



## **BUYER POWER GUIDELINES**

**March 2022**

This publication is not a legal document. It contains general information intended for guidance on how the provisions under section 24A of PART III of the Competition Act, Act No.12 of 2010 are applied. This publication can be made available in alternative formats upon request. Please contact the Competition Authority of Kenya using the contact information provided below. This publication may not be reproduced, in part or in whole by any means without the express permission of the Competition Authority of Kenya.

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## PREFACE

These Guidelines have been developed in terms of section 8(2) of the Competition Act No. 12 of 2010 (“the Act”) which allows the Competition Authority of Kenya (“the Authority”) to regulate its own procedure on matters falling within its jurisdiction. The Guidelines are made in line with section 24A, Part III of the Act to indicate the Authority’s policy approach regarding the application of the Act with respect to abuse of Buyer Power.

The Competition Amendment Act No. 27 of 2019, made significant amendments to the hitherto Buyer Power provisions under sections 24(2A) to (2D) of the Act. These Guidelines review, update and replace the present Buyer Power Guidelines 2017 prepared and issued prior to the amendments.

In terms of section 24A(1), any conduct that amounts to an abuse of Buyer Power in a market in Kenya, or a substantial part of Kenya, is prohibited. These Guidelines provide guidance by outlining how the Authority will interpret the Buyer Power provisions of the Act for enforcement and advisory purposes and present the general principles that the Authority will follow in assessing and screening whether conduct under investigation contravenes section 24A(1) of the Act.

These Guidelines may be revised, supplemented, or replaced from time to time based on the experience derived by the Authority in investigation and determination of abuse of Buyer Power matters and based on subsequent decisions of the Competition Tribunal, High Court and Courts of Law generally on these provisions.



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## A. BACKGROUND

1. The object of the Competition Act No. 12 of 2010 (“the Act”), upon which these Guidelines are anchored is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya. Promotion and protection of effective competition and prevention of unfair market conduct are achieved by among other means, regulating Abuse of Buyer Power.
2. Buyer Power occurs within a vertical relationship between a supplier and a powerful buyer or a group of buyers in a position to dictate or influence the terms of purchase from upstream suppliers. In some circumstances, a powerful supplier may have the incentive and ability to defeat the exercise of market power by a buyer. However, even the least powerful buyer has a disciplinary effect on a supplier if there is a credible threat that it could switch to another supplier(s) to a sufficient extent and to the detriment of that supplier.
3. The Authority recognizes abuse of Buyer Power as a pertinent economic concern in Kenya. Amendments to the Act made in 2016 were effected to address this fact and introduced sections 24(2A) to 24(2D) prohibiting abuse of Buyer Power.<sup>1</sup> Further amendments in 2019 clarified the law as well as expanded the mandate of the Authority with regard to the offence.
4. A buyer undertaking may use its market power and/or superior bargaining position to occasion unlawful, unreasonable and/or unfair trading terms and engage in other conduct that disadvantages supplier undertakings and affects their ability to remain competitive. Conduct in abuse of Buyer Power is likely to lessen a supplier’s incentives and ability to invest in new capacity, products and production processes.
5. Regulation of Buyer Power directly impacts a critical component of a developing economy by safeguarding the sustainability of Small and Medium Enterprises (SMEs). SMEs form about 90 per cent of businesses worldwide and contribute over

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<sup>1</sup> Competition Amendment Act No. 49 of 2016.



40 per cent of the Gross Domestic Product (GDP) in emerging economies.<sup>2</sup> In Kenya, SMEs play a pivotal role in economic development, investment and employment creation. According to Kenya Economic Survey 2019, the sector contributed 33% of Gross Domestic Product and was responsible for 83.6% of the jobs created.<sup>3</sup> The Authority has established in the course of its enforcement that SMEs suppliers, by virtue of their size are often the victims of abuse of Buyer Power.

## B. CITATION

These Guidelines shall be known as the Buyer Power Guidelines, 2022.

## C. DEFINITIONS

6. In these Guidelines, words and phrases which are defined in the Act have the same meaning herein unless otherwise indicated.
7. Unless otherwise indicated, the following words and phrases in these Guidelines have the meaning attributed to them under the Act as follows –

*Act* refers to the Competition Act No.12 of 2010 (as amended from time to time);

*Authority* means the Competition Authority of Kenya;

*Buyer Power* has the meaning assigned to it under section 2 of the Act.

*Code of Conduct/Practice* means a set of established standards, fair trade practices, principles and values agreed on by players in a given sector that ensure compliance with applicable laws of trade or written guidelines issued by a business membership

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<sup>2</sup> <https://www.worldbank.org/en/topic/smefinance> (accessed 10 April, 2021).

