

## **“Buyer Power” in Emerging Markets – Economic or Consumer Protection Driven**

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### **I. INTRODUCTION**

There has been an underwhelming enforcement of “buyer power” cases across Africa as the majority of cases have focused on the supply-side. While there may be several good reasons for this, buyer power concerns has no doubt received a greater degree of attention over the past few years – particularly in South Africa and Kenya. This may be due to perceived concerns that in emerging markets, suppliers are more susceptible to abuses of buyer power than those in developed countries.<sup>1</sup>

This paper focuses on the primary economic principles that underpin buyer power concerns, before unpacking recent legislative developments and enforcement activities in South Africa and Kenya, where buyer power concerns have taken centre stage. We also explore the relationship between consumer protection objectives and how that has or may shape the application of buyer power concerns going forward.

### **II. DEFINING BUYER POWER**

Broadly, “buyer power” describes a situation in which the relative bargaining position of a buyer, or a group of buyers, compared to that of its supplier, allows it to decrease the purchase price of input costs below the level at which the supplier supplies other firms.<sup>2</sup> Further, buyer power can be characterized into either: monopsony or bargaining (countervailing) power.<sup>3</sup>

Monopsony is the buyers’ equivalent of a sellers’ monopoly.<sup>4</sup> In this respect, a monopsony arises where there is only a single buyer, or association of buyers, of a particular good or service despite there being a competitive market on the supply side of the value chain.<sup>5</sup> Similar to how a monopolist has market power in selling its particular good or service, a monopsonist has buying power in respect of purchasing requirements.<sup>6</sup> Typically, a buyer, or group of buyers, is an effective monopsonist when it has a sufficient share of purchases allowing it to

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<sup>1</sup> Fox E (2013) ‘Imagine: Pro-poor(er) Competition Law, Organisation for Economic Co-operation and Development’ DAF/COMP/GF at 10. Available at: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2013\)4&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2013)4&docLanguage=En)

<sup>2</sup> Anchustegui I ‘Buyer power, Global Dictionary of Competition Law, Concurrences, Art. N° 12328’. Available at: <https://www.concurrences.com/en/dictionary/buyer-power>

<sup>3</sup> *Supra*, note 1 above, at 10.

<sup>4</sup> Roger D and Jeffrey H (1991) ‘Antitrust Policy and Monopsony’ Cornell Law Review Vol 76(2) 297 at 301.

<sup>5</sup> The Organization for Economic Cooperation and Development (“OECD”) (2022) ‘Purchasing Power and Buyers’ Cartels’ at 9. Available at: <https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf>

<sup>6</sup> *Supra*, note 4 above, at 301.

influence its purchasing price by adjusting its level of demand. Where there is a monopsonist, their “buyer power” is exercised through the withholding of purchases in order to decrease the purchase price that it would ordinarily be subjected to but for the withholding.<sup>7</sup>

Unlike a monopoly, however, where a supplier holding back on output will inevitably cause prices to rise, the anti-competitive effects of the monopsony model is applicable in only a limited number of contexts. This is because buyer power is not typically exercised through the strategic reduction of quantities, but is instead exerted in bilateral negotiations between buyers and sellers over individual prices, which may often be subject to what is essentially a ‘volume discount’ (meaning that prices actually fall as more purchases are made).<sup>8</sup> In these situations, and without more, the exercise of buyer power would have a pro-competitive effect (if certain of the discounts are passed on to consumers) or at the very least a neutral effect (if the welfare gains from the volume discounts are simply shifted from supplier to buyer).

Bargaining, or countervailing power, describes the situation where a purchaser is able to obtain favourable prices or trading conditions as a result of its strengthened position in negotiations with suppliers.<sup>9</sup> Contrary to a monopsony, bargaining power is not exercised through the withholding of purchases. Rather, bargaining power sees purchasers threaten to reduce demand from a supplier, or set of suppliers, in order to decrease purchase prices, with the objective of maintaining or increasing purchases of the input.<sup>10</sup>

Generally, benefits associated with the reduction of input prices resulting from the exercise of buyer power are likely to be passed on by purchasers to the end consumer, provided there is sufficient downstream competition.<sup>11</sup> In this respect, there has been comparatively less intervention by competition authorities regarding abuse of power on the purchaser side as opposed to the sellers’ side of the market. This is particularly due to many jurisdictions being premised on the “consumer welfare” standard, justifying competition authority intervention when it prevents harm to, or would otherwise benefit, consumers.<sup>12</sup>

While buyer power is generally likely to result in lower prices to consumers in the short-run, in some contexts substantial buyer power can also harm competition in the relevant upstream and downstream markets in the long-run.

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<sup>7</sup> *Supra*, note 2 above.

<sup>8</sup> See, for example, European Commission (2004) ‘*Guidelines for the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*’ Official Journal, C 31/5-18, [64] and Office of Fair Trading. 2004. *Assessment of Market Power*. Competition Act Guidelines OFT516a, [6.2], both of which refer to buyer power in the context of a bargaining framework.

