in digital markets is a focus area for many countries at the moment. The US and the EU are looking in detail at digital markets, and in South Africa there is an ongoing market review of different aspects of them. The assessment of innovation and potential competition in mergers in digital markets is important in many of these processes as regulators are concerned that large digital firms are prone to acquiring small innovative competitors before they transform into credible competitive threats. The EU's public stance is that a merger's impact on innovation should be expressly assessed when digital markets are implicated.

The impact of mergers on innovation and potential competition in digital markets is controversial because there are difficulties surrounding the evidence required to assess these considerations empirically. In South Africa, the Competition Act 89 of 1998 (Act) requires that potential competitive constraints and innovation be part of merger assessments. The Act identifies potential import competition, barriers to entry and innovation dynamics as important considerations. Given that South Africa requires prior notification and approval for economically significant mergers, the assessment is forward-looking, predictive and probabilistic, involving a certain level of speculation and conjecture.

The Competition Commission (Commission) recently made submissions to the Organisation for Economic Co-operation and Development (OECD) reflecting its perspectives on potential competition in digital market mergers. In contrast with the global experience, in South Africa large firms, as potential innovators, seek to merge with maverick entrants, which reduces innovation **in the large firm's business**.

What is interesting is that in its OECD submissions, the Commission noted that in many digital markets there are established, well-resourced firms

in other jurisdictions that are multiple times the size of their South African counterparts. These global counterparts have ready-built technological platforms and business models which can be leveraged to reduce the costs of entry into the South African market.

The Commission seems reticent to consider the potential competitive constraints that these firms may represent. For example, the Commission stated in its OECD submissions that "*whilst Amazon has entered South Africa in cloud computing and data centres, to date it has not established an eCommerce presence*". This is an interesting view, given that Amazon itself advertises the fact that it offers a broad range (thousands) of products for delivery to South African customers. If one considers the EU approach to assessing potential competition in mergers (including in digital markets), it requires proper regard to evidence relating to: (1) the extent to which the merging parties **already** represent competitive constraints to one another, and (2) the extent to which other competitors, including global firms, **are already posing a competitive constraint on South African firms**, or will likely do so in future. Assessing potential entry by a non-merger party is fraught with difficulty. However, assessing the extent of existing competition by international firms in digital markets should be done carefully.

This is particularly so in circumstances where the Commission has published proposed amendments to its small merger guidelines, in terms of which the Commission would request to be informed of a wide range of small mergers in digital markets. Generally, small mergers are not subject to oversight by the Commission, but it appears that the Commission intends to take a more hands-on approach to small mergers and digital markets. When doing so, we think that a clear-eyed approach to the evidence of international competition will be fundamental.

Albert Aukema and Craig Thomas

KENYA

Abuse of buyer power: Regulation of the retail sector in Kenya

The retail sector is key in Kenya's Vision 2030 development plan and there has been keen interest in addressing issues of abuse of buyer power.

On 11 June 2021, the Director General of the Competition Authority of Kenya (CAK) gazetted the Retail Trade Code of Practice (Code), to encourage self-regulation, harmonise the means of engagement between retailers and suppliers, and apply international best practice to the Kenyan retail market.

The publication of the Code is based on section 24A (3) and (8) of the Competition Act, Chapter 504 of the Laws of Kenya (Competition Act) which allows the CAK to prepare a code of practice for industries and sectors in which instances of buyer power are likely to occur. The retail sector is key in Kenya's Vision 2030 development plan and there has been keen interest in addressing issues of abuse of buyer power in the sector, as illustrated in the recent decision of the Competition Tribunal in *Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya and Another* [2021] eKLR.

Outlined below are the key requirements and protections for retailers and suppliers, as set out in the Code, that are most likely to impact the Kenyan retail sector.

Application of the Code

The Code aims to regulate the operations between retailers and suppliers. The Code defines a retailer as "any person carrying on a business in Kenya for actual retail of goods for the retail market as a supermarket, hypermarket or self-selection store." The Code does not define the

terms "retail market", "supermarket", "hypermarket" or "self-selection store" but from the use of these terms, it would appear that the Code is geared towards the regulation of "traditional" retail businesses. Nevertheless, given the lack of specificity, it is not clear if the Code would apply to persons engaging in online retail business.

Extraterritorial effect

The Code defines a supplier as "any person carrying on (or actively seeking to carry on) a business in the direct supply to any retailer of goods for resale in the Kenyan market, and includes any such person established anywhere in the world." The phrase "... and includes any such person established anywhere in the world" implies that the Code will have an extraterritorial effect as it would apply to suppliers outside Kenya. Our understanding is that the protections set out in the Code would apply to suppliers who provide their goods to Kenyan retailers for sale in the Kenyan market.

Principles of fair and ethical dealing

The Code provides that retailers and suppliers should at all times deal fairly and lawfully with each other. Fair and lawful dealing is interpreted as conducting trading relationships with suppliers in good faith, without distinction between formal or informal arrangements, without duress, and in recognition of the other party's need for certainty with regards to the risks and costs of trading.

KENYA

Abuse of buyer power: Regulation of the retail sector in Kenya...continued

The Code requires retailers and suppliers to have recorded supply agreements or joint business plans.

The Code recognises that a retailer may require suppliers to undertake certain actions, such as an increased supply of goods, in response to ordinary commercial pressures faced by the retailer. "Ordinary commercial pressures" as described in the Code include external exigencies which affect profitability of a retailer but which:

- do not constitute or involve duress (including economic duress);
- are objectively justifiable and transparent; and
- result in similar cases being treated alike.

