The Competition Authority of Kenya Retail Trade Code of Practice

By:

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Key Points

- On 28 May 2021, the Competition Authority of Kenya (CAK) adopted the Retail Trade Code of Practice (RTCP).
- The RTCP seeks to regulate the retailer-supplier trade relationships in the Kenyan market, ensuring that retailers do not abuse their buyer power.
- This essay examines the contents of the RTCP, unraveling the obligations of the retailer and supplier.
- The analysis shows that the RTCP requires retailers and suppliers are required to trade in an ethical and fair dealing. More variation of trade agreements and making a supplier pay for additional unanticipated costs, is prohibited. Unless exceptional circumstances exist.

I. Introduction

Grimes (2005, 565) defines buyer power as 'the ability of a buyer to significantly influence the terms of a purchase for reasons other than efficiency' . Notably, buyer power is the ability of a buyer to obtain favourable terms from a supplier than those available to another buyer. In its recent Antitrust Chronicle on buyer cartels the Competition Policy International (CPI) noted that powerful buyers are more likely to conspire to extract competitive prices from suppliers. As a result, the ability of buyers to abuse their buyer power has recently attracted scholarly attention (See Ezrachi and Williams, Carstensen, Meehan and Wright, Wakui and Cheng, Kigwiru, Nzomo, and Lee.)

Moreover, following the likelihood of buyers abusing their buyer power, several competition agencies worldwide have enacted competition provisions that explicitly prohibit the abuse of buyer power. In Africa, Kenya is the first country to prohibit abuse of buyer power under Section 24A of its 2010 Competition Act. Section 2 of the Kenyan Competition Act defines buyer power as:

> The influence exerted by an undertaking or group of undertakings in a position of a purchaser of a product or service to obtain from a supplier more favourable terms, or to 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.

Additionally, abuse of buyer power attracts a financial penalty not exceeding ten million Kenya Shillings or imprisonment for a term not exceeding five years. CAK can also impose administrative remedies or penalty of up to 10% of the preceding year's turnover of the parties infringing the Competition Act. Therefore, it is important for market participants to know that the following conduct amounts to abuse of buyer power:

1. Delays in payment of a supplier without justifiable reason in breach of agreed terms of payment;
2. Unilateral termination or threats of termination of the commercial relationship without notice or on an unreasonably short notice period, and without an objectively justifiable reason;
3. Refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;

4. Transfer of costs or risks to the supplier by imposing a requirement for the supplier to fund the cost of a promotion of the Suppliers' goods or services;
5. Transfer of commercial risks meant to be borne by the Buyer to the supplier;
6. Demands for preferential terms unfavourable to the supplier or demanding limitations on the supplier to other Buyers;
7. Reducing prices by a small but significant amount where there is difficulty in substitutability of alternative Buyers or reducing prices below competitive levels;
8. Bidding up of inputs by the Buyer with the aim of excluding competitors from the market

Nonetheless, the abuse of buyer power provision was included in the Competition Act in 2016 after a market inquiry by the Competition Authority of Kenya (CAK) in the retail sector. The findings of the market inquiry unraveled incidents of abuse of buyer power in the retail industry, which informed CAK to recommend the amendment of the Competition Act to the Parliament. Subsequently, the Competition Act empowers CAK to monitor the sectors that are likely to experience incidents of abuse of buyer power. CAK can also request such industries and sectors to develop a binding code of practice.

CAK considers several factors when determining whether, indeed, abuse of buyer power exists. These factors include the nature and determination of contract terms between the concerned undertakings, the payment requested for access to infrastructure, and the price paid to suppliers. So far, CAK has established a Buyer Power Department that handles complaints related to abuse of buyer power in the private and public sectors. In its 2019/2020 Annual Report, CAK reported to have investigated and received 19 complaints about the abuse of buyer power. Most of them emerging from the retail industry and involving late payments.

To enhance compliance, Section 24(8) of the Competition Act requires CAK to publish a code of practice developed in consultation with the relevant stakeholders, government agencies, and the Attorney General. Consequently, on 28 May 2021, CAK adopted the Retail Trade Code of Practice (RTCP). The RTCP was published under the Kenya Gazette *Vol. CXXXIII-No 130, Gazette*

Notice No. 5725 on 11 June 2021.