<sup>9</sup> *Supra*, note 2 above.

<sup>10</sup> *Supra*, note 5 above, at 13.

<sup>11</sup> OECD (2008) ‘*Policy Roundtables: Monopsony and Buyer Power*’ at 257. Available at: <https://www.oecd.org/daf/competition/44445750.pdf>

<sup>12</sup> *Supra*, note 5 above, at 8.

Accordingly, as the exercise of buyer power typically has pro-competitive effects, the context in and market structure in which the alleged abuse arises must be more carefully scrutinised and the rules regulating buyer power must ensure that an overly strict enforcement of buyer power rules does not dampen pro-competitive conduct.

Lastly, and as alluded to above, it has been submitted that abuses of buyer power are more prevalent within emerging markets – and which may be the cause for the suddenly apparent interest regarding buyer power across Africa. However, we note that whilst this may be the case, particularly where there may be fewer downstream purchasers, there is a general lack of economic literature to support such an assertion.

### III. BUYER POWER DEVELOPMENTS: SOUTH AFRICA

In South African context, the development of buyer power concerns was most prevalent in the findings following the Grocery Retail Market Inquiry (“**GRMI**”)<sup>13</sup>, which specifically investigated as a key objective the prevalence of buyer groups and buyer power within the grocery retail sector. The findings contained in the GRMI Report<sup>14</sup> inspired recent amendments to the Competition Act, 89 of 1998 (“**Competition Act**”) such that buyer power is now specifically included as one of the listed forms of “abuses” in section 8.<sup>15</sup>

#### Grocery Retail Market Inquiry

In 2015, the South African Competition Commission (“**SACC**”) initiated the GRMI which sought to investigate, *inter alia*, the impact of buyer groups on small and independent retailers in the grocery retail sector.<sup>16</sup> In addition, the GRMI sought to determine the extent to which large supermarket chains had a degree of buyer power over their suppliers.<sup>17</sup>

In its findings, the GRMI identified that the grocery retail market was characterised by high levels of concentration among national supermarket chains as well as high barriers to entry, which it considered to be conducive to the exercise of buyer power due to the limiting of the amount of purchaser options available for suppliers.<sup>18</sup> In this respect, the GRMI identified that, due to large national supermarket retailers constituting a significant route to market for suppliers, these retailers were able to obtain favourable trading terms from

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<sup>13</sup> Competition Commission of South Africa (2019) ‘Grocery Retail Market Inquiry’. Available at: <https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf>

<sup>14</sup> A copy of the Non-Confidential Report can be accessed at: <https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf>

<sup>15</sup> See section 8(4) of the Competition Act.

<sup>16</sup> Competition Commission of South Africa ‘Grocery Retail Sector Market Inquiry: Terms of Reference’ (October 2015). Available at: [http://www.compcom.co.za/wp-content/uploads/2015/06/GROCERY-RETAIL-SECTOR-MARKET-INQUIRY\\_ToR\\_final-3.pdf](http://www.compcom.co.za/wp-content/uploads/2015/06/GROCERY-RETAIL-SECTOR-MARKET-INQUIRY_ToR_final-3.pdf)

<sup>17</sup> *Supra*, note 13 above, at 212.

<sup>18</sup> *Supra*, note 13 above, at 248.

suppliers who had few alternative options. These retailers were, therefore, found to exert buyer power.<sup>19</sup>

In its assessment of the buyer power of these large supermarket retailers, the SACC found that these retailers were, in fact, able to extract higher rebates from suppliers.<sup>20</sup> As the rebates were typically afforded to large supermarket retailers to cover costs associated with placing products within stores, it was found that these same rebates were not passed onto small, medium and independent retailers who otherwise did not perform this function.<sup>21</sup> As a result, the GRMI broadly found that the buyer power of large supermarket retailers resulted in harm to smaller market players who could not benefit from similar rebates in order to effectively compete and grow. Importantly, while the GRMI found that large retailers are able to exert buyer power not only on small suppliers but indeed on the largest FMCG suppliers, the amendments to the Competition Act provide relief only for small suppliers. This was an important missed opportunity. It failed to recognise that an abuse of buyer power that has anti-competitive effects for consumers could occur regardless of whether the supplier is considered large or small – naturally the larger the supplier the more counter-veiling bargaining power the supplier may have (which would mitigate the risk of an abuse of buyer power in the first instance). We turn to this further below.

Although the GRMI was significant in that it identified the existence of buyer power within the grocery retail market, it also confirmed the long-standing principle that buyer power only results in consumer harm in a limited set of scenarios. Moreover, the GRMI confirmed the likely benefits of buyer power in that consumers may pay less for products in which the resulting cost-saving has been passed on to end-consumers.<sup>22</sup>

Additionally, the GRMI conducted an assessment on the prevalence and impact of “buyer groups” within the grocery retail sector and found there to be beneficial outcomes for the buyer group’s members.<sup>23</sup> This too was not a surprising finding. The question, however, of how buyer groups are to be regulated in the context of South Africa which, quite uniquely, prohibits the fixing of a “purchase price” by competitors as a *per se* hardcore cartel prohibition. Thus, just like competitors discussing and agreeing on a joint selling price, competitors are potentially at risk of cartel conduct if they jointly agreed on a purchase price.

