

Press Statement

18th October 2018

CA Rejects Choppies-Payless Application

The Competition Authority has rejected an application for a buying group exemption from Choppies Distribution Centre and Payless Supermarket.

The applicants are enterprises trading in the Fast Moving Consumer Goods (FMCG) and this makes them direct competitors. However, in terms of the Competition Act competitors can apply for an exemption where there are off-setting public benefits that out-weigh the anti-competitive effects of an undertaking they seek to engage in. The thrust of the application was that the envisaged buying group would enable better purchasing power which would translate into lower prices, better quality products and therefore availing benefits to consumers and employees.

Prior to the current application, the applicants had launched a similar application in 2014, which while it was rejected the applicants were given some time to wind up the buying group agreement and for a period of more than three years the buying group has been active.

During the life of the buying group exemption (which continues even now) Payless's performance reportedly improved, stabilized financially and increased its staff complement. It is the contention of the applicants in the current application that if Payless is not granted the buying group exemption it would suffer devastating harm possibly resulting in liquidation.

When fortifying their case in the current application, the parties or the two stores maintain that the buying group arrangement is the main cause of Payless's improved performance and stability due to the combined leverage of the two stores economies of scale when buying; stabilised cash flow; ability to rebrand and refurbish its stores; and ability to retain employees, but also created an additional 250 more jobs since the last exemption (when the weaning-off period was granted), increasing its staff complement from 400 to 650. As a consequence Choppies and Payless are now applying for an exemption to run for a three (3) year period.

In considering an exemption application, the Authority is directed by section 32(1) of the Act on the assessment criteria of exemptions, which provides that, "*Where the Authority finds, on investigation that an agreement other than a horizontal agreement or vertical agreement prohibited by section 25 and section 26 (1) respectively prevents or substantially lessens competition, the Authority may, subject to section 34, grant an exemption from the prohibition if it can be reasonably expected that there will be offsetting benefits for the public directly attributable to the agreement.*"

Considering this application, the Authority turned out very adverse findings proving a dire case of substantial lessening of competition in the considered market. After a careful Competition Assessment, the Authority established that:

- (1) There is no competition between Choppies and Payless, the duo had monthly promotions wherein they had the same goods on promotion at identical or similar prices and the pamphlets were an exact replica of each other.
- (2) The two stores had alleged that Choppies would not benefit from the arrangement. It however emerged that Choppies was benefiting, particularly given, the quantity of Choppies in house brands found in Payless stores. Payless did not have any in house brands, but instead sold a variety of Choppies goods in large volumes.

(3) Further, the Authority finds that the granting of an exemption to the applicants would be in effect granting the Choppies and Payless the leeway to continue with their price fixing and distortion of competition.

Public Interest

The two stores hinged their application around the assertion that the agreement would yield public benefits that would off-set competition concerns. However, on closer examination of the alleged public benefits claims, it is clear that these are not supported by any documentary evidence.

The Parties failed to prove that Payless' financial stability in the last three years was solely based on it being a member of the Buying Group.

With regard to employment, it is worth noting that initially when the application was made, the two stores claimed that Payless had been able to retain the same number of staff and even increased its staff complement. Upon scrutiny this claim was found to be untrue.

Whilst the parties allege that profits have remained low because of some projects Payless had undertaken to revamp its brand, such as refurbishing its stores and rebranding, there are no documents to support these plans and cost thereof.

Recommendation

The parties have mostly made unsubstantiated allegations in support of their application without any concrete evidence. The application is therefore rejected on the basis that there is no evidence that proves that the agreement has any offsetting benefits for the public directly attributable to it in the form of maintenance of lower prices, higher quality or greater choice for consumers, as provided under section 32(1) (a) of the Act, because Choppies and Payless sell the same goods at similar prices especially during the month-end promotion period; and further the parties or the two stores have failed to prove that the agreement has any off- setting benefits in the form of maintenance or promotion of employment in Botswana as stated under section 32(1)(d) of the Act, instead, the information shows that Payless has reduced its employees and the parties tried to mislead and provided false information to the Authority.

The Authority therefore directs the parties to dissolve the agreement because it has no substantial economic benefits for the public. The Parties are granted a period of three (3) months, from receipt of this determination, to have dissolved the agreement and in addition to, at the expiry of the three (3) months period report to the Authority that they indeed dissolved the agreement.

The parties or the two stores have been informed of their right to appeal this determination of the Authority to the High Court, in the event they feel aggrieved.

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