<sup>3</sup> Kenya National Bureau of Statistics *Economic Survey 2019*. A 2016 report estimates that the SME sector in Kenya contributed 23.6 per cent and 24.7 per cent of the gross value addition and national output of the economy and employed respectively 14.9 million persons, approximately 90 per cent of the total working population. County Business Environment for Micro and Small Enterprises in Kenya, Kenya Institute for Public Policy Research and Analysis (KIPPRA), SPNo.27/2019 available at <http://repository.kippira.or.ke/bitstream/handle/123456789/2080/county-business-environment-for-micro-and-small-enterprises-in-kenya-sp27.pdf?sequence=1&isAllowed=y> (accessed 10 April, 2021).



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association or other official body to its members to help them comply with its ethical standards.

*Goods* has the meaning assigned to it under the Act.

*Small and Medium Enterprises (SME)* means a small business or businesses or a medium-sized business or businesses, as the context dictates and includes a micro business. Where applicable, the meaning assigned to it under section 2 of the Micro and Small Enterprises Act No. 55 of 2012 shall be applicable.

*Service* has the meaning assigned to it under the Act.

#### **D. PURPOSE**

8. These Guidelines present the general principles and policy approach that the Authority will follow in assessing whether alleged conduct contravenes section 24A(1) of the Act. They provide a framework for practical implementation of the substantive law. Consequently, these Guidelines must be read in conjunction with the Act and the Rules and Guidelines under the Act.

#### **E. LEGAL EFFECT AND DISCRETION**

9. These Guidelines set out the general approach that the Authority will follow in assessment of alleged contravention of section 24A(1) of the Act, and do not, in any way, fetter the discretion of the Authority in investigation and determination of abuse of Buyer Power matters on a case-by-case basis. They do not constitute legal advice, and should not be relied on as a statement of the law relating to the Act and/or other legal document(s).
10. These Guidelines are not intended to be a substitute for the provisions of the Act or any subsidiary rules made pursuant thereto and do not have the force of law. In the event of inconsistency between these Guidelines and the Act, the provisions of the Act shall prevail.



## F. LEGAL FRAMEWORK

11. The relevant provisions for abuse of Buyer Power are the following:

### **Section 2 of the Act:**

#### 2. Definition of Buyer Power

"Buyer Power" means the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to— (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 of the Act:**

#### 24A. Abuse of Buyer Power

- (1) Any conduct that amounts to an abuse of Buyer Power in a market in Kenya, or a substantial part of Kenya, is prohibited.
- (2) Where the Authority establishes that a sector or an undertaking is experiencing or is likely to experience incidences of abuse of Buyer Power, it may monitor the activities of the sector or undertaking and ensure compliance by imposing reporting and prudential requirements.
- (3) The Authority may require industries and sectors, in which instances of abuse of Buyer Power are likely to occur, to develop a binding code of practice.
- (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 an abuse of Buyer Power includes –
  - a) delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;
  - 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 promotion of the goods or services;



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- e) transfer of commercial risks meant to be borne by the buyer to the suppliers;
- f) demands for preferential terms unfavorable to the suppliers or demanding limitations on supplies to other buyers;
- g) reducing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; or
- h) bidding up of inputs by a buyer undertaking with the aim of excluding competitors from the market.

(6) When investigating abuse of Buyer Power complaints, the Authority shall be guided by any existing agreement, whether written or not, between a buyer undertaking and supplier undertaking.

(7) An agreement between a buyer undertaking and a supplier undertaking shall include –

- a) the terms of payment;
- b) the payment date;
- c) the interest rate payable on late payment;
- d) the conditions for termination and variation of the contract with reasonable notice; and
- e) the mechanism for the resolution of disputes

(8) The Authority shall publish the code of practice which shall be developed in consultation with the relevant stakeholders, relevant Government agencies and the Attorney-General.

(9) Any person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings or to both.

### **Section 31 of the Act:**

#### **31. Investigation 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.

(3) Deleted by L.N. 23/2011, Sch.



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(4) If the Authority decides to conduct an investigation, the Authority may, by notice in writing served on any person in the prescribed manner, require that person –

(a) to furnish to the Authority by writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Authority considers relevant to the investigation;

(b) to produce to the Authority, or to a person specified in the notice to act on the Authority behalf, any document or article, specified in the notice which relates to any matter which the Authority considers relevant to the investigation;

(c) to appear before the Authority at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice; and

(d) if he possesses any records considered relevant to the investigation, to give copies of those records to the Authority or alternatively to submit the record to the authority for copying within the time and in the manner specified in the notice.

