

**SECTION27 SUBMISSIONS ON THE TERMS OF REFERENCE FOR
THE GROCERY RETAIL SECTOR MARKET INQUIRY**

3 July 2015

1. SECTION27 is a public interest law centre that seeks to influence and use the law to protect, promote and advance human rights. One of our priority areas is the right of access to food and the right of children to basic nutrition as guaranteed by section 27 and 28 of the Constitution of the Republic of South Africa. As an organisation that acts in the public interest we are concerned about the accessibility, availability and adequacy of food and, given that the vast majority of people in South Africa buy food, the functioning of the grocery retail sector and the value chains that lead to the retail of food are of interest to us.
2. We therefore welcome the initiation of a market inquiry into the grocery retail sector and look forward to engaging further on the issue.
3. We make this submission in response to the Commission's call for public comment on the Terms of Reference for the Grocery Retail Sector Market Inquiry. We make submissions on three broad issues and further brief comments on three general matters, namely:
 - A. The reason for initiation of the Grocery Retail Sector Market Inquiry
 - B. The constitutional context, the right to food and the Grocery Retail Sector Market Inquiry
 - C. The subject matter or scope of the Grocery Retail Sector Market Inquiry

D. General comments:

- Timelines
- Composition of the panel of experts
- Methodology

A. REASON FOR INITIATION OF THE GROCERY RETAIL SECTOR MARKET INQUIRY

4. In section 2.3 of the Terms of Reference, it is stated that the Commission is initiating the Grocery Retail Sector Inquiry because it has reason to believe that there are features in the sector that may prevent, distort or restrict competition. The Competition Act 89 of 1998 provides for an additional reason for conducting a market inquiry - to achieve the purposes of the Act.¹ It is our view that it is important to recognise the Grocery Retail Sector Market Inquiry as intended to achieve the purposes of the Act, including in particular the broad public interest goals to promote development of the economy, to provide consumers with competitive prices, to advance the social and economic welfare of South Africans, and to ensure broader participation in the economy and a greater spread of ownership.
5. The purposes of the Act that are listed above make it clear that the Act intends to go further than merely to prevent the distortion or restriction of competition. Instead, the Act is intended to ensure that the public interest in a well-functioning market that takes the social and economic welfare of South Africans into account is pursued.² Given that the South African National Health and Nutrition Survey, published in 2012, found that 26.0% of the population experiences hunger and

¹ Section 43B(1)(ii).

² See further, Timothy Fish Hodgson, "Public interest, the Constitution and the Health care Inquiry: preventing patients from becoming the victims of market failure" [Hodgson] (2014) Competition Commission of South Africa: Eighth Annual Conference on Competition Law, Economics & Policy part I and II, available at <http://www.compcom.co.za/assets/Uploads/events/Eighth-Annual-Conference/Parallel-2A/Public-interest-the-Constitution-and-the-Private-Healthcare-Inquiry-preventing-patients-from-becoming-the-victims-of-market-failure.pdf>

28.3% of the population was at risk of hunger, the social and economic welfare of South Africans is clearly not being advanced within the market.

6. In recognising as a reason for the initiation of the market inquiry the need to ensure that the purposes of the Act are achieved, the Commission would indicate the market inquiry's firm grounding in the Act and the public interest.

B. THE CONSTITUTIONAL CONTEXT, THE RIGHT TO FOOD AND THE GROCERY RETAIL SECTOR MARKET INQUIRY

7. It is necessary, in conducting a market inquiry into the grocery retail sector, to paint the constitutional context, which differentiates the market for the retail of food from other "ordinary" markets for goods and services, and the grocery retail sector in South Africa from grocery retail sectors elsewhere in the world. This constitutional context should be acknowledged in the Terms of Reference and must inform the competition analysis that the Panel undertakes.

8. The Constitution provides in section 27 that:

- (1) Everyone has the right to have access to-

...

- (b) sufficient food and water

...

- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

...

9. Section 28 of the Constitution further provides:

- (1) Every child has the right-

...

- (c) to basic nutrition ...

10. The right to food is unusual among socio-economic rights in the extent to which the realisation of the right implicates private parties. The state does not and cannot produce food in the way that it provides health care services, water or education. Instead, the state's role is primarily, though not only, the development of policy and law and the regulation of producers and others in the food value chain to ensure that food is available and accessible. At present, policy on the right to food security is scattered and unclear and the state appears not to be fulfilling its regulatory function adequately. In addition to the constitutional obligation on the state to realise the right to food, section 8 of the Constitution provides for the horizontal application of rights, meaning that there is, at the very least, an obligation on participants in the food sector not to hamper people's access to food.
11. A market inquiry that examines the retail of food, therefore, deals not with an ordinary market for goods and services but with a market in which the goods traded are constitutionally entrenched rights and those trading in and regulating the market both have constitutional obligations in relation to that market. The constitutional framework is part of the historical and present context of an existing market that the Competition Tribunal has acknowledged should be considered in the assessment of competition.³
12. We therefore submit that the right to access to food ought to inform the Panel's competition assessment throughout: the Panel's competition assessments themselves should be focused both on ensuring an efficient grocery retail market and on ensuring an equitable market, which is able to meet the needs and right of people in South Africa to access food. Both the practices of dominant retail players and the regulatory gap impacts the efficiency and equitability of the market and the realisation of the right to food and should be in the focus of the Panel. This framing should be reflected in the Terms of Reference.

