DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

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PUBLICATION OF THE FRESH PRODUCE MARKET INQUIRY'S PROVISIONAL REPORT (EXECUTIVE SUMMARY)

Notice is hereby given that the Competition Commission ("Commission") has released its Provisional Report for public comment on 18 June 2024.

The complete report can be accessed on the Commission's Website at https://www.compcom.co.za/wp-content/uploads/2024/06/CC_FPMI-NonConfidential-Report-2024.pdf.

Public comments can be made until 16 July 2024 to freshproduceinq@compcom.co.za.

competition commission
south africa

FRESH PRODUCE

MARKET INQUIRY

PROVISIONAL REPORT

18 JUNE 2024

EXECUTIVE SUMMARY

a growing, deconcentrated and inclusive economy

EXECUTIVE SUMMARY

1. INTRODUCTION

1.1. The Competition Commission ("the Commission") formally initiated the Fresh Produce Market Inquiry ("FPMI" or "the Inquiry") on 23 March 2023 (with official commencement on 31 March 2023) in terms of section 43B(1)(a) of the Competition Act 89 of 1998 (as amended) ("the Competition Act"). An Inquiry was initiated because the Commission has reason to believe that there exist market features which impede, distort or restrict competition in the markets for fresh produce in South Africa.

1.2. The Scope of the Inquiry is set out in the Final Terms of Reference ("ToR") which were published on 14 February 2023. The objective of the FPMI is to investigate any adverse effects on competition which may be present in the fresh produce value chain. In order to do so, it was essential that the Commission understands the state of competition within the industry, the market features affecting price outcomes, and the challenges currently faced by farmers (especially black, small-scale and emerging farmers). More broadly, the importance of the sector to both the economy and employment, and the nutrition and welfare of its citizens, lent further weight to the need for the FPMI.

1.3. The FPMI focused on particular and ancillary issues at each layer of the value chain. Specifically, the scope of the FPMI covered aspects from the provision of certain key inputs to farmers (namely, fertiliser, seeds and agrochemicals), the production of fresh produce at a farming level, to the wholesale and retail of fresh produce at national fresh produce markets and formal retail stores. These issues were grouped into three themes, as follows:

1.3.1. ***Efficiency of the value chain, with an emphasis on the dynamics around fresh produce market facilities***. This theme stems from concerns that the value chain, particularly at the level of NFPMs is inefficient and uncompetitive. A specific focus was to be given to the competition dynamics prevalent at NFPMs and other contracting means (such as direct contracting) which may affect competitive dynamics. This entailed a focus on two routes to market, namely, wholesale supply through NFPMs and direct contracting by farmers with formal retailers;

1.3.2. ***Market dynamics of key inputs and its impact on producers.*** Specific aspects relating to key inputs (namely, fertiliser, seeds and agrochemicals) that were to be considered under this theme were concentration levels and if any price discrimination, buyer power and exclusivity that may exist in relation to these key inputs; and

1.3.3. ***Barriers to entry, expansion and participation.*** Specific consideration was to be given to the barriers faced by small, medium and micro enterprises ("SMEs") and firms owned or controlled by historically disadvantaged persons ("HDPs"). In addition, the broader regulatory framework was to be considered.

1.4. The Statement of Issues ("SOI") was a key initial document providing stakeholders with a framework of the FPMI's approach to the issues. It ensured that stakeholders focused on issues that were most relevant to answering the questions arising from the ToR.

1.5. The SOI identified a wide range of issues that the FPMI intended to probe during the initial stages of information gathering. Apart from setting out issues on which the FPMI required stakeholders to comment, the SOI also identified 11 commodities which would receive priority consideration where an individualised product approach was called for.

1.6. All Inquiry documents and public submissions are available on the Inquiry website. Since initiation, the key Inquiry processes and proceedings to date have been as follows:

1.6.1. Release of the Statement of Issues ("SOI") for public comment (25 March 2023);

1.6.2. Issuing a first round of Requests for Information (RFIs) and information gathering (31 March 2023 until 2 June 2023);Issuing of second round of RFIs and information gathering (3 June 2023 until 31 July 2023);

1.6.3. Further rounds of RFIs and information requests (31 July 2023 until 1 May 2024);

1.6.4. Public engagements which included farmer workshops to engage farmers directly with a focus on black, emerging and small-scale farmers (3 September 2023 until 13 October 2023).