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra*, note 13 above, at 249.

<sup>23</sup> *Supra*, note 13 above, at 33.

## The South African Competition Amendment Act

Prior to the implementation of the Amendment Act and section 8(4) of the Competition Act, instances of buyer power were predominantly seen in terms of the *per se* prohibition of fixing purchase prices.<sup>24</sup> However, on 13 February 2019, the South African Competition Amendment Act 18 of 2018 (“**Amendment Act**”) broadened the South African competition law framework to expressly cater for buyer power. In this respect, the Competition Act was amended to include section 8(4), which:

*[prohibits] a dominant firm in a sector designated<sup>25</sup> by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair—*

- (i) *prices; or*
- (ii) *other trading conditions.*

Notably, amendments to the South African Competition Act represents a stark contrast from the conventional means of regulating abuse of buyer power. In this regard, section 8(4) is:

- (i) expressly included within the “abuse of dominance” framework; and
- (ii) considered against the public interest rather than against the consumer welfare standard.<sup>26</sup>

### ***Abuse of buyer power as an “abuse of dominance”***

As explained in the Background Note to the Competition Amendment Act, the prohibition of an abuse of buyer power was specifically included to protect suppliers of dominant firms from being required to sell goods or services at prices that prevent them from being able to effectively participate in the market.<sup>27</sup> Thus, section 8(4) requires a purchaser to be dominant.

Section 7 of the Competition Act provides that a firm is deemed to be dominant where it has: a market share of at least 45%; has between 35% and 45% market share (unless it can be established that the firm does not have market power); or less than 35% market share but has market power. Hence, for section 8(4) to find applicability a firm must satisfy one of the above thresholds. Economic literature and international experience has shown, however, that

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<sup>24</sup> *Supra*, note 13 above, at 293.

<sup>25</sup> As provided for in the ‘*Regulations on Buyer Power*’, the following are included as ‘designated sectors’:

- (a) Grocery wholesale and retail sector;
- (b) Agro-processing sector; and
- (c) Ecommerce and online services sector.

<sup>26</sup> Van der Hoven Z *et al* (2020) ‘*An economic perspective on the new South African buyer power provision and enforcement guidelines*’ *Competition Law International* Vol. 16(2) at 140.

<sup>27</sup> Competition Commission of South Africa ‘*Background Note on the Competition Amendment Bill*’ Government Gazette No. 41294 at 16.

buyer power can be exercised by firms that are not “dominant”, as buyer power is largely dependent on relative bargaining positions. Equally, a dominant firm will not necessarily hold substantial bargaining power vis-à-vis its suppliers. Subsequently, it is common for competition authorities to regulate the abuse of buyer power outside the ambit of their abuse of dominance frameworks.<sup>28</sup>

Further to this, despite the abuse of buyer power provision requiring that dominance first be established, the SACC has itself confirmed that buyer power cannot be exclusively limited to the market share of firms as even firms with less than 35% market share can still have the requisite market power in the context of buyer power concerns:

*Based on economic theory and experience in other jurisdictions, buyers with less than 35%, but still a material share, frequently have buyer power and would therefore be considered dominant under section 7. This is because buyer power is strongly impacted by the outside options available to both the supplier and the buyer.*<sup>29</sup>

Thus, the Buyer Power Guidelines have significantly reduced the conventional dominance thresholds to include instances where firm that has a “material share” in a market, which it states to be 15% or more.<sup>30</sup> Further to the market share assessment, the Buyer Power Guidelines provide that the SACC is likely to consider the following in determining dominance for purposes of section 8(4):<sup>31</sup>

- (i) a supplier’s dependency on alternative purchaser options;
- (ii) the availability of alternative suppliers available to purchasers; and
- (iii) the nature of supply negotiations between the purchaser and seller.

In light of the recent “price gouging” cases in South Africa (which dealt with excessive prices and not buyer power), the approach to determining dominance, and in particular, a firms’ “market power”, is more open-ended and subjective than was previously the case. Accordingly, the risk that firms in South Africa are considered dominant, even if their market shares are well below 35%, has increased significantly. It is, however, important to discuss the Competition Tribunal (“**Tribunal**”) and Competition Appeal Court (“**CAC**”) approach to market power assessments in the price gouging cases, for further context.

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<sup>28</sup> *Supra*, note 13 above, at 144.

<sup>29</sup> Competition Commission of South Africa ‘Buyer Power Guidelines’, at 8 (“**Buyer Power Guidelines**”).

<sup>30</sup> *Supra*, note 29 above, at 9.

<sup>31</sup> *Supra*, note 29 above, at 9 – 11.

