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Date: 29 May 2019
Our Ref.: KO/002JM/020
Your Ref.: TBA



Director General,
Competition Authority of Kenya,
PO Box 36265 - 00200,
Nairobi, KENYA.

Dear Sir/Ma'am

RE: COMPLAINT ON SAFARICOM LIMITED'S ABUSE OF DOMINANCE IN ITS MONOPSONY MARKET AS A DOWNSTREAM CONSUMER FROM ITS COMPETITORS IN THE UPSTREAM MARKET SPECIFICALLY ON THE SUPPLY OF INNOVATIVE SOLUTIONS AIMED AT IMPROVING ITS MPESA BUSINESS

We refer to the above matter.

I. BACKGROUND AND INTRODUCTION

1. TLO Law Associates, a law firm in Kenya, act for Solut Technology Limited (hereinafter the "Complainant"), a limited liability company incorporated in Kenya under the Companies Act and carrying on its business primarily in the information, communication and technology sector.
2. Safaricom Limited (hereinafter the "Dominant Party") is a public limited company incorporated in Kenya under the Companies Act and carrying on its business primarily in telecommunication and mobile money services sector.
3. The Competition Authority of Kenya (hereinafter the "Authority") established under the Competition Act No. 12 of 2010 (hereinafter the Act) is the statutory body charged with the objective as set out under section 3 of the Act of enhancing the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya.
4. The Complainant and the Dominant Party entered into a contractual relationship for an intended collaboration that ultimately did not materialize.
5. The Complainant took issue with the conduct of the Dominant Party during and after the subsistence of its contractual relationship, which conduct it deems anti-

competitive amounting to an instance of an abuse of dominance contrary to the competition laws in Kenya.

6. That acting under this deemed anti-competitive conduct and invoking section 70A of the Act empowering the Authority to initiate investigations into consumer complaints on its own motion or upon receipt of a complaint from members of the public, the Complainant files this complaint calling on the Authority to initiate investigations on the conduct of the Dominant Party.

7. The Complainant submits that the fruits of the investigation shall be useful in the interpretation of certain aspects of competition laws. More specifically, the Complainant seeks an interpretation by the Authority on forced consents and or unilateral contracts (otherwise referred variously as individually negotiated contracts, unfair terms in contracts, unconscionable contracts, among others) arising in the course of an abusive dominant party transacting with a weak consumer/supplier of services offered and or consumed by the dominant party.

8. The Complainant wishes to guide the Authority on applicable laws; and will appreciate receipt of concrete feedback from the Authority on the legal questions raised by this complaint which feedback would be seminal and watershed on questions around unilateral and or forced consent-based contracts.

9. That in the spirit of transparency, the Complainant is in an advanced stage of instituting legal proceedings (hereinafter an intended suit) against the Dominant Party for inter alia: (i) breach of confidence leading to idea theft; (ii) breach of copyright involving computer programs to include the scheme of works; (iii) tort of deceit; (iv) unconscionable conduct on the part of the Dominant Party.

10. The Complainant registers that it has served the Dominant Party with a demand letter dated 27 February 2019; and received a response dated 6 March 2019 from the Dominant Party. The Complainant has also served the Dominant Party with a rescission of contract letter under the Consumer Protection Act dated 20 May 2019 and served on 21 May 2019.

11. That this Complaint does not occasion a multiplicity of suits for two main reasons, to wit: (i) the issues to be addressed by the Authority fall within its exclusive jurisdiction and are distinct and separate albeit related to the issues in the intended suit; and (ii) the intended suit is not alive, and therefore questions of sub-judice do not materialize at this juncture.

12. Be that as it may, the Complainant reiterates that the interpretation of the Authority on this Complaint would be useful for the intended suit and to that extent, acknowledges the apparent nexus between this Complaint and the intended suit.

THE FACTS AND LAWS IN ISSUE

13. The Dominant Party is the proprietor of the Zindua Café Platform. The Dominant Party through its Platform invites and accepts innovative ideas that provide solutions to the challenges it faces in its business.

14. Zindua Café Platform as designed requires that a subscriber submits their idea/concept/protected IP to the Platform after which the Dominant Party will screen the idea; and where successful or a potential value is identified, the Dominant Party will invite the subscriber to a session to further discuss the idea and elaborate on its usefulness to their business needs.