Generally, the objective of the RTCP is to enhance market participants' compliance with Section 24A of the Competition Act that prohibits any conduct that amounts to abuse of buyer power in the Kenyan market. Therefore, the objective of this piece is to briefly summarize the RTCP, unraveling the obligations of the retailer and supplier to enhance compliance with the RTCP in particular.

II. The Retail Trade Code of Practice

The increasing buyer power of retailers' visa vis suppliers has become a central concern to policymakers, researchers, and competition regulatory agencies. Retailers are likely to abuse their buyer power through vertical restraints. For a long time, suppliers in the Kenyan market engaged in trading relationships with retailers that were marred with uncertainty. Thus, the RTCP intends to regulate the retailer-supplier trade relationships in the Kenyan market, improving the standards of business conduct, enhancing transparency, accountability, and predictability. The RTCP ensures that the retailers do not transfer excessive and unintended costs and risks to the supplier. Likewise, the RTCP seeks to cushion suppliers from retailers' exploitation, especially from retailers exhibiting a high market concentration level.

Overall, regulating retailers' conduct is important because they act as gatekeepers for the supplier's access to the end consumers. As gatekeepers, retailers possessing buyer power are more likely to influence the bargaining process earning more favourable terms to the supplier's detriment. Moreover, powerful retailers could transfer unjustified risks and costs to the supplier. In the end, it harms consumer welfare. Unfortunately, it could lead to the exit of suppliers and smaller retailers from the market. Generally, the retail sector's abuse of buyer power takes different forms, such as listing charges, slotting allowances, and unjustified promotion contributions from the suppliers. Often, legislation against retailer's abuse of buyer power seeks to protect suppliers, small retailers, and consumers.

Importantly, CAK is not the first national competition agency (NCA) to develop a code to regulate trade relationships between retailers and suppliers. For instance, in 2009, the United Kingdom (UK) enacted the 2009 Groceries Supply

Code of Practice. In Australia, the Australian Competition and Consumer Commission (ACCC) has adopted different Industry Codes regulating sectors such as dairy, electricity retail, franchising, horticulture, food and grocery, wheat port, oil, unit pricing, and voluntary codes. CAK seems to have drawn lessons from best practices of existing Codes from other jurisdictions, although ensuring that the RTCP addresses local context problems. In the next section, I describe the key elements of the RTCP.

III. RTCP Key Elements

Before delving into the key elements of the RTCP, it is important to note that the RTCP pays close attention to what constitutes 'reasonable time' that will inform the retailer and supplier relationship. On what constitutes 'reasonable notice,' the RTCP connotes that the reasonableness will depend on the circumstances of the individual case.

First, it will depend on the duration of the Supply Agreement to which the notice relates or the frequency with which the retailer places orders. Secondly, it will depend on the supplied goods' characteristics, including their durability, seasonality, and the external factors affecting their durability. For instance, fruits, vegetables, dairy products, and generally, perishable goods are more likely to invoke short notice. Third, is the value of a relevant order relative to the supplier's turnover. Finally, CAK will consider the overall impact of the information given in the notice on the supplier's business.

So, what are the key elements of the RTCP that retailers and suppliers should be conversant with? The key features identified are fair and ethical dealing in trade relationships; variation of Supply Agreements, and rules relating to prices and payments.

A. Fair and Ethical Dealing

The RTCP requires the retailer and supplier to deal with each other in a fair, lawful, and ethical manner. The principle of fair and ethical dealing means that during trading relationships, whether formal and informal, the retailer must act in good faith and without duress when trading with suppliers. More so, the retailer must consider the supplier's certainty regarding the risks and costs of trading, particularly concerning production, delivery, and payment issues.

The RTCP also introduces the concept of ordinary commercial pressures, which a retailer could rely on when requiring particular actions from the supplier. Whether the supplier responds to the retailer's request or suggestion or not does constrain the retailer. All the retailer has to show is that, indeed, ordinary commercial pressures exist. According to Section 2(2) of the RTCP, 'ordinary commercial pressures will include but are not limited to external exigencies which affect the profitability of a retailer'. The RTCP does not list instances that constitute ordinary commercial pressures, which the trading parties shall determine. However, cases such as flooding or terror attacks that a retailer has no control of may require the retailer to request particular actions from the supplier. Therefore, it is upon the retailer to show that indeed an act constitutes ordinary commercial pressures.

