

Competition Law

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Does the right of first refusal in contracts violate competition laws in Kenya?



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**COMPETITION LAW
ALERT**

Does the right of first refusal in contracts violate competition laws in Kenya?

The right of first refusal is a contractual right that provides the holder with the first opportunity to match an offer from a third-party buyer, ensuring that they have a chance to purchase or acquire an asset before anyone else. This right is mostly used in lease agreements, shareholder agreements, supply contracts and joint ventures.

This article looks at whether the right of first refusal in supply contracts amounts to restrictive trade practices in the context of Kenyan competition laws.

Legal framework

The primary legislation governing competition law in Kenya is the Competition Act, Cap 504, Laws of Kenya (Competition Act), whose object is to promote and protect effective competition and prevent unfair and misleading market conduct throughout Kenya. The Competition Authority of Kenya (the Authority) is the body responsible for enforcing compliance with the Competition Act, including investigating impediments to competition in the economy as a whole or in particular sectors of the economy.

Under section 21 of the Competition Act, agreements between undertakings which have the object or effect of preventing, distorting or lessening competition in the trade of any goods and services in Kenya are prohibited unless exempted by the Authority in accordance with the Competition Act. The Competition Act sets out a non-exhaustive list of restrictive trade practices, including price fixing, market segmentation, collusive tendering, controls in production, market outlets or access, technical development or investment, applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage, and bundling of products, among others.

While the Competition Act does not specifically mention the right of first refusal as a restrictive trade practice, it is arguable that such rights may have the effect of creating exclusivity in the manner parties deal with each other, creating barriers of entry into a market. According to the Consolidated Guidelines on Restrictive Trade Practices under the Competition Act, competition concerns may arise where one of the parties in a vertical relationship – i.e. between an undertaking and its suppliers or customers or both – enjoys market power. These types of relationships are more likely to have anti-competitive effects such as market foreclosure or market exclusion.



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Case law

In the matter of *Two Rivers Lifestyle Centre (TRLC) and Majid Al Futtaim Hypermarkets Ltd (t/a Carrefour) CAK/EC/05/122/A* [2018], TRLC and Carrefour sought an exemption from the Authority with regards to a lease which prohibited TRLC from leasing any part of the Two Rivers Mall to any other hypermarket, supermarket, butchery, greengrocer and fruit and vegetable store, or permitting the expansion of any existing competitor supermarket in Two Rivers Mall without the written consent of Carrefour i.e. Carrefour's right of first refusal. The Authority rejected the exemption application, finding that the provisions of the lease effectively granted exclusivity to Carrefour which had a negative impact on competition as it imposed a strategic barrier to entry and expansion for other retailers on the establishment.

In *Airtel Kenya Limited v Safaricom Limited CAK/EC/05/34/A* [2014], Airtel Kenya Limited lodged a complaint against Safaricom alleging that Safaricom had entered into agreements with its M-PESA agents barring them from offering mobile money transfer services for competing service providers. The Authority found that as Safaricom was dominant in the mobile money transfer service market, the arrangements with its M-PESA agents had the effect of lessening competition in the market.

Comparative analysis

The question of the legality of the right of first refusal has been adjudicated in other jurisdictions. In *Director of Investigation & Research v Laidlaw Waste Systems Ltd* [1992], the Competition Tribunal of Canada (Competition Tribunal) ruled that Laidlaw Waste Systems Ltd, which

substantially controlled the lift-on-board services for waste disposal in certain markets on Vancouver Island, had abused its market power through certain contractual terms, including exclusivity of service, the right of first refusal, disclosure of competing bids, heavy switching penalties and lengthy contracts. The Competition Tribunal found that these were unfair as they limited customer choice and hindered competition. The Competition Tribunal ordered Laidlaw Waste Systems Ltd to amend its service contracts to remove the offending clauses and reduce the terms of the service contracts.

In the English case of *Arriva The Shires Ltd v London Luton Airport Operations Ltd* [2014], the court examined whether London Luton Airport Operations Ltd had abused its dominant position by granting an exclusive concession to National Express for coach services, along with a right of first refusal for future contracts. The court found that the exclusivity clause hindered competition and violated the Competition Act, 1998 by distorting market access for competitors.



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Exemption under the Competition Act

Section 25 of the Competition Act allows entities and associations to apply to the Authority to be exempted from the provisions on restrictive trade practices. However, an exemption may only be granted where there are exceptional and compelling reasons of public policy as to why the restrictive trade practice should be excluded from the prohibitions. In determining an exemption application, the Authority considers whether the arrangement is likely to contribute to or result in:

- maintaining or promoting exports;
- improving, or preventing decline in the production or distribution of goods or the provision of services;
- promoting technical or economic progress or stability in any industry;
- and obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result from the arrangement.

Conclusion

The right of first refusal is generally a legal and widely used contractual tool across various jurisdictions. However, where used to foreclose competition or limit market access, the right of first refusal may be deemed to be anti-competitive, particularly for entities controlling a significant share of the market. Where such clauses are used for strategic reasons, parties to the agreement are advised to seek the Authority's exemption so as to operate within the law.

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