

MEDIA RELEASE

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Commission non-refers supermarkets investigation

The Competition Commission has concluded its investigation into exclusive lease agreements entered into between supermarkets and property developers, owners and managers of shopping malls (landlords). The Commission has found that this practise raises barriers to entry into grocery retailing. However, the investigation did not find sufficient evidence to meet the tests set out in the Competition Act for demonstrating anti-competitive effects.

In June 2009, the Commission initiated an investigation against the major supermarket chains and wholesale-retailers (namely Pick n Pay, Shoprite, Woolworths, Spar, Massmart and Masscash) for various alleged contraventions of sections of the Competition Act, including substantially preventing or lessening competition, and engaging in exclusionary conduct.

The Commission examined various competition concerns in grocery retail, including buyer power, category management, information exchange and long term exclusive lease agreements, focusing mainly on staple foods. In 2011 the Commission concluded its investigation into the first three activities and took the decision to focus on the practice of concluding long term exclusive lease agreements between food retailers and landlords which required further investigation. Exclusive leases usually give the supermarkets, who play a role as 'anchor tenants', the sole right to trade as food retailers in the shopping centre, and often also include restrictions on the type of non-supermarket tenants the landlord can allow in the centre, preventing competing bakeries, butcheries and other part-line stores from entering the centre.

The Commission's preliminary views were that long term exclusive lease agreements could give rise to considerable competition concerns and could amount to practices that restrict (sections 5(1)) or exclude or impede (section 8(c) and 8(d)(i)) competition. The Commission's concerns included the exclusionary effect of the conduct on competition and the heightening of entry barriers for smaller and independent firms, such as Fruit & Veg City who also laid a complaint with the Commission regarding the same conduct. The Commission also received various complaints from other parties affected by similar conduct. These complaints were investigated in conjunction with the Commission's own initiation.

The Commission conducted an investigation into the exclusive leases, looking at local markets across the country where exclusive leases had been agreed and enforced by the three major supermarket groups (Pick n Pay, Shoprite and Spar). The investigation established that the respondents were dominant in certain local markets and that they would often compel landlords not to deal with competitors (by entering into exclusive lease agreements with landlords in return for agreeing to

'anchor' the centre). The Commission found that in some instances supermarkets would take action against landlords where they may have breached the exclusivity clause and brought in another supermarket or part-line store into a mall.

However, on the basis of the evidence before the Commission, the anti-competitive effects of the conduct could not be demonstrated conclusively. The evidence did not meet the tests required in order to prosecute the firms involved and therefore the Commission has taken the decision not to refer the matter to the Tribunal.

Notwithstanding this, the Commission remains concerned about the barriers to entry into the grocery retailing industry and the potential dampening effects of exclusive leases on competition, particularly as they affect small competitors and potential competitors. Further concern is raised since exclusivity is usually a blanket requirement of the supermarket groups requested in all new developments regardless of the level of risk or projected returns. Additionally, exclusive leases can last for up to 40 years, depending on the length of the lease agreement.

The Commission therefore aims to address the residual competition concerns arising out of the conduct of the respondents through advocacy engagements with key industry stakeholders including landlords and supermarkets. The Commission will advocate against the parties entering into long term exclusive agreements as by default for each new development and encourage their use only where justified by the investment made by the supermarket in a particular centre.

The Commission will also advocate that the length of exclusivity granted should be related to the length of financing agreements or the period required to recoup the initial investment. The Commission is pleased with the Banking Association's written undertaking that banks (big 5) no longer require an exclusive agreement between the developers and anchor tenants as a condition for funding.

ENDS

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