**Section 32 of the Act:**

32. Entry and search

(1) Where the Authority deems it necessary for its investigations under this Part, the person or persons authorized in writing by it may enter any premises in the occupation or under the control of a trader, manufacturer, producer, commission agent, clearing and forwarding agent, transporter or other person believed to be in possession of relevant information and documents and inspect the premises and any goods, documents and records situated thereon.

(2) Upon entering premises in pursuance of the powers conferred by subsection (1), the person or persons authorized in writing shall, before proceeding to conduct an inspection of the premises, goods, documents and records situated thereon, inform the person present who is or who reasonably appears to be for the time being in charge of the premises of his intention to exercise his powers under this Act.

(3) The authorized persons may use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to –

(a) search any data contained in or available to that computer system;

(b) reproduce any record from that data;

(c) seize any output from that computer for examination and copying;

(d) attach and, if necessary, subject to the issuance of a receipt to that effect, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.



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(4) The Authority may seek the assistance of police officers and other law enforcement agencies in its execution of the mandate conferred upon it by this section.

**Section 33 of the Act:**

33. Power of Authority to take evidence

(1) The Authority may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, but a statement, document, information or matter shall not be received in evidence unless it meets the requirements for admissibility in a Court of law.

(2) The Authority may take evidence on oath or affirmation from any person attending before it, and for that purpose any member of the Authority may administer an oath or affirmation.

(3) The Authority may permit any person appearing as a witness before it to give evidence by tendering and, if the Authority thinks fit, verifying by oath or affirmation, a written statement.

(4) A person attending before the Authority is entitled to the same immunities and privileges as a witness before the High Court.

**Section 34 of the Act:**

34. Proposed decision of Authority

(1) If, upon conclusion of an investigation, the Authority proposes to make a decision that —  
(a) a prohibition or prohibitions under Section A of this Part have been infringed;  
(b) a prohibition or prohibitions under Section B of this Part have been infringed; or  
(c) a prohibition or prohibitions under section C of this Part have been infringed, it shall give written notice of its proposed decision to each undertaking which may be affected by that decision.

(2) The notice referred to in subsection (1) shall —

(a) state the reasons for the Authority's proposed decision;

(b) set out details of any relief that the Authority may consider to impose;

(c) inform each undertaking that it may, in relation to the Authority's proposed decision or any of the matters contemplated in paragraph (b), within the period specified in the notice —

(i) submit written representations to the Authority; and

(ii) indicate whether it requires an opportunity to make oral representations to the Authority.



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**Section 35 of the Act:**

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.

**Section 36 of the Act:**

36. Action following investigation

After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures –

(a) declare the conduct which is the subject matter of the Authority’s

investigation, to constitute an infringement of the prohibitions contained in Section A, B or C of this Part;

(b) restrain the undertaking or undertakings from engaging in that conduct;

(c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;

(d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question; or

(e) grant any other appropriate relief.



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**Section 37 of the Act:**

37. Interim relief

(1) If the Authority 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 section A, B, or C of this Part, and that it is necessary for the Authority to act as a matter of urgency for the purpose of—

- (a) preventing serious, irreparable damage to any person or category of persons; or
- (b) protecting the public interest, the Authority may, by order in writing, direct the undertaking or undertakings to stop and desist from engaging in such conduct until the ongoing investigation is concluded.

**Section 38 of the Act:**

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.

**ASSESSMENT OF BUYER POWER AND THE ELEMENTS OF ITS ABUSE**

**F.1 APPROACH**

12. In its investigations, the Authority will assess the conduct in terms of the elements outlined at sections F.3 and F.4 alongside any defense or justification put forward by the accused buyer.

13. During investigation, the Authority shall be guided by any existing agreement, whether written or not, between a buyer undertaking and supplier undertaking.

14. In determining whether Buyer Power exists, the Authority shall take into account all relevant circumstances in accordance with section 24A(4) of the Act. These include the nature and determination of contract terms between the concerned



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undertakings; payment requested for access to infrastructure; and the price paid to suppliers.