1.6.5. First Round Public Hearings (18 October 2023 until 27 October 2023); and

1.6.6. Second Round Public Hearings (8 February 2024 until 9 February 2024, and 11 March 2024).

1.7. The Provisional Report provides detailed chapters on each of the issues identified in the SOI. These include the Regulatory Framework Governing the Fresh Produce Industry; the Wholesale of Fresh Produce (National Fresh Produce Markets or NFPMs); Fresh Produce Market Agents; Retailing of Fresh Produce (supermarkets); Market Dynamics of Key Inputs (fertiliser; seeds, and agrochemicals); and Barriers to Entry (market access, finance, water). The Provisional Report concludes with a chapter containing a summary of the provisional findings and proposed remedies to address those provisional findings.

1.8. Following the release of the Provisional Report, there will be a period of four weeks for the submission of public comments. The FPMI will review all public submissions and engage directly with stakeholders affected by any provisional findings and recommendations. That process may result in changes to the provisional findings and/or recommendations. The FPMI contemplates releasing a final report with findings, remedial actions and recommendations in October 2024, in line with the administrative timetable.

1.9. This executive summary provides a broad overview of the issues considered in the Inquiry as well as the provisional findings and recommendations or remedial actions, where applicable.

2. THE WHOLESALE OF FRESH PRODUCE

2.1. National fresh produce markets are crucial to food security and local economic development. They can be classified as a low-cost market channel especially for small scale farmers which allow them to be effectively integrated into the mainstream of national economies. The FPMI found that there are two distinct supply models through which fresh produce is supplied: one on a wholesale basis through NFPMs and another through formal retail channels.

2.2. NFPMs remain at the centre of fresh produce trading, particularly because the formal retail players use the NFPM prices as a benchmark for negotiating with their contracted farmers. Therefore, it can be said that NFPMs are an integral part of the price discovery or price setting for fresh produce. Emphasis is put on the demand and supply for various produce in establishing market clearing prices on a daily basis throughout the year. The prices that are discovered through the NFPMs platforms are utilised by buyers as well as farmers in price negotiations.

2.3. The FPMI observed four types of operating models for NFPMs, namely:

2.3.1. As a department or business unit inside the municipal structure;

2.3.2. As a corporatised entity (with a separate budget, executive and board of directors), but which still reports into the overall municipal structure;

2.3.3. As a public-private partnership; and

2.3.4. As a wholly privately-owned and operated entity.

2.4. The Tshwane and Durban Markets are business units within the municipal structure. Their budgets, staff and assets are wholly owned and operated by the municipalities and all revenue and expenditure (operational and capital) are subject to the Municipal Finance Management Act 56 of 2003 ("MFMA"). All property and operations fall directly within the municipality's control.

2.5. The Johannesburg Market follows a corporatised model and its immovable assets remain wholly owned by the City of Johannesburg Metropolitan Municipality. However, the market's operation, systems, employees, and movable assets belong to and are managed by a state-owned company (or "SOC"). The immovable assets are leased by the municipality to the SOC. Expenditure remains subject to the MFMA. The SOC is also regarded as a "municipal entity" in terms of the Municipal Systems Act 32 of 2000 ("the Municipal Systems Act").

2.6. The Cape Town Market is operated in terms of a public-private partnership ("PPP"). The immovable assets are owned by the Cape Town Metropolitan Municipality, but all operations are essentially outsourced to a private entity (who pays rent to the municipality). The operating firm has a broad shareholding comprising of farmers, agents, and buyers. Expenditure by the operating firm is not subject to the MFMA.

2.7. The final operating model is wholly privatised markets. In this model, all the assets of the market (movable and immovable) are owned and operated by a private firm. Despite this, the current privately owned markets still operate on the commission basis (with market agents) and in materially the same manner as the other markets, albeit that they are not subject to the MFMA and do not use public income to fund operations.

