



COMPETITION LAW ALERT

24 JUNE 2022



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INCORPORATING
KIETI LAW LLP, KENYA

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Abuse of buyer power: Kenyan Competition Authority recovers over KES 38 million from insurance companies

Over the last few months, the Competition Authority of Kenya (CAK) has ramped up its enforcement activities with respect to incidences of abuse of power (ABP).

The Kenyan Competition Act, 12 of 2010 (Act) defines “buyer power” as:

“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.”*

The Act does not define “abuse of buyer power”, however, section 24(5) of the Act provides a non-exhaustive list on conduct that constitutes ABP which includes but is not limited to:

- delays in payment of suppliers without justifiable reason in breach of agreed terms of payments;

- demands for preferential terms unfavourable to the suppliers or demanding limitations on suppliers to buyers; and
- refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms.

Following amendments to the Act in early 2020 to allow the CAK to act pre-emptively when addressing ABP incidences, the CAK finalised 26 ABP cases in the course of the 2020/2021 financial year, a 73% caseload increase from the previous year.

ABP IN THE INSURANCE SECTOR

One of the investigations carried out by the CAK during this period was with respect to allegations of ABP against service providers in the insurance sector relating to delayed payments and unilateral termination of supply agreements.

On 21 June 2022, the CAK issued a press statement confirming the conclusion of investigations into ABP incidences against 20 motor vehicle

repairers and five motor vehicle assessors (Service Providers). The CAK investigation targeted 18 major insurance companies that unjustifiably defaulted on honouring payments to the various Service Providers and the actions of the insurance companies had forced the service providers to take up expensive loans, downsize or increase the cost of their services or, in some instances, shut down their operations.

The complaint made in this regard claimed that the insurance companies engaged in ABP conduct by delaying payments without justifiable reasons and in breach of the agreed terms of payment, unilaterally terminating contracts without prior notice, demanding unfavourable terms detrimental to the garages, and transfer of commercial risk.

The CAK noted that the contract terms between the insurance companies and the Service Providers pointed to the presence of buyer power on the part of the insurance companies as the service level

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agreements (SLAs) between the entities were unilaterally drawn by the insurance companies and submitted to the Service Providers for execution. The terms of the SLAs were in favour of the insurance companies and were non-negotiable.

The CAK noted that the insurance companies abused their buyer power by delaying payments to the Service Providers without justifiable reasons, as well as through constructive termination of contracts.

Furthermore, the CAK noted that the relevant market was skewed against the Service Providers as the Service Providers relied almost entirely on insurance companies for their business and they did not have alternatives to switch to, whereas the insurance companies had viable alternatives to switch to through the multitude of Service Providers.

Several insurance companies opted to settle with the various Service Providers after the investigation, with the CAK noting that its intervention had occasioned the release of over KES 38 million to these service providers and had salvaged the livelihoods of approximately 1,000 Kenyans.

WHAT LARGE AND SMALL MEDIUM ENTERPRISES IN KENYA NEED TO KNOW

ABP has negative effects on markets and on small and mid-sized enterprises (SMEs), which play a key role in the growth of the economy and the provision of employment. The increased enforcement actions of the CAK indicate its desire to eradicate ABP in various sectors of the economy, including the insurance sector.

To this end, the CAK has developed model contracts for use by contracting parties in the insurance sector. The model contracts provide for certain minimum provisions, including terms of payment, conditions for termination and variation, and dispute resolution mechanisms.

It would be prudent for large enterprises and SMEs to understand the nature of ABP and the potential penalties and fines that may arise from conduct that would amount to ABP. In addition, SMEs should ensure that they enter and maintain written contracts with counterparties to minimize the risk of conflict and guard against ABP.

It will be interesting to see what other actions and orders the CAK will issue as it seeks to strike against ABP in all sectors of the Kenyan economy.

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