South Africa: Grocery Retail Market Inquiry Final Recommendations

1. The Competition Commission initiated a market inquiry into the grocery retail market on 30 October 2015. More than four years later, on 25 November 2019, the Commission’s final report was published.

2. A brief summary of the key recommendations made by the Commission, specifically relating to long-term exclusive lease agreements and buyer power, is set out below. The recommendations are not legally binding and compliance is voluntary.

   Long-term exclusive lease agreements

3. The Commission has recommended that the ‘national supermarket chains’ (defined as Shoprite, SPAR, Pick ‘n Pay, Woolworths and Massmart) must, with immediate effect, cease enforcing exclusivity provisions, or provisions that have a substantially similar effect, in their lease agreements against:

   (A) Small Medium and Micro Enterprises (or SMMEs);
   (B) Speciality stores such as butcheries, liquor stores, bakeries, fishmongers, fresh fruit and vegetables and delicatessens;
   (C) Other grocery retailers (including the emerging challenger retailers) in shopping centres located in non-urban areas.

4. There appear to be some inconsistencies between this recommendation and the substance of the final report including that ‘Massmart grocery stores’ is listed as an example of an ‘emerging challenger retailer’ while ‘Massmart’ is also being considered to be a ‘national supermarket chain’.

5. In addition, the Commission has recommended that no new leases or extensions of leases by grocery retailers may incorporate exclusivity clauses (or clauses that have substantially the same effect) or clauses that may serve to restrict the product lines, store size and location of other stores selling grocery items within the shopping centre.

6. This appears to relate to all grocery retailers, and not only ‘national supermarket chains’. This recommendation essentially means that any grocery retailer, even an independent grocery retailer who may not be dominant in any market, is prevented from negotiating a contractual advantage, such as exclusivity for any period of time.

7. Finally, the Commission recommends that the enforcement of exclusivity by the ‘national supermarket chains’ as against other grocery retailers must be phased out by the next extension of the lease or within five years from the date of the publication of the final report, whichever is earlier.

8. The Commission will seek to secure voluntary compliance by the ‘national supermarket chains’ (and not all grocery retailers, despite one of the recommendations appearing to relate to all grocery retailers).
These recommendations do not preclude the Commission from pursuing litigation in respect of the existing complaints and evidence gathered in the Inquiry.

**Buyer power**

10. The Commission recommended that suppliers of fast moving consumer goods must ensure that:

(A) trade terms are uniformly available to all retailers, wholesalers and buyer groups;

(B) the trade terms offered have an objective justification based on cost savings, supply chain efficiencies, efficient risk-sharing or sales promotion. The supplier must clearly stipulate and communicate the link between the trade terms offered and the efficiencies to all retailers, wholesalers and buyer groups;

(C) the available trade terms and the conditions required to qualify for those terms are clearly communicated to all retailers, wholesalers and buyer groups and applied in a fair and uniform manner;

(D) the percentage value provided under each trade term to different customers is reasonably related to qualifying criteria and value provided in respect of the objective justification for the trade term; and

(E) the volume purchased may not form the basis for qualification or relative percentage value offered for any trade term to the designated class of retailers or wholesalers.

11. The possible impact of these recommendations on consumers may not be what the Commission intended; it is possible that dominant suppliers may refuse to offer trading terms to large retailers on the basis that they are not available to smaller retailers which may have the consequence of higher consumer prices.

12. In addition, in order to address the challenge faced by small suppliers in accessing shelf space of the national retail chains, the Commission will engage with the large national retail chains on their procurement practices to ensure that the procurement practices are aligned with the buyer power guidelines (once adopted), failing which, consideration should be given to initiating an investigation into these firms’ trading practices.

13. The draft buyer power guidelines set out, among other things, a provisional list of trading practices that the Commission will consider unfair for dominant buyers in the grocery retail sector to impose on or require from small and medium businesses (or SMEs) and firms controlled or owned by historically disadvantaged persons, and therefore which the Commission will consider to be in breach of the new section 8(4) of the Competition Act. Refer to the discussion here regarding the draft buyer power guidelines and what practices are considered unfair for purposes of the buyer power provisions.

14. Finally, the enterprise development programmes of the national retail chains should be formalised and strengthened. The Commission recommends that the ‘national supermarket chains’ make industry commitments to a formal ongoing programme to develop small and historically disadvantaged suppliers.

(A) Such a programme should establish binding industry targets for a proportion of turnover to be supplied by SMMEs and historically disadvantaged suppliers, as well as a proportion of turnover to be spent on the development of new SMME and historically disadvantaged suppliers.
(B) These may initially be set in line with current enterprise development spend in order to formally bind such programmes. However, the formal commitments should also entail a gradual escalation of these binding commitments over time. This escalation should take into account what is realistic and achievable but should also be ambitious in its efforts to address concentration in the supply chain.

(C) Given that it is also the government department that oversees the Broad-Based Black Economic Empowerment codes of practice which incorporate an enterprise development component, this industry commitment may be facilitated by the Department of Trade and Industry.
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