Competition Commission of South Africa v Dis-Chem Pharmacies Limited (“Dis-Chem”)<sup>32</sup>

On 14 July 2020, the Tribunal handed down its reasons regarding the excessive pricing of surgical masks during the Covid-19 pandemic by Dis-Chem in contravention of section 8(1)(a) of the Competition Act.<sup>33</sup>

Despite this being an excessive pricing case, the essence of the matter was the determination of whether Dis-Chem was in fact “dominant”.<sup>34</sup> To this end, the SACC argued that it was not necessary to define the relevant market as Dis-Chem had “market power” as it was able to substantively increase its prices, independently of its competitors, suppliers or customers.<sup>35</sup> Hence, the SACC sought to argue that market power may be inferred from Dis-Chem’s conduct alone.<sup>36</sup>

In support of the SACC’s argument, the Tribunal held that it was not necessary to define the relevant market as the assessment into market power may be conducted while only having regard to prevailing market conditions.<sup>37</sup>

Babelegi<sup>38</sup>

In addition to its decision in *Dis-Chem*, the Tribunal was subsequently presented with a substantially similar matter in the case of *Babelegi* in which it was principally tasked with determining whether Babelegi was dominant, and whether section 7 of the Competition Act imposes time periods for the determination of market shares for market power.<sup>39</sup> Notably, in this instance, it was common cause that Babelegi held less than 5% market share for the supply of FFP1 face masks.

Having regard to what the Competition Appeal Court stated in the *Sasol Chemical Industries Limited v Competition Commission*, Babelegi submitted that “market power” must be regarded as the ability of a firm to raise prices above competitive levels, consistently and

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<sup>32</sup> *Competition Commission of South Africa v Dis-Chem Pharmacies Limited* CR008Apr20.

<sup>33</sup> Section 8(1)(a) of the Competition Act provides that it is:

(1) It is prohibited for a *dominant firm* to—

(a) charge an excessive price to the detriment of consumers or customers

<sup>34</sup> Oxenham, J and Currie MJ *et al* (2020) ‘COVID-19 Price Gouging Cases in South Africa: Short-term Market Dynamics with Long-term Implications for Excessive Pricing Cases’ *Journal of European Competition Law & Practice* Vol. 11, No. 9 at 526.

<sup>35</sup> Section 1 of the Competition Act defines “market power” as:

*the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers;*

<sup>36</sup> *Supra*, note 32 above, at [81].

<sup>37</sup> Anderson R *et al* ‘Abuse of Dominance’ in Khemani R. S *et al* A Framework for the Design and Implementation of Competition Law and Policy (OECD, Paris) available at <http://www.oecd.org/regreform/sectors/aframeworkforthedesignandimplementationofcompetitionlawandpolicy.htm> at 71 as in *Dis-Chem*, note 32 above, at [103].

<sup>38</sup> *Competition Commission v Babelegi Workwear Overall Manufacturers and Industrial Supplies CC* Case No: CR003Apr20; and *Babelegi Workers and Industrial Supplies CC v The Competition Commission of South Africa* Case No: 186/CAC/JUN20.

<sup>39</sup> *Supra*, note 34 above, at 527;

*Competition Commission v Babelegi Workwear Overall Manufacturers And Industrial Supplies CC* Case No: CR003Apr20.

profitably.<sup>40</sup> However, and regardless of Babelegi's negligible market share, the Tribunal held that: "...as a matter of economics, in a crisis period such as Covid-19, the actual conduct of the firm can be used as a proxy to assess its market power" (our emphasis).<sup>41</sup> Further to this, the Tribunal held that Babelegi's conduct must be assessed in light of the particular circumstances arising from the Covid-19 pandemic and ultimately limited its market power assessment to a period of little over a month – which was commonly coined as "temporary market power" throughout the hearing. In this respect, the Tribunal noted that as the Covid-19 pandemic resulted in all competitors selling at capacity, and no firm has an incentive to reduce prices to increase sales, even small firms had market power. Thus, the Tribunal found Babelegi to have possessed market power for the complaint period as a result of its ability to materially increase prices and was ultimately found guilty of excessive pricing.

On appeal, the CAC found that the critical question as regards to the question of market power was "*how long a view must this court take of conduct which clearly is reflective of independence from customers and competitors?*" and found that on the evidence, as a whole, Babelegi's pricing practices for the complaint period was reflective of its market power.<sup>42</sup>

#### *Babelegi and Dis-Chem's likely effect on Section 8(4) and an Abuse of Buyer Power*

As a result of the above decisions, the Tribunal and the CAC substantially lowered the threshold for dominance; utilized a limited complaint period; failed to define any relevant market and failed to compare the prices of competitors during the same complaint period.<sup>43</sup>

However, as both the Tribunal and CAC decisions placed particular emphasis on a firm's ability to increase prices during Covid-19, it provides little guidance on the applicability of its assessment of dominance and market power within traditional abuse of dominance cases. In this respect, it is unclear whether the Tribunal or CAC would rely on such a limited complaint period or elect not to define a relevant market if, for instance, an abuse of buyer power was brought before it.