2.8. NFPMs vary across South Africa based on their size and the revenues generated. The total market size for NFPMs is estimated to be R21 billion in 2022. The four largest markets of fresh produce in South Africa are Johannesburg, Tshwane, Cape Town, and Durban with a combined turnover market share of approximately 84% in 2022. Markets classified as medium-sized include Springs, Bloemfontein, Pietermaritzburg, Gqeberha, Klerksdorp, Welkom and East London with a combined market share of 15%. The rest of the markets are classified as small and account for the remainder of the market share. In addition, there are private markets, predominantly owned and controlled by the Freshlinq Group.

2.9. Over the years, there have been concerns from various stakeholders, including the market agents, about the diminishing centrality of the NFPMs as a route to market. This concern was informed by indications that the volumes of fresh produce being sold at the NFPMs have been steadily declining over several years. This is largely attributed to the lack of upkeep and investments by the local municipalities which are the custodians of these markets.

2.10. The lack of maintenance with an emphasis on cleanliness, hygiene, food safety, and cold and ripening rooms was believed to have contributed to the exodus of large-scale retailers, wholesalers, and processors to direct contracting with (large-scale) growers.

2.11. The mostly dilapidated infrastructure at the different NFPMs across the country poses challenges to producers, agents and buyers, especially where ripening rooms or cold storage facilities are non-operational and cause fresh produce delivered to the market to wilt and rapidly deteriorate. Market agents have indicated that some NFPMs do not reinvest the 5% commission into the market, and this is reflected in the poor state of the infrastructure, security, and maintenance of the market facility.

2.12. Further, it has been said that the process for decision-making by management takes longer and that requests to fix the cold rooms and ripening rooms are not attended to with the necessary urgency as these rooms contain stock that may go off if infrastructure is not working optimally, negatively affecting both the agency and producer.

2.13. The FPMI also considered past attempts to revitalise the NFPMs. In 2006, the NAMC published a report into national fresh produce markets following an investigation in terms of Section 7 of the Marketing of Agricultural Produce Act 47 of 1996 ("the 1996 Marketing Act"). The investigation resulted from concerns regarding the apparent slow pace of transformation at NFPMs, market access challenges faced by black farmers and the seemingly declining competitiveness and efficiency of NFPMs. In response to the various concerns and comments raised, the NAMC's Section 7- Committee made recommendations with respect to the governance, operations, and regulatory framework of NFPMs. However, little progress was made to implement these recommendations.

2.14. This led to the inception of Project Rebirth which was launched in 2013 under the leadership of the Department of Agriculture, Land Reform and Rural Development ("DALRRD"). Project Rebirth was a collaborative initiative between government entities and industry stakeholders with the main objective of improving the operations and service standards of the NFPMs and to ensure transformation at the markets.

2.15. One of the interventions which flowed from Project Rebirth was the proposed creation of a centrally located and legally mandated entity that would coordinate efforts to ensure the development, management, and transformation of NFPMs at a national level to oversee all NFPMs. DALRRD consequently developed a Provisional Bill to establish the National Fresh Produce Market Council ("NFPMC"). However, during consideration of the Bill by Parliament, the Office of the Chief State Law Advisor indicated that the Constitution assigns fresh produce markets as a local government function. It concluded that putting markets under the control of the NFPMC (i.e. in national government) will likely be unconstitutional. The Bill was withdrawn, and no subsequent developments have occurred in this regard.

2.16. The FPMI also considered the revenue and expenditure of the four largest markets on maintenance (as an operational expenditure) and upgrades (as capital expenditure) over the last five years and juxtaposed that spend on the revenue they generated (from a 5% commission on sales). This analysis showed that although these NFPMs generate revenue to cover their operating expenditure, their needs for current and future capital expenditure surpass revenue generated. This is exacerbated by local governments not ringfencing NFPMs profits as well as lack of prioritisation of capital expenditure.