³ G Makhaya & S Roberts "Expectations and outcomes: considering competition and corporate power in South Africa under democracy" (2013) *Review of African Political Economy* Vol 40 (138) 556.

C. SUBJECT MATTER OR SCOPE OF THE GROCERY RETAIL SECTOR MARKET INQUIRY

13. The subject matter of an inquiry should be clear and ascertainable from the title of the inquiry and the Terms of Reference.
14. While, from the title of the inquiry, the subject matter of the Grocery Retail Sector Market Inquiry appears to be the grocery retail sector as a whole, from our reading of the scope of the inquiry as contained in the Terms of Reference, it seems that the Grocery Retail Sector Market Inquiry will largely focus on the grocery retail sector in townships, peri-urban and rural areas and the informal economy. In addition, the scope of the inquiry appears to be focussed on impacts of various factors on small and independent retailers and not on impacts (in particular of supermarket dominance) on consumers and (particularly small) producers.
15. In developing the subject matter or scope of the inquiry it may be useful for the Commission to consider the array of matters relating to food and the food sector that it and the Competition Tribunal have dealt with, beyond the most recent complaints. These include the following:
 - a) In 2012 the Competition Commission reached a settlement agreement with Astral Operations in which Astral admitted to colluding with its competitor to fix the price of poultry in the Western Cape. Astral also admitted that the terms of its Elite joint venture was an abuse of dominance and had an exclusionary effect undermining Country Bird's ability to compete. Astral agreed to pay a penalty of 3% of their revenue for the 2008 financial year in the Western Cape. The Commission made it clear that the matter fell within its prioritisation of staple foods as poultry is the single largest source of protein for low income consumers.
 - b) In 2010 the Commission prohibited a proposed merger of seed companies Pioneer Hi-Bred and Pannar Seed. The Commission found that the merger would substantially lessen or prevent competition in the maize seed market in South Africa. One of the reasons stated by the Commission for prohibiting the merger was that maize is a staple food in South Africa and

higher levels of concentration in the seed market may dis-incentivise local innovation and increase the likelihood of price increases to the detriment of the consumer.

- c) In the Tiger Brands, Pioneer Foods and Premier Foods price collusion case, the Commission found that Pioneer Foods and Foodcorp had contravened the Competition Act. The Commission asked the Tribunal to levy an administrative penalty of 10% of their annual turnover for the 2006/7 financial year. An important aspect of the case was its impact on the consumers who were adversely affected as a result of the collusion by these companies to push up bread prices.
 - d) In its investigation into anti competitive behaviour in the milk industry in 2005, the Commission found evidence of price fixing in retail milk and manipulation of the market to restrict competition. One of the findings of the Commission was that some of the dairy processors had made an agreement on the selling price of UHT milk ultimately resulting in the consumers paying a higher price for UHT milk.
16. While none of these complaints have dealt directly with grocery retail, they are illustrative of competition problems in the value chain, brought about by the power of some players, that contribute to making food unaffordable for many people in South Africa. The cases also all deal with staple foods, relied upon by millions of poor people in the country. In the retail sector, the strong market position of the handful of supermarkets that dominate the sector may lead to a poorer retail offer for consumers in terms of prices, quality and service and enjoyment of additional profits due to weak competition (in addition to the impact that this dominance has on small and independent retailers in townships, peri-urban and rural areas). In addition, the power that the dominant supermarkets have over the value chain may lead to supply chain practices that involve the transferring of excessive risk and unexpected costs to suppliers. These are issues that should be considered in a market inquiry into the grocery retail sector but do not appear to be included in the scope under the Terms of Reference.

17. We do not propose expanding the scope of the inquiry to all parts of the food value chain but suggest that the Commission ensures that the subject matter of the inquiry is wide enough to consider the impact of the dominance of national supermarket chains on consumers and small producers and that the focus on townships, peri-urban and rural markets is reassessed.

D. GENERAL COMMENTS

Timelines

18. The Competition Act in section 43B(4) requires that the Terms of Reference include "the time within which [the inquiry] is expected to be completed". The Terms of Reference do not give any indication of time frames other than the period within which interested parties are required to make comments on the Terms of Reference. This oversight should be remedied.

Panel of experts

19. Very little detail is provided in the Terms of Reference on the areas of expertise of the panel of experts. Given the constitutional framework within which the inquiry must operate in the light of the right to food, we suggest that the Terms of Reference make specific reference to the inclusion of an expert in constitutional law on the panel.

Methodology

20. Section 5 of the Terms of Reference deals largely with the panel's methodology in conducting the market inquiry. While there is provision for the participation of the "general public", in the light of the potential importance of the market inquiry for the realisation of the right to food, it is important that the inquiry is consumer-focussed and that, in addition to general requests for input, the Commission actively seeks the involvement of affected people (including small producers, consumers, civil society organisations and organised labour) through public awareness campaigns, public calls for comment and the facilitation of that comment.

CONCLUSION

21. SECTION27 thanks the Commission for the opportunity to make these submissions and trusts that they will be of assistance to the Commission in this important process.

22. For further information, please contact Sasha Stevenson at stevenson@section27.org.za or on 011 356 4100.