Accordingly, and notwithstanding the CAC repeatedly emphasising that the price gouging cases were considered during the time of a global pandemic.<sup>44</sup>

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<sup>40</sup> *Sasol Chemical Industries Limited v Competition Commission* 131/CAC/Jun14 at [2].

<sup>41</sup> *Competition Commission v Babelegi Workwear Overall Manufacturers and Industrial Supplies CC* Case No: CR003Apr20 at [92].

<sup>42</sup> *Babelegi Workers and Industrial Supplies CC v The Competition Commission of South Africa* Case No: 186/CAC/JUN20 at [53] read with [57].

<sup>43</sup> *Supra*, note 34 above, at 530.

<sup>44</sup> *Supra*, note 38 above, at [55]:

*"However, in law, as I have already indicated, the context of the dispute matters. In this case, the context is a market where market conditions have been altered by an unprecedented pandemic"*

See further *supra*, note 38 above, at [57]:

Given the transformative agendas of, not only section 8(4), but also of the Competition Act and Competition Commission as a whole – it would be, however, unsurprising if the Competition Authorities were to adopt a similarly broadened assessment of dominance within the context of an abuse of buyer power.<sup>45</sup> In this respect, the notion of economic dependence is also of particular importance.<sup>46</sup> Accordingly, market power traditionally refers to a firm's ability to act independently across a market as a *whole* whereas buyer power significantly reduces this scope to the bilateral relationship between a buyer and seller. In this regard, the assessment of a “dominant purchaser” would not be identical to the conventional assessment of market power. In this respect, where a buyer falls below the 15% market share threshold provided in the Buyer Power Guidelines, it may still be deemed dominant as a result of a particular supplier's dependence on the buyer. The likely applicability of an “economic dependence” doctrine may be inferred from the Buyer Power Guidelines themselves which provides that the SACC may consider the following in determining whether a buyer is dominant:<sup>47</sup>

*If suppliers are financially dependent on a buyer then they may not be able to replace those sales quickly or easily if the buyer threatens to not purchase in future. This position would provide the buyer with a strong negotiating position to extract favourable terms from the supplier.*

We submit that such an approach, if it were to be implemented, would be a notable cause of contestation and could have the effect of opening the floodgates for all sellers to complain about a buyer on whom they are dependent (but who may not necessarily be dominant).

While such an assessment of dominance and market power have prejudicial effects on firm's themselves, they may also have an unintended consequence on consumer welfare. Hence, remedial measures that are designed to protect inefficient market participants are likely

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*“But on the evidence read as a whole as it relates to the determination of dominance, appellant's ability to price in the manner it did was reflective of its market power albeit that this was sourced in the unprecedented market conditions created by Covid-19.”*

<sup>45</sup> In this respect, the Minister of Trade, Industry and Competition, Ebrahim Patel, stated the following in respect of supporting local economic growth:

*The Competition Act has been amended to place transformation at the centre of competition policy, including through measures to address price discrimination against smaller businesses and firms owned by black South Africans, new curbs on abuse of power by dominant firms and new powers to the regulators to deal with economic concentration that results in exclusion of black South Africans in the economy... (own emphasis)*

Available at: <https://www.gov.za/speeches/minister-ebrahim-patel-supporting-local-economic-growth-3-jun-2021-0000>

<sup>46</sup> An abuse of economic dependence refers to the instance where one party (the buyer) abuses their relative power over another (the seller).

<sup>47</sup> Buyer Power Guidelines, note 29 above, at [4.4.2.1].

to serve as a tax on large (or small firms)<sup>48</sup>, which has the potential to either be passed onto consumers or will otherwise discourage investment within the Republic.

We discuss section 8(4)'s competing relationship with the public interest and consumer welfare below.

### ***Abuse of buyer power as a public interest provision***

Importantly, section 8(4) of the Competition Act provides that it is an offence to require or impose unfair prices or trading terms against small or medium firms (“**SMEs**”) or firms owned by historically disadvantaged persons (“**HDPs**”).<sup>49</sup> Evidently, section 8(4) has a broader policy concern of protecting HDP and SME suppliers which has the potential to inadvertently cause tension with the consumer welfare standard. For instance, where a purchaser's conduct results in consumer benefit, or results in a net zero benefit, but otherwise prejudices an SME or HDP firm, such conduct may be deemed an offence despite intervention not being justified in terms of the consumer welfare standard.<sup>50</sup>

In emphasis of the SACC's supplier-centric approach, the Buyer Power Guidelines provide for a series of “guiding principles” when the SACC is tasked with making an assessment in terms of section 8(4). Hence, the Guidelines provide that:<sup>51</sup>

*2.2.1 An inquiry under section 8(4) is whether the prices and trading conditions imposed on suppliers in the designated class by a dominant firm are unfair or not. The focus of the inquiry is therefore on the treatment and welfare of suppliers in the designated class, and the application of a fairness principle to that treatment.*

*2.2.2 The inquiry does not, in the Commission's view, require an assessment of the effects on final consumers. For instance, it is not relevant whether an unfairly low price achieved through the exercise of buyer power is passed through to consumers or not. The legislation does not require any weighing up of the welfare of suppliers in the designated class against final consumers. (own emphasis)*

In this respect, section 8(4) seemingly allows the SACC to intervene only where a purchaser extracts unfair prices or trading terms from SME or HDP suppliers, regardless of

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<sup>48</sup> As confirmed in *Babelegi* where the Respondent had less than a 5% market share in the supply of FFP1 face masks.