However, for a retailer to rely on ordinary commercial pressure as a justification requiring the supplier to undertake a particular action, the normal commercial pressures should not be partly or wholly attributed to the retailer. If this happens, the retailer must show that the ordinary commercial pressures do not constitute or involve duress and are objectively justifiable and transparent. More so, the result in similar cases being treated alike. Suppose the supplier believes that the particular action by the retailer does not constitute ordinary commercial pressure. In that case, the burden of proof on a balance of probabilities falls on the supplier.

Ethical and fair dealing also requires that a supplier deals with the retailers fairly and lawfully. Section 2(3) of the RTCP, therefore, requires the supplier to conduct their business with retailers in 'good faith, without distinction between formal or informal arrangements, without duress and in recognition of the retailers' need for certainty as regards the risks and costs of trading, particularly in relation to stocking levels cash flow and product movement'. Thus, fair and ethical dealing is a principle that retailers and suppliers must adhere to in their trading relationships.

Finally, ethical and fair dealing envisages confidentiality. One of the challenges of enforcing abuse of buyer power provisions relates to the confidentiality of information. An aspect that the RTCP seeks to address. CAK considers confidential information as commercially sensitive information or information whose disclosure can adversely affect the competitive position of the case.

Suppliers and retailers are not required to disclose any confidential information shared during their normal line of business as articulated in their supplier agreement or Joint Business Plan. However, two exceptions apply. Confidential information can be disclosed after the collapse of a year after the date they were revealed. Secondly, such information can be divulged when required under the law for the purposes of dispute settlement. In conclusion, the principle of ethical and fair dealing in trade relationships seeks to enhance accountability, transparency, predictability, and integrity.

B. Variation of Supply Agreements/Joint Business Plans and Terms of Supply

Under the RTCP Section, it is now mandatory to have a recorded Supply Agreements/Joint Business Plans under any Supplier-Retailer relationship. Thus, oral Supply Agreements are not recognizable. Suppliers must ensure that they have a written supply agreement with the retailer. Secondly, the Supply Agreement must include the following terms; the terms of payment, the payment date; the interest rate payable on late payment; the conditions for termination and variation of the contract with reasonable notice; and the mechanism for the resolutions of disputes. CAK has provide sample templents of the contents of a supply agreement. Thus, suppliers need to be vigilant and only enter into written agreements with retailers.

Nevertheless, the above terms of engagement between a supplier and retailers could be reviewed. However, whether a retailer can review or vary an existing Supply Agreement/JPA will depend on several factors. Section 3(2) of the RTCP prohibits a retailer from varying the Supply Agreement retrospectively. Neither can a retailer require the supplier to consent to a retrospective variation. This provision seeks to protect suppliers from unnecessary and unreasonable changes from the retailer.

Whereas the retrospective variation of the Supply Agreement is prohibited, exceptionally, a retailor can make adjustments to terms that have retroactive effects. Section 3(3) of the RTCP only allows for such an adjustment if the relevant Supply Agreement sets out clearly and ambiguously a specific change that would allow for such an adjustment. Consequently, a circumstance that could invoke a change in terms of engagement should be outside the retailer's

control. Terrorist attacks or fire that leads to the destruction of property are outside a retailer's control and can justify a variation of the Supply Agreement. However, to make any adjustments to the terms of supply, detailed rules that determine the basis for calculating the adjustment to the terms of supply should exist. When a retailer has the right to vary a Supply Agreement unilaterally, the retailer must provide the supplier with reasonable notice.

Likewise, the RTCP, Section 3(5), imposes a duty on the supplier to inform the retailer of any anticipated shortages and supply constraints on confirmed and/or agreed orders. Failure by the Supplier to communicate to the retailer without reasonable justification of any unfulfilled supply fills will attract a reasonable loss of claim from the retailer. However, both the retailer and the supplier should agree on the value of the loss.

