Introduction

2009: The Supermarket Investigation announced

On 29 June 2009, the Competition Commission ("Commission") initiated an investigation against the major South African supermarket chains namely Pick ’n Pay, Shoprite/Checkers, Woolworths and Spar, as well as the major wholesaler-retailers, Massmart and Metcash, for alleged contraventions of the Competition Act, 89 of 1998 ("Act").

The investigation initiation was premised on a preliminary review of industry practices by the Commission and structural characteristics identified by the Commission in the industry. The Commission identified several potential concerns which included a concern in relation to long-term exclusive leases. The concern specifically related to property developers entering into exclusive anchor lease agreements with major retailers for periods as long as 20 years. In addition to exclusive lease agreements, the Commission also identified concerns relating to the concentration of buying power, category management and information exchange.

The Commission determined that in terms of the exclusive leases, supermarkets that play a role as ‘anchor tenants’ were given the sole right to trade as food retailers in the shopping centre, and often these leases also included restrictions on the type of non-supermarket tenants the landlord would be able to allow in the centre, preventing competing bakeries, butcheries, and other part-line stores from entering the specific shopping centre.

2011: The Commission’s partial findings in the supermarket investigation

The Commission concluded part of its supermarket investigation on 27 January 2011. Whilst the investigation revealed that there was insufficient evidence to show contraventions in terms of the Act pertaining to abuse of buyer power, category management and information exchange, the Commission remained concerned with long-term exclusive leases.
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 competition or exclude or impede 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.

The Commission conducted an in-depth investigation into the exclusive leases by 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 major supermarket groups 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 the landlords may have breached the exclusivity clause and brought another supermarket or part-line store into a mall.²

2014: Notice of non-referral by the Commission

On 24 January 2014, the Commission announced that it had concluded its investigation into exclusive lease agreements entered into between supermarkets and property developers, owners and managers of shopping malls (i.e. landlords). The Commission found that exclusive lease agreements raised barriers to entry into grocery retailing. However, they found insufficient evidence as to a contravention of the Act and anti-competitive effects of exclusive lease agreements could not be demonstrated conclusively. The evidence before the Commission did not meet the tests required in order to prosecute the firms involved in terms of the Act and therefore the Commission issued a notice of non-referral.³

Lingering concerns about the potential dampening effects of exclusive leases on competition

Despite its notice of non-referral, the Commission has stated that it remains concerned about the barriers to entry into the grocery retailing industry and the potential dampening effects of exclusive leases on competition, particularly as exclusive leases affect small competitors and potential competitors. A further concern that lingers for the Commission is in relation to the “blanket exclusivity requirement” by the supermarket groups, regardless of the level of risk or projected returns.

As a result of its lingering apprehension in relation to exclusive leases, the Commission will in future aim to use advocacy engagements with key industry stakeholders (including landlords and supermarkets) to bring about change as required by them. The Commission deems it important to advocate –

- against the parties entering into long-term exclusive agreements, and to encourage the use of exclusivity only where the exclusivity can be justified on the basis of the investment made by the supermarket in a particular centre; and
- that the length of exclusivity granted should be linked to the length of financing agreements or the period required to recoup the initial investment.

Addressing exclusivity clauses through merger control

While there has been no proof evidencing a contravention of competition legislation in respect of exclusivity clauses in lease agreements, the Commission is insistent upon addressing these clauses through merger control.

There has been an array of merger transactions between 2009 and 2013 wherein the Commission has required that the merging parties agree to a condition involving a negotiation with the supermarket tenants to remove the exclusivity terms from the anchor leases.

In a variety of merger transactions, the Commission has found that exclusivity clauses in lease agreements have had the effect of excluding rivals of the anchor tenants. There is also a concern in terms of section 12A(3)(c) of the Act, inter alia, the ability of small firms to become competitive. The Commission has maintained that exclusivity clauses in lease agreements have the effect of preventing small businesses - such as butcheries, bakeries and delicatessen stores - from competing effectively in shopping centres and from gaining access to rentable retail space in such centres.

In order to address the Commission’s concerns, merging parties have had to agree to a condition to negotiate in the utmost good faith with the lessees in respect of the current effective lease agreements to have the exclusivity clause contained therein removed at the approaching renewal date.

Conclusion

Section 12A(3)(c) of the Act: The ability of small businesses to become competitive

In terms of efficiencies, it can be argued that it is vital to have an anchor tenant in a shopping centre in order to attract consumers to the shopping centre. An anchor tenant will result in increased footfall, which will be beneficial for smaller businesses in terms of exposure. It should be borne in mind that an anchor tenant has the ability to attract more people to the mall than the other tenants and is therefore vitally important to the smaller tenants.

The significance of an anchor tenant should therefore not be underestimated. For the consumer, it is respectfully submitted that a quality tenant in a shopping centre is of importance as well as convenience. It would therefore be advisable for the Commission to adopt a sensible approach, carefully balancing the interests of consumers on the one hand and the interests of small businesses, anchor tenants and landlords on the other. The final aim of the Commission should be quality offerings to the consumer at prices that don’t exploit. And this should be advocated at all times.

2 Media Release, “Commission non-refers supermarket investigation”, issued by the Competition Commission on 24 January 2014
3 Ibid

4 2012 Dec 0740; Tribunal Case No: 016170; Tribunal Case No: 016519; Tribunal Case No: 016683
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