15. Once Buyer Power has been established, the Authority shall determine whether the specific conduct engaged in by the buyer amounts to an abuse of Buyer Power in accordance with section 24A(5) of the Act.
16. Investigations into the offence at section 24A(1) of the Act is an inquiry into whether the prices, trading conditions and conduct between a buyer and supplier are unfair or not. Therefore, the Authority's focus of investigation is on the treatment and welfare of the supplier undertaking by the buyer and the fairness or unfairness of the trading conditions.
17. Unfairness will be broadly determined by whether such terms are one-sided or onerous or disproportionate or unrelated to the stated objective of the supply contract, and/or whether they unreasonably transfer risks or costs which should be borne by the buyer onto suppliers. Business practices will be considered against the overall perspective of promoting and maintaining fair competition. Accordingly, conduct will not be justified merely because it complies with the currently existing business practices
18. The Authority will not inquire into the effects of the conduct in question on final consumers. Investigation will not weigh up consumer welfare as against the welfare of the relevant supplier. It is therefore not relevant for instance, that a buyer passed on the benefits of an unfairly low price achieved through the abuse of Buyer Power to consumers.
19. The Authority will prioritise and fast-track investigations in material cases, including those where the supplier that is the subject of alleged abuse of Buyer Power is an SME or where the impact of the alleged abuse is on a larger number of suppliers.
20. The Authority will be guided by existing best international practice and local and international case precedents in respect of the assessment of what constitutes abuse



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of Buyer Power. Abuse of Buyer Power under the Act has equivalents in 'abuse of dependency' and 'abuse of a superior bargaining position' in certain jurisdictions.

21. The Authority will continue to review the benchmarks for its investigations based on the experience gained from the screening and investigation of complaints.

## F.2 PROCEDURE

22. The Authority will conduct abuse of buyer power investigations under the provisions of Part III E of the Act and within its commitments under its Citizens Service Delivery Charter.

23. The Authority will conduct a preliminary investigation under section 31 of the Act to screen complaints to establish those which require a more detailed investigation and those which are unlikely to succeed even with a more detailed investigation. The preliminary investigation will entail initial inquiry into the following matters:

- i. Establishment of the Authority's jurisdiction;
- ii. Adequacy of evidence submitted;
- iii. Existence of a buyer-supplier relationship between the parties subject to the investigation;
- iv. Identification and definition of the relevant market;
- v. Likelihood of existence of buyer power on the part of the buyer; and
- vi. Likelihood of abuse of buyer power.

24. At the conclusion of the preliminary investigation, the Authority will inform the accused buyer of the particulars of the complaint to enable them to either seek settlement under section 38 of the Act and resolution by altering their conduct and remedying the effect of the conduct as necessary, or put forward a defense and present evidence in support of the defense.

25. The burden on the accused buyer is one of providing evidence that either they did not have buyer power or that the conduct engaged in does not amount to abuse of Buyer Power. The Authority will consider the defence and make its determination subject to requiring more information from either party.



26. Where the buyer does not provide any defence, or where the evidence provided is insufficient as to the claimed defence, the Authority will make a finding that the conduct violates section 24A(1) of the Act.

### **F.3 DETERMINING BUYER POWER**

#### **Defining Buyer Power**

27. "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.
28. Buyer Power is a market phenomenon that occurs within a vertical relationship between a seller or supplier and a powerful buyer. Buyer Power is concerned with how downstream firms or undertakings can affect the terms of trade with upstream firms or undertakings.
29. Buyer power enables a single buyer, or a group of buyers, to influence or dictate the terms of trade with upstream suppliers. This power may stem from strategic advantages enjoyed by the purchaser. Alternatively, it may derive from the attainment of a dominant or collective dominant position or possession of market power on the input market.
30. Buyer Power is a scenario where an undertaking, in this case, a buyer, in a transaction with a trading partner, the supplier, may impose terms and conditions of trade that are outside the scope of normal business practice or are disproportionate or unrelated to the stated objective of the supply contract and are unfair or unreasonable against the supplier.
31. The Authority considers that Buyer Power is the ability of a buyer to reduce profitability below a supplier's normal selling price, or more generally, obtain terms of supply more favourable than a supplier's ordinary contractual terms. Therefore,



an undertaking or group of undertakings having Buyer Power may influence the bargaining process eventually extracting more favourable terms of trade that are unfair and/or to the detriment of the supplier, and which terms would not pertain in the absence of such Buyer Power.

32. An undertaking may have Buyer Power and not be dominant in a market. The Authority considers that there are two types of Buyer Power - monopsony power and bargaining power, also known as countervailing Buyer Power.
33. A firm has monopsony power if its share of purchases in the upstream input market is sufficiently large that it can cause the market price to fall by purchasing less and cause it to rise by purchasing more. Bargaining Power on the other hand refers to the bargaining strength that a buyer has with respect to its suppliers.