Additionally, Section 4 of the RTCP requires that a retailer restrains from directly or indirectly requiring a supplier to change significantly any aspect of its supply chain procedures during the period of the Supply Agreement. If this happened, the retailer must give reasonable notice agreed upon by both parties, in writing stipulating any change. If the retailer fails to provide reasonable notice, such changes shall attract a reasonable loss claim decided by both parties.

C. Prices and Payments

Generally, the RTCP limits additional payments from the suppliers upon request from the retailers. Once a retailer has possession of the supplier's goods, they have an obligation to take care of the goods and avoid transferring unjustifiable costs and risks to the supplier. Section 5(1) of the RTCP, therefore, requires the retailer to pay a supplier for goods delivered according to the relevant Supply Agreement /JBP.

Generally, Part IV of the RTCP cushions the supplier from delayed payments and additional payments imposed by the retailer. Additional payments include a contribution to marketing costs, shrinkage, damage, better positioning of goods, and unjustified product promotions. I briefly discuss the rules pertaining prices and payments.

1. Delayed Payments

Delay in payments is the most notorious conduct of abuse of buyer power. Sometimes suppliers have to wait for years before the payment of goods supplied is made by the retailer. The implications have been adverse. For instance, SMEs that rely on credit facilities could exit the market when they cannot repay the loans advanced. Most of the abuse of buyer power cases already handled by CAK relate to delayed payments from private retailers and government institutions. Thus, the RTCP seeks to address this problem by prohibiting delays in payments and setting out payment timelines.

If any anomalies in the documents that would lead to delayed payments exist, the supplier should be notified within seven days. Additionally, action for the same should be solved within the following **seven days**. However, when the goods involved are fresh and perishable, any anomalies in the documents should be notified to the supplier within **24 hours** or at the earliest possible opportunity. In the case of disputed invoices, they should be settled within **30** calendar days from the date of the statement.

The implication of delayed payments is that the retailer shall pay interest to the supplier per the terms in the supply agreement. The Retail Trade Dispute Settlement Committee established under section 18 of the RTCP is the body mandated to solve the disputes arising as a result of delayed payments or disputes.

2. Additional Costs

Making a supplier pay additional unanticipated costs relating to marketing is now prohibited under Section 6 of the RTCP. Unless it is agreed upon between the retailer and the supplier or stipulated within the Supply Agreement/JBP, a retailer has no right, directly or indirectly, to require a supplier to make additional payments to costs associated with:

a. Category buyer visits to new or prospective suppliers;

b. Artwork or packaging design;

c. Consumer or market research;

d. The opening or refurbishing of a store or;

e. Hospitality for that retailer's staff; and

f. Listing a product

3. Payments for Shrinkage

Section 1(o) of the RTCP defines shrinkage as 'losses that occur after goods are delivered to a retailer's premises and arise due to theft, damage, internal accounting error, internal loss or any other internal aspect of the retailer's chain'. Shrinkage refers to costs associated with factors such as shoplifting, administrative errors, fraud, or employee theft. Generally, shrinkage occurs after the retailer has taken possession of the supplier's good and leads to retail losses.

Section 7 (1) of the RTCP prohibits including a provision under the Supply Agreement that requires a supplier to pay for costs arising from shrinkage. In exceptional cases, however, the supplier could compensate the retailer for any shrinkage if it is proved that the supplier was negligent. In some cases, the supplier should assist the retailer in the training of product knowledge and handling to reduce shrinkage. Thus, it seems to avoid shrinkage, supplier and retailers need to work together. Additionally, in case a supplier is involved in the wrong and non-confirming barcoding, the supplier will pay the penalty as agreed per the Supply Agreement/JBP.

4. Payments of Damages

Whereas damages are inevitable as part of retail trade, Section 8 of the RTCP prohibits a retailer from directly or indirectly requiring a supplier to pay for any damages to the goods incurred at the retailer's store. However, a supplier can only pay for product damage in two scenarios. First, when the damage is a result of the supplier's negligence or default. However, the Supply Agreement/JBP must set out in clear terms what amounts to negligence or default on the supplier's part. Second, when the basis of such payment is well stipulated in the Supply Agreement. Thus, a retailer and supplier must set out the circumstances in which the supplier will be required to pay for damages or wastage incurred at the retailer's premises. However, in this scenario, an

applicable percentage should be agreed upon, and the retailer will bear anything over and above.