<sup>49</sup> Section 2 of the Competition Act defines “historically disadvantaged persons” as, *inter alia*:  
*a category of individuals who, before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), came into operation, were disadvantaged by unfair discrimination on the basis of race...*

<sup>50</sup> *Supra*, note 26 above, at 141.

<sup>51</sup> Buyer Power Guidelines, note 29 above, at 5.

whether such intervention may result in increased costs to the end consumer. Where consumer welfare is compromised as a result of favouring a group of identified competitors, this would clearly be untenable, even if justified on the premise of public interest grounds.<sup>52</sup>

As the Constitutional Court in *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* confirmed, an increase in prices is inherently against the public interest and further went on to state:<sup>53</sup>

*Lest we forget, to the overwhelming majority of South Africans, regard being had to our acute economic inequalities, even a 1% fuel or bread price hike probably constitutes a threat to their presumably shallow pockets and survival.*

While the Constitutional Court's approach in *Mediclinic* is questionable in so far as the Court links an increase in prices to a public interest criterion, when an increase in prices fits squarely within a traditional and well accepted competition test, the key point that the Constitutional Court recognises is that any regulatory intervention which results in prices going up, is in conflict with the public interest objectives enshrined in the Competition Act.

While it is easy to foresee the risk of conflicting tensions between public interest objectives and competition law objectives in respect of the amendments to the Competition Act's price discrimination provisions<sup>54</sup>, it is less obvious that the amendments to the Competition Act's buyer power provisions will give rise to the same tensions.

If anything, the legislature failed to recognise that where a dominant purchaser is able to exert its market power such that it can engage in the type of buyer power that gives rise to competition or public interest concerns, that such buyer is effectively able to leverage that buyer power across all suppliers and not only small suppliers. Accordingly, in seeking to advance the participation and expansion of SME and HDP firms, the legislature has created a framework which does not fundamentally address the type of consumer harm that buyer power could cause in certain circumstances. However, there is always the catch-all abuse of dominance provision contained in section 8(1)(c) of the Act which prohibits general exclusionary conduct which has always been available to a complainant.

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<sup>52</sup> To this end, van der Hoven, Anderson and Zwane submit that section 8(4)'s public interest agenda is likely to cause tension with a strict interpretation of the consumer welfare standard, but is nevertheless workable. *Supra*, note 21 above, at 142.

<sup>53</sup> *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* (CCT 31/20) [2021] ZACC 35; 2022 (5) BCLR 532 (CC) (15 October 2021) at [61].

<sup>54</sup> See a comprehensive analysis in this regard in Currie's Masters Thesis (2020) '*South Africa's Amended Price Discrimination Provision: An Analytical Framework in Relation to the Grocery Retail Market*' Kings College London.

#### IV. DEVELOPMENTS IN BUYER POWER: KENYA

Prior to South Africa's introduction of section 8(4) of the Competition Act, Kenya was the first African jurisdiction to enact a separate provision within its competition law framework through which to specifically regulate an abuse of buyer power.<sup>55</sup> Thus, section 24A of the newly amended Competition Act No. 12 of 2010 ("**Kenyan Competition Act**") provides that:

*Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited (own emphasis).*

Section 24A(5) provides a closed list of conduct that would constitute an "abuse" of buyer power. Hence, it is not the ability to exert buyer power that is prohibited but rather the abuse thereof.<sup>56</sup>

In support of the amendments to the Kenyan Competition Act, the CAK stated that abuses of buyer power were most prevalent within the Kenyan retail sector after it had received complaints from suppliers that certain buyers had refused to pay for goods or failed to honour general contractual obligations.<sup>57</sup>

In comparison to the inclusion of buyer power into South Africa's Competition Act, section 24A of the Kenyan Competition Act does not expressly require that a firm be "dominant" for the abuse of buyer power provision to find applicability. Emphasising this point, the recently amended Buyer Power Guidelines state that: "*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.*"<sup>58</sup>

Moreover, the Kenyan Competition Act defines "buyer power" as:<sup>59</sup>

*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.*

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<sup>55</sup> Competition Authority of Kenya ("**CAK**"), Newsletter Issue No.1 (2016), at 7.

<sup>56</sup> For a full list of which conduct may constitute an "abuse" of buyer power, see section 24A(5) of the Kenyan Competition Act.

<sup>57</sup> *Supra*, note 55 above, at 4.

