



THE COMPETITION (ABUSE OF BUYER POWER) RULES, 2018

**The Competition Act
(No. 12 of 2010)**

The Competition (Abuse of Buyer Power) Rules, 2018

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**THE COMPETITION ACT
(No. 12 of 2010)**

In exercise of the powers conferred under section 24 (2C) of the Competition Act, No. 12 of 2010, the Cabinet Secretary makes the following Rules.

THE COMPETITION (ABUSE OF BUYER POWER) RULES, 2018

PART I: PRELIMINARY

Citation. 1. These Rules may be cited as the Competition (Abuse of Buyer Power) Rules, 2018.

Interpretati 2. In these Rules, unless the context otherwise requires-
on.

“Act” means the Competition Act, No. 12 of 2010;

“Authority” means the Competition Authority of Kenya established by Section 7 of the Act;

“buyer power” has the meaning assigned to it under section 24 (2D) of the Act;

“buyer undertaking” means an undertaking which has entered into contractual relations with a supplier of products;

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to Finance;

“complainant” means a person who has submitted a complaint on an alleged abuse of buyer power;

“Competition Rules” means the Competition (General Rules) 2018;

“confidential information” includes trade, business or industrial information or material that belongs to an undertaking, has a particular economic value and is not generally available to or known by others, whose disclosure might adversely harm the competitive position of a person, or as may be determined by the Authority from time to time;

“supplier undertaking” means an undertaking which proposes to enter into or has entered into contractual relations with a purchaser to supply products;

Scope of Rules.

3. These Rules shall govern the procedures relating to -
 - a) conduct of investigations into abuse of buyer power;
 - b) analysis, determination and settlement of abuse of buyer power complaints;
 - c) determination of penalties and remedies relating to abuse of buyer power.

PART II: ACTS CONSTITUTING ABUSE OF BUYER POWER

4. In assessment of buyer power, under the criteria provided for in section 24 (2B) of the Act, the Authority will consider the following factors, including:
 - i. The actual position and concentration of the buyer undertakings in the market relative to supplier undertakings;
 - ii. the commercial significance of the products in relation to the buyer undertaking;

- iii. The ability of the buyer undertaking to easily switch to competing suppliers and the supplier to easily switch buyers;
- iv. availability of substitutes;
- v. the nature of the products such as perishable life of the products; and
- vi. the bargaining strength of the buyer undertakings.

5. Pursuant to section 24 (2A) of the Act, acts constituting abuse of buyer power, shall include:

- i. delayed payment by a buyer undertaking without justifiable reasons in breach of agreed terms of payment to suppliers;
- ii. unilateral termination or threat of termination by a buyer undertaking of a commercial relationship without notice, or subject to an unreasonably short notice period and without an objectively justified reason;
- iii. refusal to receive or return of part or all goods by a buyer undertaking, without justifiable reasons in breach of the agreed contractual terms with suppliers;
- iv. **Transfer of costs;** buyers transfer of costs or risks to suppliers by imposing a requirement for the suppliers to fund the cost of a promotion;
- v. **Transfer of risks;** transferring commercial risks meant to be on buyer to the suppliers;
- vi. demand for preferential terms by buyer undertakings which are unfavourable to the suppliers or demanding limitations on supplies to other buyers

- vii. a buyer undertaking depressing prices by a small but significant amount where there is difficulty in substitutability of alternative buyers or a buyer undertaking reducing prices below competitive levels;
- viii. bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.

COMPLAINTS AND INVESTIGATIONS ON ABUSE OF BUYER POWER

Initiation of an investigation

- 6.
 - 1) An undertaking or person may lodge a complaint to the Authority on an alleged abuse of buyer power by-
 - a) submitting information concerning alleged abuse of buyer power by an undertaking or person;
 - b) filling the prescribed **Form I** in the Schedule; or
 - c) submitting an anonymous complaint to the Authority.
 - 2) Pursuant to sections 31(2) of the Act, the Authority shall make a preliminary assessment of the facts available to it to decide whether a complaint is to be subject to a full investigation.
 - 3) Where the complaint does not disclose sufficient information to make a preliminary assessment, the Authority may issue to:
 - a) a complainant a notice requesting for further information;

b) any other person a notice requesting for information; or

c) a notice to appear before the Authority for an interview.

4) Notwithstanding sub-rule (1) of this Rule, a complaint may not be considered by the Authority where-

Investigation process

a) the complaint lodged, in whole or in part, is before any court or the Competition Tribunal;

b) the complainant fails to cooperate and provide information sought by the Authority as provided in Rule 7(3).

7. Rules 8 to 14 of the Competition Rules on the investigation process will apply *mutatis mutandis* to abuse of buyer power investigations.

Settlement proceedings

8. Sections 21 to 24 of the Competition Rules on Settlement proceedings will apply *mutatis mutandis* to abuse of buyer power investigations.

Consultations with other stakeholders

9. The Authority may consult the Ministry responsible for matters of related to trade and other relevant government agencies and stakeholders, in implementing abuse of buyer power provisions under the Act.