Nonetheless, payment of damages must be reasonable and should not exceed the costs associated with mitigating the damages. Accordingly, a retailer must always act in good faith and remain transparent without transferring unnecessary costs to the supplier.

5. Compensation for Forecasting Errors

The RTCP cushions the supplier from erroneous forecasts from the retailer. A retailer must always ensure that the basis for preparing the forecast is communicated to the supplier. In case of written forecasting errors, a retailer is required to fully compensate the supplier for any costs incurred as per Section 10 of the RTCP. However, if the retailer prepared the forecasts in good faith and with due care and consulted with the supplier, there is no need to compensate the supplier. Moreover, a retailer may not compensate the supplier if a provision within the Supply Agreement that expressly and in unambiguous terms indicates that no full compensation is appropriate.

6. Better Positioning of Goods

Under no circumstances should a supplier make payments to the retailer for better positioning of their goods or allocation of shelf space. However, Section 11 of the RTCP provides that such payments can only be requested if it is made in relation to a promotion. Consequently, suppliers need to be alert to such unnecessary requests.

7. De-Listing

De-listing is one of the biggest challenges facing suppliers in the retail sector around the globe. The RTCP defines de-listing as conduct where a retailer ceases to purchase goods for resale from the supplier. According to Davies, de-listing happens when a retailer significantly reduces the volume of its purchases from a supplier or removes a product completely from its shelves even when its competitors are still selling the product (see Davis 1994). De-listing also involves threats to terminate commercial relations or terminate well-established commercial ties.

Generally, de-listing or threatening to de-list a supplier's product to obtain favourable treatment or as a form of punishment amounts to abuse of buyer power. However, de-listing of supplier's products can only be allowed under exceptional cases. For example, a retailer can only de-list a supplier's product under genuine commercial reasons under Section 15 of the RTCP. The RTCP does not define or list what amounts to genuine commercial reasons. It is upon the retailer to show that indeed it delisted the suppliers product because of genuine commercial reasons beyond their control. A retailer, for instance, cannot de-list a supplier or a product simply because they argued with the supplier. Or the retailer no longer likes the supplier. As noted by ACCC, de-listing as a punishment for a complaint, concern or dispute raised by a supplier is not a genuine commercial reason.

More so, supplying goods that do not meet the quality described in the Supply Agreement could lead to the retailer de-listing the product. Thus, to avoid de-listing, suppliers need to comply with their contractual obligations. Consequently, before de-listing a supplier's product, the retailer must provide reasonable notice to the supplier, including sufficient time to have the retailer's decision reviewed by the Retail Trade Committee or the Retail Trade Dispute Settlement Committee.

Suppose the supplier and the retailer agree that the specific product can be de-listed. In that case, the retailer has to follow a particular procedure as stated under Section 15 (2, c) of the RTCP. First, the supplier must be given reasonable time to implement the agreement. Second, the retailer has to allow the supplier to sell the de-listed products at a discount. Third, the retailer could allow the supplier to move the product to a mutually agreed retailer's retail branch. Finally, the supplier should be entitled to collect the de-listed goods within a reasonable time. This process enables the suppliers to recoup the losses associated with the de-listing.

8. Instances When a Supplier Can Make Additional Costs: Costs Related to Promotions

Notwithstanding, in accordance with Section 9 of the RTCP, a retailer can request a supplier to make additional costs but not as a condition of stocking or listing the suppliers' goods. This can only happen under two scenarios. First are

costs related to promotions. Second, a supplier can make payments regarding goods that have not been stocked, displayed or listed by the retailor during the preceding 30 days in 25 percent or more of its stores. Consequently, it should reflect reasonable risk to the retailer.

As earlier stated, a retailer can request a supplier to make additional payments relating to the promotion of the supplier's products in accordance with Section 12 of the RTCP. However, a supplier does not need to agree to fund promotion, especially when the funding is unreasonable, unnecessary, and only aims at transferring additional costs to the supplier. Even when a retailer wishes to do an internal promotion, the supplier must be given reasonable notice. This allows the supplier to accept or decline participation in the promotion, especially if it has not been addressed in the Supply Agreement.