3. THE MARKETING OF AGRICULTURAL PRODUCE

3.1. The marketing of agricultural products entails various activities performed to ensure that products are made available to consumers at a convenient place and time, in the required quantities and quality and at fair prices. These marketing activities can either be performed inhouse on the farm or by other intermediaries and agencies outside the farm. These activities include picking/harvesting, sorting, grading, processing, packaging, labelling, transporting, storing, promotion and sale of agricultural products. Given the perishable nature of agricultural products, their marketing tends to differ from industrial products.

3.2. Prior to 1994, the regulatory framework for the marketing of agricultural products was highly interventionist. Following the dawn of democracy, agricultural marketing has been market driven.

3.3. The Agricultural Marketing Act 26 of 1937 ("the 1937 Marketing Act") introduced organised marketing of agricultural produce through the establishment of control boards, who were given powers such as monopoly buying of farm produce, the setting of prices, single channel exporting and quantitative controls over imports. This effectively stabilised the agricultural sector by reducing the gap between producer and consumer prices.

3.4. The 1937 Marketing Act was later repealed and replaced by the Marketing Act 59 of 1968 ("the 1968 Marketing Act") which was mainly a consolidation of various amendments to the 1937 Marketing Act. It continued the policy of government control over the marketing of agricultural produce as well as the regulation of import and export of any agricultural products. The 1968 Marketing Act also established schemes which consisted of a set of rules relating to the regulation of the marketing of any product in the country, the regulation of the export of any product, and the promotion of demand for and research of any product.

3.5. Approximately 80% of produce in South Africa were controlled by various marketing boards and subject to about 23 different schemes established under the agricultural marketing law. There were five types of control schemes put in place with the goal of stabilising the market and ensuring a guaranteed market for farmers' produce at fixed prices namely; single-channel fixed-price schemes, single-channel pool schemes, surplus removal schemes, supervisory schemes and publicity schemes.

3.6. The policy of tight control and extensive government involvement in agriculture continued until the 1980s when a White Paper on Agricultural Policy was published. The primary objective was to ensure stability in the sector to achieve optimum economic, political, and social development.

3.7. The Agricultural Resources Act 43 of 1983 ("the Agricultural Resources Act") was subsequently put in place to realise the objectives set out in the 1984 White Paper. The objectives of the Agricultural Resources Act were to control the utilization of the country's natural agricultural resources, and to conserve the soil, water resources and vegetation while combating the spread of weeds and invader plants.

3.8. The Co-operative Societies Act 28 of 1922 ("the 1922 Co-operatives Act") is also an important piece of legislation which sustained the marketing of agricultural produce prior to the democratic era. It provided for the registration and control of co-operatives, which at the time were mainly in the agricultural sector. In terms of the 1922 Co-operatives Act, only producers of agricultural products could become members of co-operative agricultural organisations, with no limit on the number of members.

3.9. Like most legislation in the pre-democratic era, the co-operatives law created an extensive agricultural co-operative structure that almost exclusively served the white commercial agricultural sector. The Minister had the powers to veto the registration of any proposed co-operative society or company if it was deemed to be unsustainable due to capital or turnover inadequacies. These provisions were used to prevent market entry, particularly the registration of smaller, black-owned co-operatives.

3.10. Cooperatives became critical to the regulation of the agricultural sector in that they became vertically integrated economic hegemonies with interests at all levels of the agricultural value chain. They were involved in the purchase and sale of agricultural inputs and equipment; the purchase, storage, processing, and sale of agricultural produce; transportation services; and even credit extension. They were also agents of the marketing boards, through which the government of the day extended its assistance to the white farming community, not only for economic but political support reasons as well.

3.11. The provision of financial support to farmers through co-operatives grew over time, reaching more than R1 billion per year between 1983 and 1992. Many white-owned agricultural co-operatives took advantage of the changing political landscape in the late 1980s to the early 1990s and took over the government sponsored co-operatives in the former homelands whose governments were beginning to collapse.

