

CPI's Africa Column Presents:

The Grocery Retail Sector Market Inquiry In South Africa

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The Competition Commission of South Africa has initiated its third general market inquiry—the first inquiry was into the retail banking sector and the second, ongoing, inquiry is into the private healthcare sector. The Inquiry will focus on shops that primarily sell fast-moving consumer goods, whether as wholesalers or retailers, particularly in townships, peri-urban areas, rural areas and the informal economy. In this article, the authors outline the Inquiry’s basis, scope and procedural context.

1. Introduction

On 27 November 2015, the Competition Commission of South Africa (“Commission”) initiated a market inquiry into the South African grocery retail sector (“Inquiry”) and published its Terms of Reference (ToR) in terms of section 43B of the Competition Act No. 89 of 1998, as amended (“the Act”). The initiation of the Inquiry was prompted largely by increased complaints to the Commission regarding the prevalence of exclusivity clauses in lease agreements between property developers and national supermarket chains. In 2014, the Commission concluded an investigation into exclusive leases entered into between large retail shopping centres and retail anchor tenants, finding that there was insufficient evidence to conclusively demonstrate the anticompetitive effects of the leases—it nonetheless remained concerned with the potential dampening effects of the effects of leases on competition, particularly in relation to small competitors and potential entrants.

2. Inquiry rationale and scope

Section 43A of the Act empowers the Commission to conduct a formal inquiry in respect of the general state of competition in a market for particular goods or services without necessarily focussing on the conduct or activities of any particular firm. A market inquiry under the Act is thus a general investigation into the state, nature and form of competition in a market, rather than a narrow investigation of specific conduct by a particular firm or a group of firms.

The purpose of the Inquiry is twofold, namely (i) to ascertain whether there exist features within the grocery retail sector that may lessen, prevent, restrict or distort competition; and (ii) to pursue the objectives of the Act, which include the promotion and maintenance of competition within South Africa in order to provide consumers with competitive prices and product choices, and to promote public interest goals. Those goals include the increased

participation of small and medium-sized enterprises in the economy, a greater spread of ownership (in particular to increase the ownership stakes of historically disadvantaged persons), the promotion of employment, and the advancement of social and economic welfare of South Africans.

For the purposes of the Inquiry, the definition of the grocery retail sector includes the activities of all traders that predominantly sell fast-moving consumer goods (such as food, toiletries, and liquor). Whilst the Inquiry will assess the sector generally, it will have a specific focus on competition dynamics in townships, peri-urban areas, rural areas and the informal economy and the impact of barriers to entry and expansion on small and independent retailers who are active within this sector.

The Inquiry has outlined six main objectives for conducting its assessments, namely:

- (i) The impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;
- (ii) The impact of long term exclusive leases on competition in the sector;
- (iii) The dynamics of competition between local and foreign owned small and independent retailers;
- (iv) The impact of regulations, including inter alia municipal town planning and by-laws on small and independent retailers;
- (v) The impact of buyer groups on small and independent retailers; and
- (vi) The impact of certain identified value chains on the operations of small and independent retailers.

3. Procedural aspects of the Inquiry

The Inquiry Panel, which is tasked with co-ordinating the Inquiry, consists of Professor Halton Cheadle (Chairman), Ms. Lulama Mtanga (Competition Law specialist) and Mr. Lumkile Mondi (Economist). A technical team, comprising economists and lawyers, has been appointed from the Commission's existing staff component to support the Inquiry Panel in collecting and analysing all available information in the grocery retail sector that is relevant to the Inquiry's objectives.

The Inquiry is vested with various powers with which to gather information, including: general research, literature reviews, information requests, meetings, site visits, issuing summons for information and appearance, interrogations, calls for submissions, and public hearings.

The participation of industry stakeholders is paramount to the success of the Inquiry as they are a vital source of information. The Inquiry therefore encourages the participation of every affected entity, including, among others: consumers; firms that are directly or indirectly involved in the grocery retail sector (whether large or small); and firms who may not be involved in the grocery retail sector but whose business operations may have an impact on the competition dynamics within that sector (such as finance institutions, firms active in the property market, and suppliers). The Inquiry is currently in its information-gathering phase, which will conclude in February 2017. Thereafter, once the Inquiry has completed its public hearings, data analysis and its assessment of the sector, the Inquiry will submit a report to the Minister of Economic Development and publish a non-confidential version. This report will provide a detailed overview of the sector, the Inquiry's findings and possible recommendations to address any factors that the Inquiry believes may stifle competition within this sector (if any). These may include recommendations for new or amended policy, legislation or regulations, and recommendations to other regulatory authorities in respect of competition matters.

Finally, upon completion of the Inquiry, the Commission is able to take any of the following actions:

- (a) Initiate a complaint and enter into a consent order with any respondent, with or without conducting any further investigation;
- (ii) Initiate a complaint against any firm for further investigation;
- (iii) Initiate and refer a complaint directly to the Competition Tribunal without further investigation;
- (iv) Take any other action, within its powers in terms of the Act, which has been recommended in the Inquiry's report; or
- (v) Take no further action.