

Big grocers in cross hairs of broad market inquiry

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SA's grocery heavyweights face a fresh Competition Commission inquiry. Established by Economic Development Minister Ebrahim Patel, this one has a wider ambit than the previous probe that cleared the big supermarkets of anticompetitive activities and price-fixing...



Maiponya Mall in Soweto has given big supermarkets access to the township in which independent retailers previously ruled the roost.

Image credit: [Kevin Sutherland/Sunday Times](#)

The watchdog's overarching purpose is to examine whether there are features in the grocery retail sector that lessen, prevent or distort competition.

This time, the small fish have centre stage. Most of the six major areas of the inquiry deal with the market dynamics of small and independent retailers including foreign operators.

Slowing income growth, high household debt and the rising cost of living have prompted big retailers to launch an aggressive space race to capture consumers' spend - both in city suburbs and townships serviced by smaller players.

Announcing the inquiry during his budget vote this year, Patel said the retail sector contributed to growth in jobs, and the small retail sector was a critical economic entry point for black South Africans. This suggests the scope of the inquiry goes beyond competition concerns.

Robert Wilson, a partner at Webber Wentzel's competition practice, says the breadth of the inquiry is less about the commission hoping it will find something that will stick, and more about pursuing its public interest mandate in the context of a market inquiry.

In balancing competition and public interest considerations several difficult questions emerge.

"Could the promotion of small retailers lead to inefficiencies and higher prices for consumers?" Wilson asks.

"Balancing only public interest considerations also presents challenges. For example, given that small retailers typically do not employ unionised workers, how will the inquiry be viewed by the trade unions, and could support for small retailers result in diminished working conditions?"

He adds that while Patel's motives for asking for the inquiry might be well-intentioned, some will question whether this type of intervention will ever achieve the desired outcome and whether it will increase the already high levels of confusion over the government's economic and social policies.

The most contentious issue to be scrutinised in the retail inquiry is that of lease exclusivity at malls - a battle being fought largely among big retail chains.

In its previous inquiry into retailers, the Competition Commission said it was concerned about the potential damping effects of exclusive leases on competition, but it found insufficient evidence to pursue any cases.

However, that was before Massmart's Game stores launched a major food strategy. The chain has encountered opposition at some malls because exclusivity provisions in lease contracts in terms of which the biggest grocers are anchor tenants, block the sale of certain types of perishable food and dry groceries by other large retailers. Exclusivity clauses have been commonplace in the grocery sector for years and are defended on the grounds that they protect big retailers' investments - chains often spend more than R30m setting up larger-format new stores and do not want their trade affected by another large anchor store or smaller businesses. Fresh food offerings bring footfall to malls.

The South African Property Owners' Association (Sapoa), the representative body and official voice of the commercial and industrial property industry, has for years raised its concerns about the anticompetitive effects of exclusive lease agreements.

On behalf of its members, the organisation recently lodged a complaint with the Competition Commission and asked it to reopen its investigation into exclusivity clauses and to include the broader prohibitive practice of long-term leases in shopping centres.

"Exclusive lease agreements harm competition to the clear detriment of the consumer. They restrict entry into the market by competing retailers, especially when a retailer's entry strategy requires scale of activity and buying, distribution and selling networks," says Sapoa CEO Neil Gopal.

"Besides excluding potential new entrants - including independent and small retailers - long-term, exclusive lease agreements reduce competition between supermarkets and broader competitors.

"The anticompetitive effects and outcomes, including higher prices, are to the detriment of consumers, who prefer multiple grocery retailers at shopping centres to benefit from greater variety and choice.

"Sapoa's members are unmistakably against these types of clauses. Sapoa considers exclusive lease agreements highly undesirable and requires the commission to give a definitive ruling on the anticompetitive effects of exclusive lease agreements once and for all."

Mark Stevens, whose company Fortress Income Fund acts as the marketing manager for the South African Real Estate Investment Trust Association, says exclusivity clauses are archaic and legal changes are needed to make them unenforceable.

"We have never signed an exclusivity clause and we will never sign one. A challenge many landlords face is that once in an agreement, the clauses are difficult to work around," he says.

Recent court cases on exclusivity clauses involving Shoprite, Pick n Pay, Massmart and Fruit & Veg City's Food Lover's Market delivered mixed results. In some instances exclusivity clauses have been relaxed but Massmart has hit a brick wall, spurring it to file a complaint with the Competition Tribunal in September last year.

The Walmart-owned group believes that the lease exclusivity clauses enforced by entrenched grocery retailers are "intuitively anticompetitive". For Massmart's parent, this is a curious position - the world's largest retailer is notorious for putting mom-and-pop stores out of business due to its clout with suppliers.

SA's grocers have been served notice of the inquiry by the commission. Woolworths says it welcomes clarity on exclusivity agreements, as it will help guide its expansion plans and "more competition in malls would offer customers more choice".

Pick n Pay maintains that small, independent shops play an important role alongside major retailers, and says it looks forward to engaging positively on this with the commission.

"The commission completed a five-year inquiry into the retail sector and the impact of long-term exclusive lease agreements barely a year ago. It concluded then that it had no basis for pursuing the matter further," a Pick n Pay spokesman says.

"Launching another inquiry now into the same issues will be hugely costly on resources. Consumers and taxpayers will be the losers.

"However " we look forward to explaining how exclusivity provisions have over many years helped give developers and retailers the confidence to invest and serve customers better. Exclusivity provisions usually do not apply to local, independent businesses and good retailers can grow quickly and successfully in SA."

In 2006, Tesco, Morrisons, Asda and Sainsbury's found themselves under a similar spotlight when the UK's Competition Commission conducted an inquiry in the grocery retail market.

It's likely that some of the outcomes of the South African inquiry will mirror those of the UK process, says Jason van Dijk, a competition lawyer at Norton Rose Fulbright.

"The UK inquiry resulted in an array of remedies being recommended for implementation by the government, regulators or public authorities, including that large grocery retailers remove restrictive elements from their agreements with their supply chain and industry players," he says.

"And that the government introduce a 'competition test' as part of the planning system when large grocery retailers or property developers apply to construct or develop large stores or shopping centres, aimed at preventing the emergence or strengthening of the already highly concentrated market."

The Competition Commission is also conducting market inquiries into private healthcare and the liquefied petroleum gas sectors, and questions are being raised about whether it is overextending itself.

"It remains to be seen whether the commission will be able to adequately resource this inquiry," says Wilson.

"While they might appoint an independent panel of experts, the panel will need to be supported by individuals from the commission. This means the commission's other functions might be compromised, such as investigating mergers and alleged contraventions of the act."

The commission's next step will be to consider comments made on its draft terms of reference.

"We will see what we need to add or alter and then, after 14 July, we will determine a date when we will formally launch the inquiry," says Competition Commission spokesman Mava Scott.

Source: BDpro

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