### *Monopsony Power*

34. A monopsony is a market structure or situation in which a single buyer or an association of buyers substantially controls the market as the major or only purchaser of goods and services offered by several would-be sellers or suppliers. This market structure positions the buyer at a powerful market position as a buyer and could enable and incentivise abuse of its position. Monopsony is the mirror image of monopoly. An undertaking that is a monopoly has the means to force up the market price for what it sells by restricting the amount it produces and thus move up the market demand curve. The usual index used to measure the extent of market power exercised by a seller is the Lerner Index. In the case of a monopsonist, the mirror image is the Buyer Power Index (BPI). (*See Annexure*).
35. An undertaking or group of undertakings have monopsony power if its/their share of purchases in the upstream input market is sufficiently large that it can cause the market price to fall by purchasing less and cause it to rise by purchasing more. The defining characteristic of monopsony power is that a buyer is able to influence price through quantity purchased. Therefore, the buyer can drive a lower price by reducing the quantity it purchases or vice versa. Monopsony power results in lower prices through the act of purchasing less. Exercise of monopsony power results in prices



being depressed below competitive levels.

36. The Authority will assess whether a buyer undertaking or an association of buyers have monopsony power if they can profitably reduce the price paid below competitive levels by withholding demand.

### ***Bargaining Power***

37. Bargaining power is the strength of a buyer in its negotiations with sellers or suppliers. It refers to the bargaining strength that a buyer has with respect to its suppliers in bilateral bargaining. A superior bargaining position typically, not always, arises when there are relatively few buyers as against suppliers. It may also be an outcome of the relative size of the buyer as against the supplier or practice in a market.
38. Bargaining power determines the extent to which a buyer is able to extract surplus from the supplier or seller. Therefore, differences in bargaining power may for instance be reflected in differences in individually negotiated discounts. Bargaining power enables a buyer to obtain lower prices or other more favourable terms to itself that are unfair to the supplier and/or disproportionate or unrelated to the stated objective of the supply contract and that would not otherwise pertain in the absence of Buyer Power.
39. The Authority will assess whether a buyer can reduce the price paid for supplies to below competitive levels or obtain unfair terms of trade by threatening to purchase less or to entirely terminate the commercial relationship.

### **Determination of Buyer Power**

40. In determining whether Buyer Power exists or not, the Authority shall take into account all relevant circumstances including the factors set out at section 24A(4) of the Act. The Authority notes that the list at section 24A(4) of the Act is not closed and the section does not provide an exhaustive list of factors and benchmarks for determination of Buyer Power. The Authority shall consider additional relevant



factors for determination of presence or otherwise of Buyer Power.

41. The factors set out at section 24A(4) of the Act are:
  - a. The nature and determination of contract terms;
  - b. The payment requested for access to infrastructure; and
  - c. The price paid to suppliers.
  
42. The existence of any factor at para 41 shall be taken to point towards definite existence of Buyer Power on the part of a buyer or group of buyers as against a supplier or suppliers.
  
43. The Authority will also consider the following factors:
  - a. The nature of the buyer and supplier markets;
  - b. Dependency of the supplier on the buyer;
  - c. Factors relevant to the buyer and commercial significance of the products in relation to the buyer undertaking;
  - d. Whether the buyer has the ability to easily switch to alternative suppliers;
  - e. Whether the buyer has the ability to sponsor new entry or self-supply without incurring substantial sunk costs; or
  - f. The buyer is a 'gate-keeper', meaning it is the gateway to the downstream (consumer) market.
  
44. *Nature and Determination of Contract Terms* – The nature and determination of terms of supply are informative of the bargaining dynamics between the parties. The Authority will have regard to the nature of the resultant terms from negotiations between the parties and manner of the negotiations between the buyer and supplier.
  - 44.1 That section 24A(4)(a) makes reference to 'terms' shall be taken to mean that price is one among other relevant factors or variables between the supplier undertaking and buyer undertaking. The Authority will consider price related terms including; discounts, promotional fees, charges and interests, listing fees, slotting allowances and terms of the contract in relation to payment.



- 44.2 The Authority will consider whether suppliers play a role in determining the contract terms. Where suppliers are obligated to accept onerous terms contained in standard form contracts or contracts that are not negotiated or negotiable, it will be deemed that there exists Buyer Power.
- 44.3 The Authority will consider the nature of the terms of the contract in relation to payment terms including discounts, contributions for expansion of buyer undertakings and promotions, fees, charges and interest; transfer of risk and cost; termination of contract and dispute resolution mechanisms. Presence of terms that facilitate abuse of Buyer Power will be inferred as pointing to likelihood of the existence of Buyer Power. Terms of supply which include listing fees, slotting allowances, volume rebates, annual rebates, requirements for contribution to promotional expenses, most favoured customer clauses and exclusivity requirements among other similar terms, will be deemed to indicate a great likelihood of presence of Buyer Power.
- 44.4 The Authority may consider the nature of contract terms from the supplier's negotiations with other similar buyers in the market to inform of the relative bargaining power of the accused buyer.
- 44.5 The Authority may consider the nature of contract terms between the accused buyer and suppliers of similar goods or services as the complainant. That some suppliers are able to apply countervailing power against an accused buyer does not mean that the buyer is unable to exercise Buyer Power over the supplier or other suppliers in the market.
- 44.6 Where it is found that a supplier has accepted a contractual term or conduct that places that supplier at an inordinate and unconscionable disadvantage as between the parties, this will be considered to be an element contributing directly to a conclusion that the buyer held a position of buyer power. The Authority will take into account the full circumstances of such acceptance.