<sup>58</sup> CAK (2022) "*Buyer Power Guidelines*" at 3. Available at: [https://www.cak.go.ke/sites/default/files/Buyer\\_Power\\_Guidelines\\_2022.pdf](https://www.cak.go.ke/sites/default/files/Buyer_Power_Guidelines_2022.pdf)

<sup>59</sup> Competition Act No. 12 of 2010, section 2.

Notably, the Kenyan Competition Act is further distinguishable from the South African Competition Act in that its applicability is not constrained to the extraction of favourable terms or prices from SMEs, despite the CAK recognising the pivotal role in safeguarding and sustaining the Kenyan economy.<sup>60</sup> Rather, the newly amended Buyer Power Guidelines provide that the CAK will fast-track investigations involving SMEs or where an alleged abuse of buyer impacts numerous suppliers.

Recently, the CAK announced that it was able to recover reneged payments worth KES38 million from twenty motor vehicle repairers and five motor vehicle assessors in favour of 1, 000 Kenyans.<sup>61</sup> However, the first decision to be brought before the Kenyan Competition Tribunal (“**Competition Tribunal**”), *Majid Al Futtaim Hypermarkets Limited vs Competition Authority of Kenya and Orchards Limited* (“**Carrefour**”), provided little clarity on the enforcement of Kenya’s buyer power regime.<sup>62</sup> Notably, the Competition Tribunal’s decision in *Carrefour* has been criticised for its failure to undertake a robust assessment of any relevant market, analysis regarding concerns of foreclosure, or consumer welfare of possible efficiencies, but rather focused on fairness to suppliers.

### Carrefour

Briefly, Orchards Limited (“**Orchards**”) had alleged that Majid Al Futtaim Hypermarkets Limited (“**Majid**”) had abused its buyer power by: transferring commercial risks to Orchards; refusing to receive Orchard’s products; unilaterally and unjustifiably terminating its relationship with Orchards; applying rebates and listing fees marked as discounts; and requiring Orchards to deploy staff as its own cost.

Although the Competition Tribunal (“**Tribunal**”) found Majid to have abused its buyer power, its judgment failed to provide much clarity on fundamental economic aspects. Firstly, the Tribunal failed to conduct a thorough and robust assessment into whether Majid, in fact, had and abused its buyer power. In this respect, the Tribunal held that where a firm engages in conduct amounting to an “abuse of buyer power”, that firm has buyer power:<sup>63</sup>

*In other words, the influence or power of the buyer becomes evident when the buyer engages in the offending conduct*

Notably, by assessing the effects of a firm’s conduct rather than the existence of buyer power, the *Carrefour* decision has the effect of departing from the approaches of other

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<sup>60</sup> *Supra*, note 58 above, at 3.

<sup>61</sup> CAK, Newsletter Issue No.9 (2022), at 3. Available at: <https://cak.go.ke/sites/default/files/2022-06/CAK%20Newsletter%20Issue%209.pdf>

<sup>62</sup> *Majid Al Futtaim Hypermarkets Limited vs Competition Authority of Kenya and Orchards Limited* Case No. CT/006/2020.

<sup>63</sup> *Supra*, note 62 above, at 165.

competition law frameworks by seemingly adopting an *ex post* assessment to buyer power. As a result, the *Carrefour* decision had the likely impact of buyers' not being able self-regulate as ordinary commercial practices, such as negotiating of terms, could now be marked as an abuse of buyer power.

Secondly, the Tribunal also failed to conduct a robust assessment of the relevant market, potential foreclosure concerns and consumer welfare or efficiencies and rather adopted an approach that favoured fairness towards suppliers – undoubtedly tipping the law's favour in protection of suppliers as opposed to other considerations.

The CAK has stated that since the implementation of section 24A of the Kenyan Competition Act, it has recognized significant obstacles impeding its ability to efficiently investigate and conclude complaints of abuse of buyer power. The main obstacle in this regard has been the lack of understanding from various stakeholders regarding the processes and tools that the CAK utilizes in assessing whether a purchaser has buyer power and whether it then abused such a position.<sup>64</sup> Encouragingly, however, is the CAK's newsletter which emphasises the need for Competition Authorities to adopt clear and certain buyer power regulations to enable firms to self-regulate and to aid in the expeditious assessment of complaints.

## V. GENERAL COMMENTARY

We briefly submit four general comments regarding the potential unintended consequences specific to the implementation of section 8(4) of the South African Competition Act and Buyer Power Guidelines.

Firstly, and as alluded to above, the South African Buyer Power Guidelines, in combination with the watered-down assessment of dominance, provide little clarity on the applicability of section 8(4) of the Competition Act to many buyers across South Africa. In this respect, the provisions of the Buyer Power Guidelines suggest that even firms below the 15% market share threshold may be considered a dominant buyer where a supplier is financially dependent on it (which may be difficult for a buyer to self-assess).<sup>65</sup> Naturally, this uncertainty will be a cause of concern for many businesses within South Africa and is likely to be a source for lengthy and costly litigation.

