

KENYA'S ABUSE OF BUYER POWER REGIME: THE ROLE OF EX-ANTE PROVISIONS

Samuel A. Roba

Abstract

The theory of social change recognises the dynamic nature of society and underscores the need for responsive and efficient legal frameworks to ensure the effective realisation of legislative objectives. Within this context, competition law has increasingly embraced proactive regulatory approaches aimed at preventing market distortions before they crystallise into anti-competitive conduct.

This article examines the regulation of abuse of Buyer Power under the Kenyan Competition Act, Cap 504 (the Act), with particular emphasis on the role and significance of ex-ante provisions introduced under section 24A of the Act. It analyses how proactive regulatory tools such as prudential and reporting requirements, sector-specific codes of practice and mandatory contractual obligations in supply agreements have been deployed by the Competition Authority of Kenya to address structural imbalances in buyer–supplier relationships.

The article argues that these ex-ante mechanisms have enhanced transparency, accountability and fairness in commercial dealings, thereby contributing to increased efficiency in the production, distribution and supply of goods and services in Kenya. By shifting regulatory focus from reactive enforcement to preventive oversight, Kenya's abuse of Buyer Power regime offers valuable insights for emerging and developing economies seeking to safeguard competitive markets and protect vulnerable undertakings.

Introduction

Competition law has traditionally been anchored in *ex post* enforcement, intervening only after anti-competitive conduct has occurred and its effects have materialised. While this reactive model has yielded important jurisprudence and enforcement outcomes for the Competition Authority of Kenya (the Authority), it has increasingly proven inadequate in addressing structural imbalances that predispose markets to abuse particularly in relationships characterised by disparities in bargaining power. One such area is the exercise of buyer power, where large purchasers may impose unfair trading conditions on suppliers, distort competitive processes and ultimately undermine market efficiency relevant to the production, distribution and supply of goods and services.

In many developing and emerging economies, including Kenya, these imbalances are rampant with over 90% of business being Small and Medium Enterprises (SMEs). Suppliers, often small and medium-sized enterprises frequently depend on a limited number of large buyers for market access, creating conditions of economic dependence that may be exploited through delayed payments, unilateral contractual variations, retrospective discounts and other unfair commercial practices. These dynamics not only affect the viability of individual suppliers but also have broader implications for innovation, investment and the sustainability of supply chains.

Against this backdrop, there has been a shift in the Act towards more proactive and preventive regulatory approaches. Rather than relying solely on *ex post* remedies, the Authority is increasingly adopting *ex ante* tools designed to identify and mitigate risks before they crystallise into harmful conduct. This evolution reflects a broader recognition within the Jeremy Bentham's theory of social change that legal frameworks must remain responsive to the complexities of modern markets and the evolving nature of commercial relationships as social progress is measured by the extent to which legislation and social institutions promote pleasure and minimize suffering.

Kenya's legislative response to the abuse of buyer power, as encapsulated in sections 24A(2), (3) and (8) of the Act, represents a significant development in this regard. By incorporating *ex ante* mechanisms such as mandatory contractual requirements, reporting obligations and sector-

specific codes of practice, the Act seeks to regulate conduct at an earlier stage, promote fairness in commercial dealings and address structural inequalities inherent in buyer–supplier relationships.

This paper will therefore examine the rationale and implications of these *ex ante* provisions within Kenya’s competition law framework and explores how section 24A has been operationalised to enhance transparency and accountability, assess its effectiveness in curbing exploitative practices and considers its broader impact on market efficiency and economic development. In doing so, the paper situates Kenya’s competition legislation approach, highlighting its potential as a model for other jurisdictions grappling with similar challenges.

Sector code of Practice

Sector-specific codes of practice constitute a central pillar of the *ex-ante* regulatory framework governing abuse of buyer power under the Act. Rooted in section 24A(3) of the Act, these codes are designed as proactive instruments that enable the Competition Authority of Kenya (the Authority) to intervene at a structural level in sectors where the risk of exploitative conduct is high. Unlike traditional *ex post* enforcement mechanisms which respond to anti-competitive conduct after it has occurred, sector-specific codes operate preventively by establishing clear behavioural standards that regulate market conduct in advance. This shift reflects an appreciation of the structural realities of certain markets, particularly those characterised by asymmetries in bargaining power, where reactive enforcement may be insufficient to safeguard fair competition and protect vulnerable trading partners.

