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**COMPETITION LAW ENFORCEMENT ISSUES RAISED BY
MONOPSONIES**

Kenya's Experience

Presentation

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COMPETITION LAW ENFORCEMENT ISSUES RAISED BY MONOPSONIES: KENYA'S EXPERIENCE

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Outline ...

- Introduction
- Background
- Review of enforcement experience in Kenya
- Abuse of buyer power cases (2 cases)
- Enforcement challenges in monopsony cases
- Actions to mitigate abuse of buyer cases
- Issues of further discussion

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Introduction

- Buyer power issues
 - Issues brought to the fore by fatality of the retail sector – the relationship between supermarket chains and their suppliers; e.g. Nakumatt (East Africa) and Uchumi (Kenya) supermarkets
 - In Kenya – the abuse of buyer power provisions cover all markets, but largely motivated by concerns in the retail sector.
 - 2017 retail sector inquiry found instances of:
 - Imposition of listing fees, delaying of payments, unilateral variation of contracts and transfer of costs and risk.

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Introduction

- GoK - Retail sector prompt payment study found similar findings
- Abuse conducts in the sector not supported by retailers having market power or being dominant, but cases of weaker suppliers, mostly SMEs
- In ability of suppliers to push back against oppressive contract terms –
 - motivated the amendments of the competition law (brought abuse of buyer power provisions into the Act – 2019).

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Review of enforcement experiences from Kenya



- CAK handled over 90 cases of ABP cases (since 2019), and 2 - notable cases of ABP
 - Majid Al Futtaim (2020) a franchise in Kenya the retailer ABP through
 - Transfer of commercial costs and risk to suppliers, unjustified refusal to accept delivery of goods retailer ordered, deductions of various rebates and listing fees, requiring free supplies and financial support for opening of new outlets and unilateral termination of supply contract without an objectively justified reason
 - Authority's decision upheld by the Competition Tribunal and that the supplier was economically dependent on the retailer
 - Retailer conduct so unconscionable, which can only be imposed by a party in a superior bargaining position.

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Case 2 – Abuse of Buyer Power

- Unilever Kenya PLC
 - Investigation of ABP relating to SMEs during the covid-19 pandemic period
 - Unilever unilaterally revised its payment terms with its suppliers, many are SMEs, and to accept within a week
 - Matter resolved through a negotiated settlement
 - Unilever undertook to increase local SME procurement by USD 2.9 million over a period of 3 years, reduce payment periods from 90 to 30 days and offer supplier development training

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Enforcement challenges in Monopsony cases

- Insurance sector regulator has primary powers under the Insurance Act over conduct between insurance companies and suppliers of insurance related services
- MoU used to resolve areas of concurrent jurisdictions between the insurance regulator and the competition Authority
- Monitoring and surveillance of the relevant sectors

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Actions to mitigate ABP challenges

- Advocacy – awareness creation on the ABP provisions in 2019, and sensitization initiatives covering 10 sectors
 - Insurance, retail, hospitality, legal services and telecommunications with special focus on SMEs
 - Additionally, CAK collaborated with sector associations, e.g. government agencies for greater reach

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Issues for further discussion

- Justification for emerging interest in regulating the behavior of firms in a monopsony cases
 - ABP is directly connected to inclusive economic development but it damages SME sustainability and competitiveness
 - Key issues of ABP – delay of payments (75% of all complaints in 2022)
 - Beneficiaries of enforcement action being MSMEs (65% sole proprietorships with less than 20 employees)
 - MSMEs account for 98% of all businesses; 40% of GDP and employee 70% of working Kenyans

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Measures to overcome challenges for assessing monopsony related cases

- Use BP guidelines (2022) to clarify the law, assessment not based on market shares
- Use of regulations that work outside of competition law – to obtain greater compliance and the benefits of self-regulation
- A code of practice for the retail sector (retailers, manufacturers and MSMEs suppliers)
- The code provide fair dealing and sets out prohibited conduct (CAK in 2nd tier of dispute resolution mechanism)

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Lessons learned from ABP practice

- Need for increased cooperation to ensure uniformity of enforcement for predictability for market players, especially for businesses that operate cross borders
- Kenya and South Africa have provisions on ABP
- South Africa law requires dominance, but a lot of similarity and exchange of experiences has been found useful in refining enforcement
- Improved cooperation with developed jurisdictions can improve case law

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Policy actions

- Need to better understand abuse of buyer power, economic dependency and superior bargaining position
- More advocacy – create awareness, sensitize and engage stakeholders

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Thank you

Questions, discussion & comments

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