Nonetheless, suppose a retailer provides the supplier a reasonable notice in writing, and the supplier's participation in the promotion does not entail a retrospective variation to the Supply Agreement. In that case, a supplier can agree to fund the promotion of their products. And the payment of the advertisement must be agreed upon between the parties.

Importantly, Section 13 of the RTCP requires that a retailer must be transparent during a funded promotion. Thus, the retailer must not overorder when ordering goods from the supplier at a promotional wholesale price. According to the ACCC's Food and Grocery Code, if a retailer overorders grocery products from a supplier in relation to a funded promotion and sells an overordered product more than the promotional price, the retailer must pay the supplier the difference between the promotional price and the full price. Secondly, when making an order, the retailer must ensure that the basis upon which the quantity of the order is made is transparent. Finally, in case of unsold goods during the promotion, the supplier and the retailer must agree on how to treat the goods.

9. Unjustified Payment for Consumer Complaints

Section 14 of the RTCP expects a retailer to solve a consumer complaint by refunding the retail price or replacing the relevant goods. The retailer should not require the supplier to make payments associated with solving consumer complaints, either directly or indirectly. However, such a request can only

happen if the payment exceeds the retail price of the product charged by the retailer. Or when the consumer complaint can be attributed to the suppliers' negligence, default, or breach.

IV. Institution Framework Governing the Implementation of the RTCP.

i. Senior Category Buyer

Similar to the 2009 UK CMA's Groceries Supply Code of Practice, Section 16 of the RTCP requires that a retailer's Senior Management Category review any decisions related to the RTCP or a specific code. In case there is any change as to the identity or contact of the Senior Category Buyer, this must be brought to the supplier's attention. Generally, a retailer has to provide information to the supplier of the relevant contact person at any given time.

ii. Retail Trade Committee (RTC) and the Retail Trade Dispute Settlement Committee (RTDSC).

The RTCP creates two Committees with the primary mandate of ensuring that the RTCP is implemented. Both committees are made up of stakeholders within the retail sector. This enables them to solve the disputes among them first before invoking CAK's jurisdiction.

The RTCP under Section 17 establishes a Retail Trade Committee, which is required to convene meetings quarterly, with the primary mandate of assessing the implementation of the RTCP. The Committee comprises the chairpersons and CEOs of the Retail Trade Association of Kenya (RETRAK), Kenya Association Of Manufacturers (KAM) and Association of Kenya suppliers AKS. If the RTC fails to resolve any dispute, the dispute is referred to the RTDSC. The inclusion of the RETRAK, KAM and AKS is important because such participation entrenches compliance with the RTCP.

The RTDS Committee, as established under Section 18 of the RTCP, is the body that shall solve all disputes arising under the RTCP. The RTDS Committee comprises seven people. Four are nominees drawn from RETRAK and KAM, equally. One nominee is drawn from AKS, Council of Governors and the Ministry of Trade. The quorum of the RTDS Committee shall be five members, and its decisions are reached through consensus. However, its decisions are binding on

all parties concerned.

Whereas the RTDS Committee is expected to be the first forum for suppliers seeking redress and its decisions to bind to all parties concerned, it does not preclude the parties involved from further redress from the courts or CAK. Appeal from the RTDS Committee lies with the CAK first.

V. Conclusion

A close analysis of the CAK's 2021 RTCP shows that it intends to protect suppliers from abuse of buyer power by enhancing transparency and predictability in the retailer-supplier trade relationships. However, whether retailers and suppliers will comply with the RTCP is a matter of time. To enhance compliance, CAK has drafted model contracts for the retail sector's supply of services and goods(CAK 2021). Already, CAK has enclosed a retail supply agreement to the RTCP where retailers and suppliers must be conversant. CAK has continued to create awareness among the various stakeholders on the substance of the RTCP. In the UK, Grocery Code Adjudicator indicates that the retailer's compliance with the Grocery Code is high.

However, there is a need for CAK in consultations with relevant stakeholders to provide clear guidance on which conduct amounts to 'genuine commercial reasons' that would justify a retailer de-listing products. Moreover, the RTCP does not include scenarios where a retailer requires a supplier to take back products already supplied. Research has shown that a retailer possessing buyer power is more likely to require a supplier to take back products, transferring rejection, collection, and disposal costs to the supplier.

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