The foundation for sector-specific codes is reinforced by the Authority’s broader investigative and supervisory mandate under sections 24A(2) and 31 of the Act. Where the Authority determines that a sector is experiencing or is likely to experience incidences of abuse of buyer power, it is empowered not only to impose reporting and prudential requirements but also to compel the development of a binding code of practice. This dual mechanism combining monitoring with standard-setting ensures that regulatory intervention is both informed by empirical evidence and responsive to sector-specific dynamics. The retail sector in Kenya

provides a compelling illustration of the application of this framework, having been identified as particularly prone to abuse of buyer power, especially in relation to delayed payments and the transfer of commercial risks from retailers to suppliers .

Retail Trade code of Practice

Globally, competition agencies compute the expected welfare benefits of their enforcement and conduct *ex-ante* assessments of the impact of some of their key enforcement. The retail sector is a key link between producers and consumers, it is a major driver of production and consumption patterns in Kenya. Retailers thus have a great influence on producers, suppliers and consumers and therefore can help contribute to the promotion of sustainability issues in line with the sustainable development goals all factors kept constant. They can also oppress the players in the value chain where conducts such as delayed payments and transfer of commercial risks among others, are in play.

Kenya's Vision 2030 economic pillar seeks to improve the prosperity of all Kenyans and aims to achieve an average Gross Domestic Product (GDP) growth rate of 10 per cent per annum. To contribute to the achievement of the goals, the Authority in July, 2020, wrote to the Retail Trade Association of Kenya (RETRAK), Kenya Association of Manufacturers (KAM) and Association of Kenya Suppliers, jointly - the retail sector stakeholders, invoking the provisions of section 24A(3) of the Act, with the requirement for these stakeholders to submit a binding code of Practice for purposes of publishing by the Authority.

On 23rd September 2020 the retail sector stakeholders, forwarded a Revised Retail code of Practice and further held a meeting with the Authority on 29th October 2020 to deliberate on the provisions of the presented code. The Authority on 16th November 2020, further, sought the input from the Office of the Attorney General & Department of Justice and the State Department for Trade & Enterprise Development in the Ministry of Industrialization, Trade and Enterprise Development, these were subsequently received.

The Retail Trade code of Practice (the code) was subsequently published on 11th June 2021, under the Kenya Gazette Notice No. 5725. The code, inter alia, provides for: Principles of fair and ethical

dealing, which sets in place the ethical standard in transaction dealings between buyers and suppliers, under the laws of Kenya, further looking into issues on confidentiality, supplier agreements, Joint business plans and renewal of agreements among others; Variation of supply agreements/joint business plans and terms of supply, this section informs on the specifics of terms of trade that include, in the overarching agreements and business plans, the terms of payment, the payment dates, the interest payable on late payments, the condition for termination and variation of contracts, mechanisms for dispute resolution; Duties of retailers and suppliers including delays in payment, contribution to marketing costs, payment for shrinkage and for damages, promotions, duties in relation to delisting et. al; and other Duties include unjustifiable payment for consumer complaints, duties in relation to De-listing, Senior category Buyer, Retail Trade committee, and the Establishment of a Retail Trade Dispute Settlement Committee and a Prompt Payment Committee.

Substantively, the code establishes a comprehensive framework of rules and principles aimed at regulating the conduct of retailers and suppliers in their commercial engagements. At its core are the principles of fair and ethical dealing, which set out overarching expectations of good faith, transparency and integrity in business relationships. These principles extend to key areas such as confidentiality, the negotiation and renewal of supplier agreements, and the development of joint business plans, thereby embedding fairness across the lifecycle of commercial interactions. By articulating these standards, the code seeks to recalibrate the balance of power between buyers and suppliers, ensuring that commercial negotiations are conducted on a more equitable footing.

