BLOCK EXEMPTION GUIDELINES

PREFACE

The Competition Authority of Kenya (hereinafter the Authority) recognizes the need for ease of doing business and deepening of the investment climate while enhancing the adoption of a competition culture in the Kenyan economy. In order to realize this, the Competition Act No. 12 of 2010 was amended and provided for the exemption from competition assessment of a category of agreements, decisions and practices by or, between undertakings from application of prohibitions under section 21 and 22. The Authority has therefore prepared the Block Exemption Guidelines for certain categories of vertical agreements, including media content generation arrangements. The Guidelines provide assessment of common restrictions in such agreements, decisions and practices by or between undertakings. The objects of the block exemptions guidelines therefore include achieving transparency and predictability in the market regarding the grant of block exemptions, consistency in analysis and application of the law, reduction in transactional costs and allowing the Authority to concentrate its resources on agreements which are likely to distort competition in the economy.

A. Introduction

1. These Guideline shall be known as the Block Exemptions Guidelines ('BEG') on certain Franchise Agreements, Stadia Branding Rights and media content generation and one-off Sporting and promotional events under the Competition Act No. 12 of 2010 (the Act).

2. The BEG are not a substitute for the Act and the Rules (subsidiary legislation) made under the Act and must therefore, be read in conjunction with the Act, Rules and other guidelines.

3. The BEG address a number of key issues related to the provisions of the law, but they cannot anticipate all questions that may arise in the market place and may be updated from time to time to account for the developments in the market place and changes in policy and law.

4. The current market trends and the Authority's experience in applying provisions of the Act, coupled with international best practices, has informed the need to grant block exemptions.

5. Additionally, Section 30 (2) of the Act prescribes that the Authority may, with the approval of the Cabinet Secretary, by notice in the Gazette, exclude any category of decisions, practices or agreements by or between undertakings from the application of the provisions of Part III of the Act. This section therefore confers to the Authority the latitude to grant category exemptions otherwise referred to as 'block exemptions[1]' on own motion by declaring the practices excluded from the application of the provisions of Part III of the Act.

6. By issuing this Guideline, the Authority provides clarity to undertakings in making their own assessment of agreements, decisions or practices which they intend to enter into and whether such agreements qualify for block exemption.

B. Legal Framework

[1] Block exemptions is a jargon used to refer to exemptions to a line of business or industry

7. Part III of the Act prohibits restrictive business practices ranging from agreements and concerted practices by parties either in horizontal or vertical relationships and trade associations (section 21 & 22). The Act, however, provides for exemption of some of those prohibited practices.

8. Vertical restraints are generally less harmful than horizontal restraints and may provide substantial scope for efficiencies. Vertical restraints can only raise competition concerns if there is insufficient competition at one or more levels of trade due to existence some of market power.

9. Exemptions are provided for under section 25 of the Act. The Act further specifies the areas undertakings and associations of undertaking can apply for exemptions. These are; exemptions relating to restrictive trade practices (section 25), intellectual property (section 28), and professional rules (section 29).

C. Scope.

10. The BEG scope will cover vertical agreements specifically regarding; Franchise Agreements, Stadia Branding Rights and content development and broadcasting agreements and one-off Sporting and promotional events.

Franchise Agreements

11. Franchising is defined as a method of structuring a productive relationship between two parties in which both contribute to the production or distribution of the product and service. The franchisor permits its trademark to be used and in order to protect its trademark, supplies a complete business plan with which the franchisee must comply. A franchise agreement therefore combines elements of integration and delegation, control and independence.

12. Franchise agreements often contain clauses that fall within the prohibitions under section 21(1) and (3) of the Act and therefore should satisfy the set thresholds in this Guideline to qualify for block exemption. In the evaluation of franchise agreements for consideration under the block exemption, the following have been taken into account; market share thresholds, hard core restrictions and nature and time period of the agreements.

a. Market share threshold

13. Franchise agreements entered into between undertakings whose individual market share on the relevant market(s) does not exceed 15% will qualify for block exemption. Market share will be determined on the basis of the average market sales or any other reliable market information parameter in the relevant market for the preceding three (3) years.

