Three particular areas of concern for the Commission were identified in the Report:
- Long-term exclusive lease agreements and buyer power;
- Competitiveness of small and independent retailers; and
- The regulatory landscape.

To address these concerns, the Commission has recommended in its Report (released for comment and further consultation with stakeholders, at this stage) a number of remedial actions to be taken. Some of the remedial actions recommended by the Commission will have a material impact on property owners, and include:
- National chains should immediately cease enforcing exclusivity provisions against specialty stores, including restrictions on store location, size and product range;
- No new leases or lease extensions may include exclusivity provisions or restrictive clauses on competing retailers; and
- Existing exclusivity against other supermarket chains must be phased out within three years after the final report has been published.

This article discusses the legal effect of the Commission's Grocery Retail Market Inquiry final report (which is expected to be published towards the end of this year) and, in particular, discusses the legal effect of the Commission's final recommendations, especially with regards to the types of recommendations highlighted above.

Given the specific reference to the Inquiry in this article, it is important to note that the Report is a preliminary report. In market inquiries, a preliminary report is generally published for further comments by stakeholders and, only once the final comments of stakeholders have been considered by the Commission (and subject to some limited further investigation by the Commission), a final report will be published. Under the Competition Act No. 89 of 1998 ("Competition Act"), as well as under the Competition Amendment Act No. 18 of 2018 ("Amendment Act"), the preliminary report, its findings and its recommendations are generally of no effect in law. (In other words, they cannot be relied upon or enforced.)

The final market inquiry report, its findings and its recommendations, on the other hand, have a legal effect, as we discuss further below. The extent of its legal effect, at least pertaining to this Inquiry and the likely timing of the final report, however, differs on whether the Commission relies on the provisions contained in the Competition Act or the Amendment Act (which has been signed by the President but is yet to become effective).

Under the Competition Act, the final report has legal effect in that the findings made by the Commission are binding on stakeholders. These findings may be judicially reviewed (if such grounds exist). While the report may have legal effect in this sense, we note that:
- The Commission is unable to enforce its recommendations, given the powers it has under the Competition Act; and
- The Commission's recommendations are unenforceable with regards to stakeholders. In respect of the Inquiry, the recommendations by the Commission in the Report (provided they remain the same in the final report) will not be enforceable vis-à-vis landlords and national chains.

Therefore, under the Competition Act:
- The Commission's findings may be reviewed to the extent that the report is reviewable under the Promotion of Administrative Justice Act or the principle of legality; and
- The Commission's recommendations are non-binding, and unenforceable.
This means that, if the relevant stakeholders were to ignore the recommendations made by the Commission in the final report in the Inquiry, then there would be no recourse available to the Commission or any stakeholder.

However, having stated the above, it is important to note two further considerations, which have an indirect impact on the effect of the Commission’s report and its findings:

- First, if the Commission’s recommendations are not adhered to by stakeholders, it is open for the Commission to investigate and refer a complaint to the Competition Tribunal. A third-party complainant could also lodge a complaint with the Commission in this regard. However, the Commission or a complainant would have to rely on the current restricted practices provisions contained in the Competition Act to sustain a complaint.

- Second, the Commission’s recommendations may have political influence, and non-adherence may lead to political interference and, possibly, regulations.

### The Amendment Act

As an overall comment, the amendments to the market inquiry provisions in the Amendment Act are seemingly aimed at giving the Commission more power to enforce its recommendations. All of this ties in with the earlier comment regarding the extent of the final report’s legal effect, and whether the report is published under the Competition Act or the Amendment Act.

Under the Amendment Act, the Commission must also publish a final report of its inquiry in the Government Gazette, and must submit the final report to the relevant Minister. In terms of the Amendment Act, once the report is submitted to the Minister, the Minister must table the report in Parliament.

A key inclusion made by the Amendment Act is the “adverse effect” test in the market inquiry provisions.

This test requires the Commission to investigate whether there is a feature in a market that restricts or distorts competition within that market. If there is such a feature, then there is an adverse effect.

Where the Commission has found an adverse effect, the Amendment Act places a duty on the Commission to mitigate such effect. This would be done by the Commission taking action “to remedy, mitigate or prevent the adverse effect”. Any action taken by the Commission must be in line with the findings in its report, as well as reasonable and practicable, taking into account the following factors (which are not exhaustive):

- The nature and extent of the adverse effect on competition;
- The nature and extent of the remedial action;
- The relation between the adverse effect on competition and the remedial action;
- The likely effect of the remedial action on competition in the market that is the subject of the market inquiry and any related markets;
- The availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition; and
- Any other relevant factor arising from any information obtained by the Commission during the market inquiry.

The findings and proposed actions to be taken following a report conducted under the Amendment Act will be binding. This is evidenced by the fact the market inquiry provisions introduced by the Amendment Act specifically provide for an appeal to the Competition Tribunal (“Tribunal”). Therefore, under the Amendment Act:

- The Commission’s findings may be reviewed to the extent that the report is reviewable under the Promotion of Administrative Justice Act or the principle of legality; and
- The Commission’s recommendations are binding, and their remedial actions are enforceable.

Even though provisions contained in the Amendment Act give the Commission more power to enforce their recommended remedial actions, these recommendations would still not be enforceable vis-à-vis stakeholders and, with regards to the Inquiry and the recommendations listed above, landlords and national chains.

Practically, however, it is difficult to understand how the Commission will enforce its recommended remedial actions, unless it were to approach the Tribunal for an order of non-compliance. The Commission is not meant to act as a regulator, nor does it have the resources to act as such. This would suggest to us that any action taken “to remedy, mitigate or prevent the adverse effect” would amount to binding findings in the final report, which should be carried out by persons affected by that, failing which an approach to the Tribunal may be made by the Commission.

Of course, the possibility of the Commission initiating a complaint, or a third party lodging a complaint against non-complying stakeholders, will remain; and the likelihood of reputational damage will also be possible.

### Conclusion

Overall, it is clear that a final report published under the Amendment Act has more legal consequences and effects – the findings are binding, and the remedial actions to be taken are enforceable by the Commission (regardless of whether, and how, they can be enforced practically).

It would not be surprising if the Commission were to rely on the provisions of the Amendment Act – if they are in force and effect at the time of the Commission publishing the Inquiry’s final report. Of course, this would lead to questions regarding procedural fairness, and may be reviewable. But it is clear that there is at least some incentive for the Commission to have this argument.