15. In order to complete the subscription to the Zindua Café so as to upload one's idea/concept/protected IP, a subscriber is required to accept the Terms and Conditions (hereinafter the T&Cs) (see annexed a copy of the T&Cs).

16. The subscription to the T&Cs is mandatory and attempts to operate outside the T&Cs are outrightly rejected. (Please note that the Complainant attempted to engage the Dominant Party outside the T&Cs but was compelled into entering the T&Cs before proceedings any further).

17. In addition, a reading of the response dated 6 March 2019 to the Complainant's demand letter bears forth the near absolute reliance by the Dominant Party on these T &Cs. Paragraph 2 of the said letter dated 6 March 2019 is illustrative:

"...We received your proposal via the Zindua Café on the 31 March 2016 and accepted the terms and conditions therein. We proceeded to engage you on the same so that you could provide clarity on your submission and scheduled a meeting in November 2016 which was attended by your client and four of our representatives (sic). Please note that during the meeting the Zindua engagement team were clearly explained and your client willingly proceeded to share his submission with our representatives..."

18. We contend that the Dominant Party deliberately insisted on its T&Cs knowing full well the deleterious consequences of accepting the T&Cs on the part of the Complainant.

19. It is on that premise that we construe the T&Cs to have been forcefully entered into by the Complainant in turn bringing them within the realm of forced consent-based contracts.

20. However, the binding nature of these contracts on the part of the forced party (non-consenting party) is fluid as the meeting of the minds never takes place. In most cases, the forced party has no choice but to accept the T&Cs so as to benefit in the consumption of the services on offer. Indeed, this was the case in this matter as the Complainant had no choice but to accept the T&Cs before proceeding any further with their engagement.

21. We submit that the Authority's jurisdiction is invited when such unilateral contracts in themselves have detrimental effects on competition in the market and or have negative impacts to consumers. We wish to reiterate that in this case, this unilateralism potentially has detrimental effects on competition. In addition, the unilateralism is inimical to consumer protection laws as currently subsisting in Kenya.

22. To begin with, we contend that the innovative solution being the subject of the transaction between the Complainant and the Dominant Party for which the T&Cs were subject falls within a narrowly definable market whose participants are few. In fact, by dint of its market share in the mobile money transfer services, the Dominant Party is a monopsonist in the sense that the Dominant Party was the singular consumer of the innovative solution for which the Complainant was selling or intending to sell.

23. In addition, it is noteworthy that the Dominant Party is also a supplier of the same product (innovate solution) that the Complainant intended to sell. The upshot is that both the Dominant Party and the Complainant were competitors bidding to sell a product to the Dominant Party, the singular monopsonist-consumer for the said product.

24. It is our contention that the fact that the Dominant Party plays in both the upstream market (supplier of innovative solutions) and downstream market (consumer/buyer of the innovate solution) places greater risks of abuse of dominance leading to the perpetuation of unfair trade practices.

25. For this reason, the Dominant Party's self-authored T&Cs for purposes of purchase of innovative solutions from competitors it competes with in the upstream market should be read with an abundance of caution so as to identify and flag any instances of unfair and anti-competitive trade practices.

26. We observe that the T&Cs by their breadth are couched in an unfair, unconscionable, and exploitative nature. More particularly, we find the following provisions problematic and that a cumulatively and conjunctive reading of these provisions occasion a direct assault on fair trade practices with detrimental effects to competition:

