

Call for definitive ruling on exclusivity clauses

Property owners, represented by the South African Property Owners Association (SAPOA), have officially asked the Competition Commission to make definitive ruling on the anti-competitive effects of exclusivity clauses.



Neil Gopal, CEO of SAPOA

The large grocery retailers in South Africa stand accused of anti-competitive behaviour, through their broader prohibitive practice of long-term exclusive leases in shopping malls. SAPOA has levelled a formal complaint that names Pick n Pay, Shoprite and Spar groups, but notes these are only some of a wider number of retailers that are parties to the conduct, which SAPOA asserts is anti-competitive.

Exclusivity clauses are usually requested by larger tenants as a condition for entering into long-term lease agreements, specifically in large retail centres.

Supermarket chains and property developers enter into and enforce long-term exclusive leases through so-called 'anchor tenancy'. Typically, these leases are of a minimum period of ten years, with renewal options up to 40 years. This means competing retail chains are excluded from particular shopping centres by 'Use and Exclusiveness' clauses in lease agreements. However, it is only competing chains that are excluded. Specialist stores, such as fruit and vegetable sellers, liquor stores and full-line grocery stores, are excluded in shopping malls where any one of the main supermarket chains is the anchor tenant.

The retailers named in the complaint are among those that have concluded and continue to seek to enforce the exclusivity clauses and thus exclude competitors.

Detrimental to consumers

Neil Gopal, CEO of SAPOA, comments, "Exclusivity clauses harm competition to the clear detriment of consumers. 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.

"Besides excluding potential new market entrants, including independent and small retailers, long-term exclusive leases also reduce competition between supermarkets and broader competitors. The anti-competitive effects and outcomes, including higher prices, are to the detriment of consumers."

Previous investigations

This will not be the first time the Competition Commission has turned its attention to long-term exclusive leases in shopping malls.

SAPOA's complaint notes that in January 2011, the Competition Commission concluded part of its investigation against the four major supermarkets and found exclusive lease arrangements are of great concern and could result in anti-competitive effects in circumstances where supermarket chains have market power within the relevant local markets, and its analysis to date indicates that this may amount to a contravention of the Competition Act, particularly where supermarkets have market power.

"In several recent merger applications before the Competition Tribunal, involving commercial or retail property, the Tribunal has imposed a condition to the merger approval that the parties to exclusivity clauses in leases negotiate in good faith to seek an end to the relevant exclusivity clauses."

However, the pervasive nature of the practice in the retail sector shows that asking parties to negotiate to drop exclusivity clauses is insufficient. "Instead it is perpetuating anti-competitive behaviour."

Moreover, SAPOA contests the issue cannot be resolved on a case-by-case basis. "It is impractical, expensive and wasteful of resources to have to bring complaint proceedings in respect of each lease agreement."

He explains the anti-competitive effects may be much broader than immediately evident. "A shopping centre where an anchor retailer has an exclusivity clause in its lease will prevent new market entrants, on a regional and national level. It will stifle competition and prejudice the consumer."

In addition, should a supermarket seek a ruling from the Competition Commission regarding the anti-competitive nature of an exclusivity clause in a lease, resources required for references to the Tribunal are extensive.

SAPOA has urged the Competition Commission to make a definitive ruling on the anti-competitive effects of exclusivity clauses.

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