A particularly significant aspect of the code is its detailed regulation of supply agreements and trading terms. The code requires that parties clearly define critical contractual elements, including payment terms and timelines, applicable interest on late payments and the conditions governing the variation and termination of contracts. These provisions are designed to eliminate ambiguity and prevent unilateral conduct by dominant buyers, such as retrospective changes to agreed terms or arbitrary termination of supply arrangements. In addition, the code addresses specific practices that have historically been associated with abuse of buyer power, including delayed

payments, the imposition of marketing and promotional costs on suppliers, charges for shrinkage or damages and unjustified delisting of suppliers' products.

Beyond substantive obligations, the code establishes institutional mechanisms intended to facilitate compliance and provide avenues for dispute resolution. Notably, it provides for the establishment of a Retail Trade Dispute Settlement Committee and a Prompt Payment Committee, both of which are designed to offer sector-specific, accessible and relatively expeditious mechanisms for addressing disputes and enforcing compliance with the code. These institutions represent an important innovation in *ex-ante* regulation, as they decentralise enforcement and encourage self-regulation within the sector. In theory, they provide an alternative to formal legal proceedings, thereby reducing the cost and complexity of dispute resolution while promoting industry ownership of compliance processes.

Empirical evidence from the evaluation of the code during the FY2023/2024 suggests that the introduction of the code has had a positive impact on the retail sector, particularly in reducing the incidence of abuse of buyer power complaints. Data indicates that the proportion of complaints originating from the retail sector declined following the implementation of the code, suggesting that the establishment of clear rules and standards has contributed to improved market conduct. Moreover, the increased use of formal agreements and structured engagements between retailers and suppliers points to a gradual shift towards more transparent and predictable commercial relationships.

However, the effectiveness of the CODE as an *ex-ante* regulatory tool is tempered by several implementation challenges. One of the most significant issues identified in the report is the moderate level of awareness of the code among market participants. While a majority of suppliers and retailers are aware of its existence, approximately 64.3% and 68.4% respectively a substantial minority remain uninformed. Awareness is therefore a critical prerequisite for compliance and gaps in knowledge undermine the ability of the code to function as a universal standard within the sector.

In addition to awareness, there are notable challenges relating to the utilisation of the code. Although more than half of surveyed retailers reported using the code in their engagements with

suppliers, a significant proportion of 45% do not incorporate it into their commercial practices. This inconsistency in application suggests that the code has not yet achieved full integration within the sector. Furthermore, the institutional mechanisms established under the code appear to be underutilised. In some instances, these committees had not commenced operations or lacked the necessary procedural frameworks to function effectively, raising concerns about their practical viability.

These findings point to a broader challenge in *ex-ante* regulation amounting to a gap between formal rules and their practical enforcement. While the CODE provides a robust and well-designed framework for regulating buyer–supplier relationships, its success ultimately depends on effective implementation, stakeholder buy-in and institutional capacity. The limited use of dispute resolution mechanisms, for example, may reflect a lack of confidence in these institutions, insufficient awareness of their role or cultural preferences for informal dispute resolution. Similarly, the persistence of practices such as delayed payments suggests that entrenched commercial behaviours may be resistant to change, particularly in the absence of strong enforcement incentives.

On the Brighter Side

Notwithstanding these challenges, the code represents a significant advancement in the regulation of buyer power in Kenya. It demonstrates the potential of sector-specific codes of practice to address complex market dynamics through a combination of legal mandates, industry participation and institutional innovation. By establishing clear standards of conduct and embedding them within the operational fabric of the sector, the code contributes to greater transparency, accountability and fairness in commercial dealings. At the same time, its limitations highlight the importance of complementary measures, including awareness campaigns, capacity-building initiatives and ongoing regulatory oversight, to ensure that *ex-ante* mechanisms achieve their intended objectives.

Finally, sector-specific codes of practice such as the Retail code exemplify a shift towards preventive competition regulation that is responsive to the realities of modern markets to offer a

flexible and context-sensitive approach to addressing abuse of buyer power, particularly in sectors characterised by structural imbalances and economic dependence. While challenges remain in their implementation, the Kenyan experience provides valuable insights into the design and operation of such mechanisms thereby underscoring their potential as effective tools for promoting fair competition and protecting vulnerable market participants.