Secondly, the exercise of buyer power is inherently pro-competitive and the regulation thereof will have the likely effect of dissuading a large downstream firm from exercising buyer

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<sup>64</sup> *Supra*, note 61 above, at 18.

<sup>65</sup> Buyer Power Guidelines, note 29 above, at [4.4.2.1].

power in respect of its customers (particularly given the uncertainty associated with whether section 8(4) of the Competition Act is likely to apply to a given buyer, as discussed above). Subsequently, firms will have less incentive to negotiate for better prices and terms from their suppliers, which will, in turn, have an adverse effect on consumers. A caveat to this, however, is that section 8(4) only applies to those sectors designated by the Minister and, thus, these unintended consequences are limited within those sectors specifically. To this end, it is understandable that the SACC has sought to limit the applicability of section 8(4) to those sectors wherein there is a high degree of downstream concentration, such that any efficiencies that may be extracted from suppliers may be less likely to be passed on to the end-consumer.

Thirdly, the Buyer Power Guidelines require that the SACC determine whether a price is unfair.<sup>66</sup> One particular consideration that the SACC may have in determining whether a price is unfair is whether the prices paid to other suppliers of similar goods or services, and whether such prices are higher.<sup>67</sup> In this context, it is important to appreciate that procurement is often associated with significant economies of scale, meaning that average procurement costs fall as the volumes purchased increase. What may appear to be a price differential based on volume alone (and thus the size of the supplier) may, therefore, in fact be the result of material differences in the cost incurred by the purchaser in procuring a given input. A purchaser may, therefore, not be able to offer the same price to smaller suppliers that it offers to large suppliers for purchases of the same input, without being prepared to earn a lower margin when sourcing from the former, simply because the procurement costs incurred by the buyer are larger in respect of those smaller suppliers (rather than because the purchaser has buyer power over smaller suppliers). In this way, precluding firms with substantial buyer power from offering different prices based on purchase volumes may ultimately disadvantage large purchasers in favour of smaller purchasers.

Fourthly, potential unintended consequences may present themselves as a result of the regulation of non-pricing terms, such as rebates. With particular reference to rebates, non-pricing terms are often motivated by the alignment of incentives between suppliers and buyers, which give rise to efficiencies that, in turn, result in increased downstream competition and consumer welfare benefits. However, such efficiencies can often only be reasonably offered by larger suppliers and cannot necessarily be provided by smaller suppliers. What appear on its face to be a higher price that a buyer pays to a large supplier may in fact reflect the benefits that buyer gets from the larger supplier in the form of rebates and other non-price terms (such that the transactions with larger suppliers are not equivalent to the transactions

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<sup>66</sup> Buyer Power Guidelines, note 29 above, at page 12.

<sup>67</sup> Buyer Power Guidelines, note 29 above, at [6.1.1].

with smaller suppliers). In this way, the section 8(4) of the Competition Act may limit the ability of larger suppliers to provide efficiency-enhancing rebates and non-price trade terms. We therefore submit that although the buyer power framework seeks to regulate the conduct of buyers, issues regarding non-pricing terms may well become an issue that concerns the conduct of a supplier. To this end, we submit that there is likely to be a frustration between buyers and suppliers as to who bears the burden of ensuring that there is no differential treatment as a result of differences in bargaining power.

## **VI. CONCLUSION**

It is prevalent from the increasing interest by the South African and Kenyan competition authorities that buyer power exists as more than scant academic writing. Rather, buyer power should be given regard by all African competition authorities due to its apparent increased likelihood of occurring within developing countries. As these competition authorities look to amend their competition law frameworks to cater for abuses of buyer power, such amendments should be implemented having due regard to international best practice.

Specific to South Africa, it is evident that that the public interest assessment in merger control has seeped its way into assessments regarding prohibited conduct. Although the transformative agenda of South Africa's competition regime is laudable, the restriction of the newly included section 8(4) to cater only for abuses against SMEs and HDPs fails to accept that *all* firms are susceptible to an abuse of buyer power. For an example, if a buyer group was able to extract favourable terms or prices from a large supplier, their conduct would be immune from scrutiny under section 8(4). The failure to protect large firms will have the likely effect of discouraging investment and may prejudice consumer welfare through the reduction of output.

As evident from the above discussions, the current approach of both the SACC and the CAK, through the recent *Carrefour* decision, reflects a supplier-centric approach towards the treatment of buyer power. In this regard, both the South African and Kenyan competition Acts fail to consider the effect of the exercise of buyer power on the consumer welfare standard. Although it is otherwise common knowledge that developing countries tend to consider all market harms, as opposed to a pure consumer welfare standard, we submit that the effect on consumer welfare should be the overarching assessment and that the prejudice to suppliers and consumers and other efficiencies must at least be put to a balance.

In light of the above, it is submitted that the adoption of a buyer power framework be premised on an objective assessment to ensure clarity, certainty and equality and to allows firms to self-

regulate and to engage in commercial operations without fear of unintentionally contravening buyer power regulations.

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