Mandatory supply agreements and joint business plans

A joint business plan is defined in the Code as "an agreement defining agreed terms of a certain agreed time for as far as product volumes, rebates, agreed share of shelf positioning and payment movement of goods by both parties for business growth and development and supply chain efficiency."

The Code requires retailers and suppliers to have recorded supply agreements or joint business plans which, according to section 24A (7) of the Competition Act, should include:

- the terms of payment;
- the payment date;
- the rate payable on late payment;
- the conditions for termination and variation of the contract with reasonable notice; and
- the mechanism for the resolution of disputes.

Retailers are also restricted from any retrospective variation of the supply agreement or joint business plan unless the supply agreement or joint business plan sets out clearly and unambiguously that:

- any specific change of circumstances (outside the retailer's control) that will allow for such adjustments to be made; and
- detailed rules that will be used as the basis for calculating the adjustment to the terms of supply.

In order for a retailer to make any amendment that has a retrospective effect, the retailer must give a reasonable notice of such amendment to the supplier. The Code does not prescribe a specific period but sets out a number of factors to determine what is reasonable in each individual case, including:

- The duration of the supply agreement or joint business plan to which the notice relates, or the frequency with which orders are placed by the retailer for relevant goods.
- The characteristics of the relevant goods including durability, seasonality and external factors affecting their production.
- The value of any relevant order relative to the turnover of the supplier in question.
- The overall impact of the information given in the notice on the business of the supplier, to the extent that this is reasonably foreseeable by the retailer.

KENYA

Abuse of buyer power: Regulation of the retail sector in Kenya...continued

A retailer is restricted from requiring a supplier to make significant changes to its supply chain procedures unless the retailer has issued a written notice to the supplier within a reasonable time period.

Change in supply chain procedures

A retailer is restricted from requiring a supplier to make significant changes to its supply chain procedures unless the retailer has issued a written notice to the supplier within a reasonable time period. Failure to comply with this requirement the retailer will be liable for the reasonable loss incurred.

Price and payments

The Code sets out a strict “no delay payment rule” for retailers. Retailers are required to make payment to suppliers in accordance with the relevant supply agreement or joint business plan. If there are any anomalies in the documentation provided to the retailer with respect to the payment, the retailer is required to notify the supplier of the anomaly within seven days with respect to general goods and within 24 hours in the case of fresh and perishable goods.

In addition, a retailer is required to make payment of any undisputed amount on any invoice or statement of account in accordance with the terms of the relevant supply agreement or joint business plan. If there are any disputed invoices, the same should be settled within 30 days from the date of the invoice.

Retailer costs and positioning of goods

The Code prohibits retailers from requiring suppliers to make payment towards any of the retailer’s marketing costs, unless the

same is mutually agreed to by the parties or set out in the supply agreement or joint business plan. Such costs include:

- Category buyer visits to new or prospective suppliers.
- Artwork or packaging design.
- Consumer or market research.
- The opening or refurbishing of a store.
- Hospitality for the retailer’s staff.
- Listing a product.

In addition to this, a retailer must not directly or indirectly require, a supplier to make any payment in order to secure better positioning or an increase in the allocation of shelf space for any goods of that supplier within a store unless such payment is made in relation to a promotion.

Administrative committees

The Code establishes two committees to aid in the administration of the Code. These are the Prompt Payment Committee and the Retail Disputes Committee.

The payment committee is made up of the chairpersons and chief executive officers of the Retail Trade Association of Kenya (RETRAK), Kenya Association of Manufacturers (KAM) and Association of Kenya Suppliers (AKS). The payment committee is mandated to assess the implementation of the Code and report any issue that will not be resolved on the implementation of the Code to the disputes committee.

KENYA

Abuse of buyer power: Regulation of the retail sector in Kenya...continued

The Code lays out a significant amount of conditions and requirements on retailers in their engagement with suppliers.

The disputes committee will act as the dispute resolution body for all disputes arising under the Code and shall be constituted of seven people:

- two nominees of RETRAK;
- two nominees of KAM;
- one nominee of the AKS;
- one nominee of the Council of Governors; and
- one nominee by the Ministry of Trade.

The quorum for a meeting of the disputes committee is five members and the committee shall make its decision by consensus. Any decision of the disputes committee shall be binding on all parties to the dispute. It is important to note that the disputes committee is only the initial forum for redress of disputes and any appeals from the decisions of the committee shall be made to the CAK.

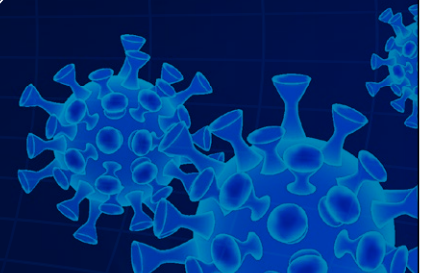
Conclusion

The Code lays out a significant amount of conditions and requirements on retailers in their engagement with suppliers. It is evident that retailers will need to relook at their existing agreements with suppliers to ensure compliance with section 24A of the Competition Act and the Code. The Code allows players in the retail sector to self-regulate and ensure fair and ethical dealings with each other. The administrative committees to be established under the Code will be critical towards the successful implementation or lack thereof of the Code.

Njeri Wagacha and Brian Muchiri

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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