45. *The payment requested for access to infrastructure* – Reference to ‘access to infrastructure’ refers to the buyer’s role as a gate-keeper where the role of the buyer is that of a seller of access to consumers.

45.1 The Authority will consider whether payments were required from the supplier by the buyer for commencement, extension or renewal of a supply contract, or for acceptance of supplies. As an example, in the retails sector payment for access to infrastructure could take the form of listing fees paid to commence business with a retailer or fees for access to a shelf and positioning in the retailer’s shop or fees to commence supplies to a new branch of the retailer. Where such payments are required, it will be deemed to indicate existence of Buyer Power.

46. *Price paid to suppliers* – The Authority will consider the price paid by the buyer to the supplier. Where such price is far below the price paid to suppliers of similar products in the market, or where it is below competitive rates in the relevant market, or where it is below cost for the supplier, it will be deemed to indicate existence of Buyer Power.

46.1 For the purposes of section 24A(4)(c) ‘price paid’ will be 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.

46.2 A price will be deemed unfair if the price paid to other suppliers of similar goods or services to the supplier are higher, in the absence of an objective justification that is reasonably related to low price.

46.3 The Authority will consider reductions imposed on the invoiced price of the complainant, rebates required from the complainant or additional costs imposed, which reduce the price paid.

46.4 A price paid will be deemed unfair where reductions to contracted price are retrospective, unilateral or unreasonable; where reductions in the price paid are directly or indirectly imposed; or where costs are directly or indirectly



imposed or required from the supplier with the effect of reduction of the price received by the supplier.

46.5 The Authority will determine whether the lower price paid is warranted by an objective justification. Differences in the supply relationship may have implications for the price paid. These differences include volumes supplied, contractual commitments, additional costs incurred by the buyer to source from the complainant and terms of payment. For instance, a lower price may be paid to the complainant if this is in exchange for more volumes purchased or immediate payment of the invoice.

47. *The nature of the buyer market and the supplier market* - Buyer Power is determined by both the options available to suppliers and the options available to the buyer. The Authority will consider the nature of the market for buyers and the share of the buyer in that market. Independent of the share of the buyer in the overall market, the market structure may impact on the ability of buyers in a market to exercise Buyer Power. Where a supplier has limited options to replace sales to a buyer, they are likely to accept terms and conduct in abuse of Buyer Power. The Authority will consider:

47.1 The actual position and concentration of the buyer undertakings in the market relative to supplier undertakings.

47.2 The ability of the buyer undertaking to easily switch to competing suppliers and the supplier to easily switch buyers. The credibility of a threat to use an alternative source of supply is closely connected to the switching cost that the buyer would have to incur. High switching costs may make it unprofitable for the buyer to change its supplier and, therefore, undermine any threat to resort to alternative sources of supply.

47.3 The ability of the buyer to credibly threaten or resort, within a reasonable time frame, to alternative sources of supply, and hence refuse to buy products from the supplier. Such sources may be actual or potential competitors of the supplier or encouraging and assisting market entry by new competitors.



47.4 Buying habits and procedures: In circumstances where buyers choose their suppliers through procurement auctions or tenders, competition may be intense even though only a few suppliers exist and participate in the bidding or auction process.

48. *Supplier dependency* – Dependency of a supplier on a buyer places the buyer in a superior bargaining position enabling it to extract favourable terms from the supplier. The Authority will consider whether the supplier can efficiently find other buyers including those who use the input for different use or other buyers for whom the assets can be used to make a different input. If reasonably the supplier has no other alternatives, then it is considered to be highly dependent on the particular buyer and the buyer may have capacity and incentive to exercise Buyer Power.

48.1 If the buyer accounts for a significant share of the supplier's output, and the supplier has poor alternatives, the buyer's refusal to purchase may allow it to counter possible exercises of bargaining power by the supplier. A supplier that is financially dependent on a buyer may not be able to replace sales with a buyer quickly or easily if the buyer threatens not to purchase in future. Though a supplier may have alternatives within the market, it may not be able to replicate the scale of sales to the buyer in question, and therefore would be dependent on the buyer.

48.2 A case of particular importance is when the buyer is a gateway to a downstream market. A supplier may be dependent on a buyer as a gateway to consumers or for building a new brand. The buyer in question will hold a position of possible Buyer Power from the dependency.