14. Parties are advised to refer to the Market Definition Guidelines of the Authority available at its website (www.cak.go.ke) to familiarize themselves with principles employed in the definition of the relevant market(s).

b. Hardcore restrictions

15. Hardcore restrictions are restrictive clauses in agreements whose object is lessening, prevention or distortion of competition. Hard core contraventions are exploitative in nature as they lead to direct consumer harm in terms of higher prices, poor quality products, and lack of alternatives. The guideline will consider the following restrictions in Franchise Agreements to be hard core in nature;

i. Minimum resale price maintenance

16. Minimum resale price maintenance is a prohibition under section 21(3) (c) of the Act. Minimum resale price maintenance is a form of price fixing which occurs when the franchisor imposes a minimum resale price on the franchisee thereby limiting or excluding the franchisee's ability to offer discounts or to sell at lower prices than what the upstream player imposes. Minimum resale price maintenance could also facilitate collusion on prices and trading conditions among the franchisees.

17. However, the franchisor can, in terms of section 21(4) of the Act, recommend a price that gives weight to the value and quality of the product/service, but should never bind the franchisee to that price. Maximum price may be recommended as long as it does not transform into a fixed price.

18. For a franchise agreement to qualify for block exemptions, the agreement should not have clauses that prevent the franchisee from determining their own selling price. However, the Guideline may allow for minimum resale price maintenance in instances where;

   a. The company is establishing a foothold in the country where the restriction is necessary to develop the market,
   b. The resale price maintenance is in regard to a promotion with a specified time frame not exceeding three (3) months aimed at promoting a new product, and
   c. It is demonstrated that the company pioneered the development of a new product/service through research and development and therefore need to recoup investment,

ii. Exclusive territories, products or customers

19. Arrangements for exclusive territories occur when the franchisor imposes limitations on the franchisee by specifying the area(s) where the franchisee can operate or supply the contract goods and services, class of customers to serve or products to deal in.

20. The allocation of markets is a prohibition under section 21(3) (b) of the Act. However, allocation of exclusive territories to franchisees will qualify for block exemption if the following conditions are satisfied;

   a. The market share of either of the parties in the contact goods market is not more than 15% in the allocated territory. Where the market share(s) exceeds 15%, the exclusivity restricts active sales only and allows for passive sales outside the assigned territory,
   b. The undertaking is testing a new product in the allocated territory or limited group of customers, and
   c. The undertaking is a startup or developing a new market with high sunk costs therefore exclusivity is necessary to recoup costs.

iii. Tying and bundling

21. Tying is the practice by the franchisor of selling one product or service as a mandatory addition to the purchase of a different product or service. Such provisions require the franchisee to purchase all their immediate requirements upon granting of the licence, from the franchisor, as well as other inputs not critical to the maintenance of the agreement.
22. Bundling on the other hand is where a good must be purchased together with another as a package.

23. The restriction is allowed where it is necessary to achieve the consistency in the quality of the good or service and ensuring the standardization of the goods/ services across the franchisees.

iv. Restriction on output

24. Restricting of output is considered a hardcore contravention under section 21 (3) (e) of the Act. Any agreement or clauses which may lead to the constraining of output at any level in the value chain cannot benefit from these exemptions.

25. The restriction of output may be allowed where the agreement involves testing of a new product in a limited geographic area or limited group of customers.

v. Non-compete restrictions

26. These restrictions prevent the franchisee from competing with the business and the franchisor, during and after the term of their agreement. A franchisee will therefore be restricted:
    i. from starting up a competing business during or after the term of the agreement for a specified duration of time,
    ii. de-badging (re-branding) their store upon the expiry of the agreement and;
    iii. Continuing to conduct business under a new name at that location.

27. These restrictions are allowed where they are intended to protect the franchisor's commercial interests in their goodwill and trade know-how.

Block Exemptions for Stadia Branding

28. The Stadia branding agreements are vertical agreements between the Sports Stadia Management Boards (whether at the national or county level) and undertakings which confers exclusive advertising/ branding rights within the stadium to the undertaking in return for funding and investments to revamp and maintain the facility.

29. These arrangements is allowed as long as it is demonstrated that there is an express benefit to the public including the rehabilitation and development of the existing infrastructure and that there was competition at entry.

Block exemptions for media content generation/naming rights and one-off Sporting and promotional events

30. The parties to exclusive agreements on local media content and/or naming rights/one-off one-off Sporting and promotional events /one-off national event will qualify for block exemption.

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31. The one-off Sporting and promotional events or national events such as sporting events will qualify for block exemption if the duration is for a period of not more than seven (7) days.

D. Period of the BEG

32. The BEG on franchise agreements, stadia branding rights and media content generation are valid for five (5) years from the date of gazzettement of these guidelines.

E. Review of the Guidelines

33. The Authority shall undertake review of the market periodically to establish if there have been major changes that might warrant a review of these Guidelines.