- a. The introductory paragraph to the T&Cs which gives Safaricom the absolute rights to vary the terms without obtaining the subscriber's consent: "These Terms and Conditions of Use for the Safaricom Innovation Portal ("Zindua Café") ("Terms and Conditions") govern your use of Zindua Café. Safaricom reserves the right to modify these Terms and Conditions at any time effective upon the date of posting any changes on our website;..."
- b. Paragraph 4.3 "Safaricom's receipt of your submission does not imply any promise to pay or compensate you for your submission nor is it a recognition of the alleged novelty, originality or usefulness of your idea nor does it establish any relationship which might require Safaricom to compensate you for the evaluation of the information disclosed in the submission."
- c. Paragraph 5.1 "You understand and acknowledge that other users of Zindua Café may have already submitted identical or similar ideas to Safaricom, or your idea may not be novel, or may already be under internal development by Safaricom. Accordingly, you denounce and waive any right in the future to make or lodge any claims against Safaricom or any of its affiliates or subsidiaries on the basis of alleged copying or infringement of your idea and any materials previously accepted or used by Safaricom."
- d. Should Safaricom choose to discuss any idea submitted further, such discussion shall be on a "without prejudice" basis and will be subject to a Non-Disclosure Agreement or such other definitive contracts as Safaricom may in its discretion determine." (sic).
- e. Paragraph 9.1 - You hereby warrant to Safaricom that you are the genuine creator/originator of the idea and/or the owner of all intellectual property rights comprised in the idea (if any) and where applicable possess all the necessary rights and permissions to submit the idea to Safaricom and that your submission does not violate the rights of any third party or any applicable law.

- f. Paragraph 11 - You understand and accept that Safaricom is under no obligation to compensate you for the submission of the idea unless the idea is approved and adopted by Safaricom upon successful completion of each of the idea submission stages in Zindua Café and the terms of compensation will be captured in the contract to be signed thereafter.

BEST PRACTICES

27. It is noteworthy that Kenya's laws on unfair trade practices and unfair commercial practices is still nascent. It is our observation that best practices from the Commonwealth jurisdictions is useful towards developing the law on unfair trade practices and other unwelcome analogous practices.

28. In that light, the legislation in the UK may be useful on the question of forced consent-based contracts/agreements.

29. The UK has the Unfair Terms in Consumer Contracts Regulations 1999 (UK 1999 Regulations) which address such contracts/agreements. Regulation 5 defines an unfair term to include inter alia, a contractual term which has not been individually negotiated and one that contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

30. Regulation 5 defines individually negotiated terms to be those terms drafted in advance and which the consumer has therefore not been able to influence the substance of the term.

31. Regulation 8 renders such unfair terms in a contract concluded with a consumer by a seller or supplier to be non-binding on the consumer to the existence of its unfairness.

32. The upside is that the UK Regulations render such unfair terms invalid to the extent of their unfairness. The UK is replete with case laws on the application of such contracts with the general trajectory being the invalidation of unfair terms where stronger parties abuse weaker parties by using individually negotiated contract.

33. It is our submission that the Safaricom T&Cs in this particular case falls within the confines of individually negotiated contracts/agreements and to that end, the unfair terms should suffer the same fate of legal invalidity.

34. It is instructive to note that the UK Regulation was promulgated in transposition of the EU Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (the EU Directive 93).

35. Article 3 of the EU Directive 93 is illustrative:

- a. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
- b. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formatted standard contract.
- c. ...the annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

36. Indeed, the terms contained in the annex to the EU Directive 93 capture some of the unfair terms in our case. Some of the terms contained in the annex are as follows:

- a. 1(b) - inappropriately excluding or limiting the legal rights of the consumer vis a vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations.
- b. 1(c) - making an agreement binding on the consumer whereas provisions of services by the seller or supplier is subject to a condition whose realization depends on his own will alone.
- c. 1(f) - authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer.
- d. 1(i) - irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.
- e. 1(m) - giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract; and
- f. 1(q) - excluding or hindering the consumer's right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the

evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

37. The ECJ's leading interpretation of the EU Directive 93 was rendered in case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona I Manresa (Catalunyacaixa)* (hereinafter the Aziz case).

38. Paragraph 69 of the Aziz case is imperative as it captures the court's observation that an unfair term would be assessed on whether a seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in an individual contract negotiation. In other words, a term would be declared unfair if it is a term that a consumer would object to had the bargaining table been equal.

CONCLUSION

39. We submit that the T&Cs as authored by the Dominant Party are unfair on their anticipated consumers. These consumers, like the Complainant in this case, have no choice but to accept the said T&Cs if they so wish to engage with the Dominant Party.

40. These practices perpetrated by the Dominant Party are anti-competitive with detrimental effects to consumers. It is on that premise that we urge the Authority to investigate the conduct and advise on the legality of the said anti-competitive conduct.

41. We remain happy to assist the Authority in any way necessary towards the full investigation and resolution of this complaint.

Yours faithfully,
TLO LAW ASSOCIATES



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cc

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2. Client