Reporting and Prudential Requirements

In the exercise of the powers in section 31 the Authority commenced investigations into possible instances of abuse of buyer power in the retail sector on 24th April 2020. Upon conclusion of the investigations, the Authority established that the sector was experiencing incidences of abuse of buyer power and invoked provisions of section 24A(2) of the Act. The Authority then, required from major retailers' information on their existing debt with suppliers that exceeded 90 days and further requested suppliers to provide the same information.

Having observed the trends in debt presented by the purchasing and supplying undertakings, the Authority identified a retailer who was holding significant payments to all its suppliers for longer periods, subsequent to which the Authority invoked section 24A(2) of the Act and imposed a Prudential and Reporting Requirements on the said retailer. The Authority required it to submit records revealing the full extent of debt owed, financial statements and records, sales forecasts, among others. The Authority also required the retailer to submit a debt settlement plan for all debt owed to suppliers over ninety (90) days and commence honoring its commitments, while prioritizing distressed suppliers and those supplying FMCGs. The intervention resulted in settlement of outstanding payments to the suppliers totaling Kes. 5 billion. This enforcement action promoted the sustainability of suppliers, understanding of the obligations of market players under the Act and the Authority's abuse of buyer power mandate.

While *ex-ante* mechanisms such as sector-specific codes of practice and mandatory contractual standards play a critical role in preventing the emergence of abusive conduct, they are not, in themselves, sufficient to address all manifestations of buyer power. Market dynamics, particularly in sectors characterised by structural imbalances and economic dependence, often

give rise to entrenched practices that require direct regulatory intervention. It is within this context that *ex ante* enforcement through tools such as reporting and prudential requirements assumes critical importance. These mechanisms enable the Authority to intervene decisively after identifying actual or imminent abuse, thereby complementing preventive regulation with corrective action.

Further, the Authority is empowered to monitor sectors or undertakings and impose reporting and prudential requirements where there is evidence, or a likelihood, of abuse of buyer power. Unlike general enforcement actions that culminate in sanctions, these measures are forward-looking but triggered by observed conduct, placing them at the intersection of *ex post* enforcement and *ex ante* regulation. They are particularly suited to addressing systemic risks, financial distress, and conduct that, while already manifest, requires structured oversight to prevent escalation. The use of such tools in the Kenyan retail sector demonstrates their practical utility in stabilising markets, restoring fairness in commercial relationships and safeguarding vulnerable suppliers.

The Authority's intervention in the retail sector provides a compelling case study of the operation and benefits of reporting and prudential requirements as an enforcement mechanism. The requirements required the undertaking to prioritise distressed suppliers, particularly those dealing in fast-moving consumer goods (FMCGs), whose operations are typically characterised by tight cash flow cycles and high dependency on timely payments. The retailer was further obligated to commence immediate compliance with its payment commitments, thereby restoring confidence within the supply chain.

This intervention yielded tangible and significant outcomes. Notably, it resulted in the payment of previously delayed supplier payments. Beyond the immediate financial relief to affected suppliers, the enforcement action had broader systemic effects. It enhanced compliance with statutory obligations under the Act, reinforced the Authority's mandate in regulating abuse of buyer power and sent a clear signal to market participants regarding the consequences of non-compliance. Importantly, it also demonstrated the Authority's capacity to deploy targeted, data-driven interventions to address complex market failures in real time.

Importance of Ex Post Enforcement

Prudential and Reporting Requirements

A key benefit of enforcement through reporting and prudential requirements lies in its ability to deliver immediate and measurable corrective outcomes. Unlike purely punitive measures, which may impose sanctions without necessarily remedying harm, these tools are designed to directly address the underlying issues giving rise to anti-competitive conduct. In the present case, the requirement to disclose financial records and implement a debt repayment plan ensured not only transparency but also accountability, enabling the Authority to monitor compliance and enforce corrective action effectively. The recovery of Kes. 5 billion in supplier payments underscores the capacity of such interventions to provide tangible economic relief to SMEs and restore commercial equilibrium.

Closely linked to this is the role of reporting and prudential requirements in promoting the sustainability of suppliers, particularly SMEs. In sectors such as retail, suppliers often operate under conditions of economic dependence, with limited bargaining power and exposure to significant financial risks arising from delayed payments. By compelling dominant buyers to honour their financial obligations, *ex ante* enforcement mitigates these risks and supports the continuity of supply chains. In doing so, it contributes not only to the survival of individual businesses but also to broader economic stability, given the central role of suppliers in production, employment and value creation.