3.12. The government gradually began to move towards a free market system with limited control of the sector. This move was triggered by, among others, the slowdown in economic growth in the 1980s, forcing a reduction in state expenditure and subsidies. At the same time, the commitments were made under the General Agreement on Tariffs and Trade ("GATT") free trade negotiations for the country to move away from import controls, especially in agriculture, and embrace an export oriented strategy.

3.13. In 1988, following an investigation into the activities of the marketing control boards, the National Marketing Council (at the time the functionary of the 1968 Marketing Act) made various recommendations, including reducing controls on certain agricultural products, the amalgamation of some control boards and abolishing certain marketing schemes.

3.14. A rapid rise in food prices and a growing gap between producer and consumer prices in the 1980s to early 1990s led to further inquiries into agricultural marketing activities. In 1992, a Committee of Inquiry into the Marketing Act ("the Kassier Committee") was set up to investigate the marketing of agricultural products in South Africa. The Kassier Committee recommended, among other things, the abolition of statutory single-channel and price support marketing schemes and the phasing out of agricultural control boards, in a managed process.

3.15. On 1 January 1997, the 1996 Marketing Act came into effect. Unlike the legislation of the previous regime, the 1996 Marketing Act sought to increase market access for all market participants. Its other objectives were to promote efficiency in the marketing of agricultural products; optimise export earnings from agricultural products; and enhance the viability of the agricultural sector.

3.16. The 1996 Marketing Act also led to the establishment of the National Agricultural Marketing Council ("NAMC") to replace the National Marketing Council. The main objective of NAMC is to promote the efficiency of the marketing of agricultural products; to optimize export earnings from agricultural products; and to enhance the viability of the agricultural sector.

3.17. The primary purpose of deregulating the industry was to create an open and market-oriented environment to boost the agricultural sector. Further, the changes introduced were also expected to facilitate market access and entry by small-scale and emerging farmers who were previously excluded from agricultural marketing.

3.18. The regulatory framework and state support for the marketing of agricultural products under apartheid shaped the structure of the agricultural sector, and the effects are still evident. Deregulation favoured the large-scale commercial farmers who consolidated to exploit economies of scale. While the 1996 Marketing Act aims to promote access by all market participants, including small-scale and emerging farmers, it lacks the kind and scale of support given to white commercial farmers prior to 1994.

3.19. Following the advent of the democratic era, the government realized that the 1981 Cooperatives Act was not suitable as it did not align with the international principles of co-operatives as adopted by the International Cooperative Alliance ("the ICA"), a body representing co-operatives globally. This led to the new Cooperatives Act 14 of 2005 ("the 2005 Cooperatives Act") being promulgated, subsequently, there was an increase in the number of new co-operative registrations.

3.20. While it can be said that cooperatives may reduce competition, they do not always fall foul of competition law. In instances where they do, they may apply for exemptions in accordance with the Competition Act, or their conduct may be justified on efficiency enhancing grounds. Therefore, co-operatives can be an effective vehicle, especially small scale and emerging farmers, to gain access to markets, particularly considering the Competition Amendment Act 18 of 2018's new provisions on block exemptions.

3.21. Cooperatives have several benefits which include providing bargaining power to members compared to stand alone SME companies; reducing transaction costs through use of shared facilities and common marketing channels; maximizing economies of scale and scope; promoting scope for specialization; and enhancing cooperation and social learning.

3.22. Small and emerging black agri-businesses, including farmers, face a myriad of impediments relating to market entry, participation and expansion, not least of which are barriers of a regulatory nature. The fresh produce value chain has a number of policies, laws and regulations relating to access to inputs, the handling of farm produce, the conduct of market agents and the marketing and distribution of produce to the final consumer.

3.23. At the input level of the value chain, there are laws regarding access to land and water, among others. The application processes pose a challenge for small scale and emerging farmers who, while comprising the majority in numbers, have miniscule land ownership.

3.24. Access to water is hamstrung by legacy rights embedded in legislation. The existing lawful use of water rights means that rights granted under apartheid discriminatory laws persist and create a barrier for new entrants.