49. *Factors relevant to the buyer and commercial significance of the products in relation to the buyer undertaking* – The Authority will consider the following:

49.1 If the buyer is dependent on the delivery of the product from the supplier on a steady basis, it will not be feasible to exert much pressure on the supplier. This also includes the nature of products such as perishable goods.



49.2 The ability of the buyer to integrate vertically, for example, through the acquisition of a manufacturer or to establish new production facilities for future in-house supply.

49.3 Private labels/ own brands: In circumstances where a buyer sells products bearing their private labels or own brands, it increases their bargaining power over their suppliers of traditional brands. The buyer may resort to selling their private labelled products as opposed to those of suppliers unwilling to accept unfavorable conditions.

#### **F.4 CONDUCT IN ABUSE OF BUYER POWER**

50. After the Authority has established the existence of Buyer Power as per the above criteria, it shall investigate whether the buyer engaged in any practice(s) or conduct that constitute abuse of Buyer Power. The Authority notes that section 24A(5) of the Act does not provide an exhaustive list of conduct in abuse of Buyer Power. Trading conditions and conduct which fall outside this list will be considered for investigation. Conduct that is unfair, unilateral, onerous and/or unrelated the objective of the supply contract shall qualify.

51. Section 24A(5) of the Act provides an open list of conducts constituting abuse of Buyer Power. They include:

- a) Late payment - where a buyer undertaking delays payment without justifiable reasons in breach of agreed terms of payment to suppliers. The unjustifiable failure of a buyer to pay on the due date and the supplier's inability to question such failure or demand payment, or use other means to procure payment including but not limited to ceasing supplies due to fear of termination of supply contract or other similar consequence such as reduction in orders, is conduct in abuse of Buyer Power.
- b) De-listing - Unilateral termination of a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason. In instances where a particular supplier of goods or services is



delisted or unilaterally removed from the list of suppliers without prior notice, and without reasonable grounds to the delisting.

- c) The threat of delisting - Use of threats of termination of supply contract to obtain undue advantage including requiring continuation of supply in the face of delayed payments and suppression of suppliers from raising genuine complaints against the buyer. This is similar from the prohibited conduct in (b) above except here the supplier is under threat to accept unfair trade terms to avoid being removed from the list of suppliers of the Powerful buyer.
- d) Refusal to receive ordered goods. Where a buyer refuses to accept delivery of contracted goods for reasons not attributable to the supplier. Refusal to receive goods includes not receiving goods on the delivery date, partial acceptance, unilaterally postponing the delivery date or unilaterally cancelling the order.
- e) Unjust return of goods which the buyer purchased from a supplier for reasons not attributable to the supplier or transfer of commercial risk from the buyer to the supplier through any other means. This conduct if done without justification, or generally in unreasonable circumstances and conditions, or done without prior notice to the seller or supplier amounts to an abuse of a position of Buyer Power.
- f) Transfer of costs - where buyers transfer costs to suppliers by imposing a requirement for the suppliers to fund the cost of a promotion or otherwise bear a cost generally belonging to the buyer in transactions of the nature under consideration.

Example

A powerful buyer requires a supplier to dispatch its employees to assist the buyer in stocking its new stores at the cost of the supplier. The buyer in this case is using the suppliers' resource (labour) to carry out work that it ought to have hired personnel to undertake. The conduct will be found to amount to Abuse of Buyer Power (ABP)



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- g) Transfer of risks - Transferring commercial risks meant to be borne by a buyer to the suppliers.

Example

Where a buyer returns expired goods to a supplier undertaking for reason not attributed to the supplier or where a buyer transfers losses caused by pilferage or other events e.g. fire. In ordinary practice, once goods are transferred to a buyer, who accepts delivery, risks associated with them become the risks of the new owner, that is, the buyer. The conduct will be found to amount to Abuse of Buyer Power.

- h) Demand for preferential terms by buyer undertakings which are unfavourable to the supplier, such as demanding lower buying prices than required from similar suppliers, demanding limitations on supplies to other buyers and requiring that a supplier sells to competing buyers at higher prices.
- i) A buyer undertaking depressing prices by a small but significant amount, where there is difficulty in substitutability or alternative buyers, or a buyer undertaking forcing suppliers to sell at low prices which are below competitive levels;
- j) Bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.

52. Unilateral variation of terms – Unilateral changes to supply terms are typically indicative of the exercise of Buyer Power and more so when retrospective. The Authority will consider whether variation of terms was unilateral or the subject of genuine negotiation and whether it was fair.