Another important benefit is the enhancement of market transparency. The obligation to submit detailed financial records, including debt positions and sales forecasts, reduces information asymmetry between regulators and market participants. This enables the Authority to gain a clearer understanding of market dynamics, identify emerging risks and tailor its interventions accordingly. Transparency also acts as a deterrent, as firms are less likely to engage in abusive practices when they are subject to ongoing monitoring and disclosure requirements. In this sense, reporting obligations serve both corrective and preventive functions, reinforcing compliance beyond the immediate case at hand.

In addition, enforcement through prudential requirements also plays a critical role in shaping market behaviour and strengthening regulatory credibility. The imposition of such measures signals that the Authority is not only willing but also able to intervene decisively where necessary. This has a normative effect on market participants, encouraging voluntary compliance and fostering a culture of adherence to legal and ethical standards. In the Kenyan context, the intervention in the retail sector enhanced the understanding of obligations under the Act and reinforced the Authority's role in safeguarding fair competition. This is particularly important in emerging markets, where regulatory institutions must establish both legitimacy and effectiveness.

Furthermore, these mechanisms provide a flexible and proportionate approach to enforcement. Unlike rigid sanctions, reporting and prudential requirements can be tailored to the specific circumstances of a case, taking into account factors such as the scale of the conduct, the financial position of the undertaking, and the potential impact on the market. This allows the Authority to balance the need for corrective action with broader policy objectives, such as maintaining market stability and avoiding unintended disruptions. In the case under consideration, the prioritisation of distressed suppliers and FMCG providers reflects a nuanced understanding of sectoral vulnerabilities and the need for targeted intervention.

Sector Code of Practice

The Authority's experience illustrates how these tools can operate in tandem: initial enforcement through prudential requirements addresses immediate harms and reveals systemic issues, which in turn informs the development of the Retail Trade Code of Practice as a longer-term preventive solution.

Sector-specific codes of practice represent a significant evolution in the regulation of abuse of buyer power which is a deliberate shift from purely reactive enforcement towards a more structured and preventive regulatory approach.

The code demonstrates how legally anchored, stakeholder-driven instruments can be used to articulate clear standards of conduct, address sector-specific risks and recalibrate imbalances in

buyer–supplier relationships. It codifies principles of fair dealing, regulates key commercial terms and establishing institutional mechanisms for oversight and dispute resolution. As such, codes provide a practical framework through which market behaviour can be guided before it gives rise to anti-competitive harm.

However, the effectiveness of these codes ultimately depends not on their design, but on their implementation and uptake. The observed gaps in awareness, inconsistent application and underutilisation of enforcement mechanisms highlight the challenges inherent in translating regulatory intent into practical outcomes. These limitations underscore the need for sustained regulatory engagement, including continuous sensitisation, capacity-building and institutional strengthening, to ensure that the codes function as living instruments rather than merely formal guidelines.

Notwithstanding these challenges, sector-specific codes of practice remain a valuable tool in the competition law framework by enhancing transparency, promote accountability and foster a culture of compliance within regulated sectors. When effectively implemented and complemented by other enforcement mechanisms, they have the potential to significantly reduce instances of abuse, improve commercial relationships and contribute to the overall efficiency and stability of markets. As such, they offer a viable and adaptable model for jurisdictions seeking to address structural market imbalances through proactive and context-sensitive regulation.

Conclusion

Importantly, *ex post* enforcement complements and reinforces *ex ante* regulatory frameworks. While codes of practice and contractual standards establish the rules of engagement, reporting and prudential requirements ensure that these rules are adhered to in practice. They provide a mechanism for addressing non-compliance where enforcement measures may fail, thereby closing a critical loop.

The success of such interventions underscores the importance of maintaining a balanced approach to competition regulation, one that integrates preventive and corrective mechanisms to address both the causes and consequences of market distortions. For emerging and developing

economies, the Kenyan model offers valuable insights into how targeted, data-driven enforcement can be leveraged to protect vulnerable market participants and promote fair, efficient and competitive markets.