Example

Where a buyer undertaking imposes direct or indirect downward adjustment in the price paid to a supplier and variation of credit periods. While the buyer may be



exposed risks or costs for instance from an emergency, crisis or deterioration in market or competitive conditions, this is not ground for blanket transfer of the same to suppliers. Costs and risks should be fairly distributed throughout the supply chain since they affect both suppliers and buyers equally. The conduct will be considered Abuse of Buyer Power.

## G. REPORTING AND PRUDENTIAL REQUIREMENTS

53. Pursuant to section 24A(2) reporting and prudential requirements will be imposed in the event of a possible finding that a sector or an undertaking is experiencing or is likely to experience incidences of abuse of Buyer Power, as established in part F above.

## H. INDUSTRY CODE OF PRACTICE

54. Pursuant to section 24A(3), the Authority may require industries and sectors in which instances of abuse of Buyer Power are likely to occur, to develop a binding code of practice.

55. The Authority in accordance to section 24A(8), is mandated to consult with relevant undertakings and stakeholders in the various sectors in order to develop a Code of Practice that will guide the undertakings in their contractual engagements and ensure that they operate within acceptable legal boundaries that promote fair and equitable business environment.

56. Therefore, the Authority considers a proper Code of Practice to have a minimum of the following:

- i. Application statement, which sets out the scope of the Code of Practice and the specific market segment that it wishes to regulate.
- ii. Interpretation segment, where the terms of trade and market usage unique to the specific sector are interpreted and allocated their unique meaning as a result of trade usage.



- iii. Principles of fair dealing provision, this part consists of basic guiding principles of fair and lawful dealings between buyer undertaking and supplier undertaking. This includes principles of good faith, duress or commercial pressure and confidentiality.
- iv. Provisions on variation, a segment outlining the legal procedures on how undertakings can vary the terms and conditions of their existing agreement. It is also important for undertakings to be aware that such variation cannot be applied retrospectively and must be fair and reasonable.
- v. Payment provision, where terms and conditions of payments are well provided. This part should have provisions on payment within reasonable time. Payments for wastage, no delay and in case of delay remedies available e.g. penalties, contribution to marketing cost, compensation for damaged goods and promotions.
- vi. Provision on duties and Obligations of both the buyer undertaking and the supplier undertaking. This should include duties they have to each other and duties towards the consumer.
- vii. Promotion provision, where a supplier is notified of its obligation in regards to promotion and rights or benefits accrued from such promotion.
- viii. Return of goods provision, grounds upon which goods shall be returned and procedure should be clearly provided in order to avoid instances of abuse of Buyer Power.
- ix. Supply chain procedures, provide the appropriate procedure of supply of goods and services to the buyer and procedure for amendment or change of the particular mode of delivery.
- x. Corruption provisions, ethical standards must be upheld, hence there is a need for both undertakings to give a stand on the corruption vice.



- xi. Dispute resolution clause- the undertakings within the sector must provide an acceptable mode of dispute resolution. In the event of a dispute, the parties are at liberty to resolve the matter through alternative dispute resolution methods (ADR) between themselves. Where ADR fails, the parties can refer the dispute to the sector specific dispute resolution platform, and if a party is dissatisfied with the outcome, the matter can be escalated to the Authority. However, nothing should stop or prohibit the aggrieved party from making a direct complaint to the Authority at First Instance. If either party is dissatisfied with the decision of the Authority, then they can appeal to the Competition Tribunal, whose decision can further be appealed to the High Court of Kenya, and whose decision shall be final and binding on the parties.
- xii. The final segment should consist of attestation by representatives of the specific sector which the Code of Practice intends to apply.

57. Once the draft Code of Practice has been completed, the Authority shall forward the same to the relevant government agency for review and input, and thereafter to the Office of the Attorney General for approval. Once approved, the Authority shall publish the Code of Practice, and it shall become legally enforceable.



## Annexure

### Measuring Monopsony Power

The usual index used to measure the extent of market power exercised by a seller is the Lerner Index. In the case of a monopolist, it can easily be shown that:

$$L = \frac{P - MC}{P} = \frac{1}{\eta}$$

Where the Lerner Index is the markup (price less marginal cost) as a percentage of the price and it is equal to the inverse of the elasticity of demand ( $\eta$ ).

In the case of a monopolist, the mirror image is the Buyer Power Index (BPI)<sup>4</sup>:

$$\lambda = \frac{VMP - w}{w}$$

Where  $w$  is the factor-price and  $VMP$  is the value of the marginal product. In a competitive market  $MVP = w$  and  $\lambda = 0$

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<sup>4</sup> <https://www.oecd.org/daf/competition/44445750.pdf> OECD Policy Roundtables, Monopsony and Buyer Power 2008 p. 32