3.25. At the marketing and distribution level, the environment is deregulated, compared to the extensive government control and support pre-democracy. The current cooperatives regulatory framework, while conducive, lacks the kind of support given by government under apartheid laws, leading to the persistence of inequality between white and black farmers. The importance of inter-governmental coordination and cooperation to ensure positive outcomes for all role-players cannot be overemphasized.

3.26. Finally, regarding access to wholesale markets, even though these platforms appear tightly regulated by laws, the relationship between the sector regulator and market management does not seem formalized.

4. FRESH PRODUCE MARKET AGENTS

4.1. The NFPMs are vital in linking the farmers to a variety of buyers present at the markets. Market agents play a crucial role in selling fresh produce on behalf of farmers. The fresh produce market agents serve as aggregators and intermediaries of fresh produce at NFPMs, linking farmers with buyers. Due to the presence of market agents on platforms such as the fresh produce market, the hindrance of producing products with weak or no demand is mitigated because the market agents know the factors that drive the price as well as the quality expected by buyers on the market. In addition, producers rely on the knowledge of market agents to plan their production and marketing activities.

Price discovery process and the role of market agents

4.2. The farmer or producer is responsible for the logistics, including but not limited to storage, breaks in the cold chain, grading, selection, packaging, and transportation incurred in getting the produce from farm gate to the NFPMs. Once it is received by consignment control at the NFPMs, the products are assigned to the relevant market agents who sell the products on behalf of the farmers and charge a commission fee of roughly 7.5% for their services. There are approximately 45 factors affecting the price of fresh produce traded at the NFPMs. The main factors being the supply and demand quantities, quality, continuity of supply and communication between farmer and market agent.

4.3. Market agents assess the demand for and supply of produce, and the quality thereof when determining the daily spot price and are prepared to offer lower prices to buyers who purchase produce in bulk. The spot price does not remain fixed for the day and can fluctuate during the day. Negotiations between the buyer and the agent are critical in determining the selling price as, on the one hand, the salesperson wants to get the highest possible price for the farmer and, on the other hand, a buyer wants the lowest possible price to be competitive in the market.

4.4. Market agents represent farmers, helping them find buyers at the best possible prices. The challenge for market agents and buyers is to decide what price to sell and buy the produce at. Price discovery is led mainly by the interactions between buyers and market agents, with price fluctuations influenced by the demand and supply dynamics mentioned earlier. Buyers, on the other hand, also have a role to play in the price determination process as they are privy to the prices for produce that they buy from different agencies. The market agent is only privy to the price that their produce is sold for and does not have access within the market's sales system to the prices of other market agencies, or to prices of other agents within their own market agency.

4.5. Furthermore, they are legally not allowed to collaborate with other market agencies on price setting. The FPMI, however, observed that there is information asymmetry between sellers of fresh produce (market agents) and buyers (wholesalers, retailers and traders) in that buyers only have access to historic information (as at market closing at 11:30 on the day and the previous day's trading information) and not real time information like market agents.

Practices by agents that may have an impact on price discovery

4.6. Various practices by market agents have been identified as problematic in the past. These include the following practices: (i) agents utilising their own buying cards (ii) agents credit extension to both buyers and farmers (iii) reserve buying and (iv) after-trading hours/ late sales or trading. These practices have been flagged due to the likelihood that they have a negative impact on price determination or discovery at the NFPMs. These practices fall within the purview of the Agricultural Produce Agents Council ("APAC") which is the sector regulator that, amongst other industries, regulates the conduct of fresh produce market agents.

4.7. The Agricultural Produce Agents Act ("APA Act") stipulates the composition of APAC and requires that three members who are deemed to represent the fresh produce industry are appointed to the Council every three years. APAC's council is made up of, amongst others, representatives of the market agencies and the registrar and deputy registrar of APAC. This implies that the Registrar is expected to exercise oversight and regulate the same market agency that he/she accounts to.

4.8. The Registrar of APAC is the Council's executive authority and is responsible for enforcing the APA Act and its Rules. The powers to investigate and discipline salespersons and market agencies for transgressions rest with the Registrar.

4.9. The FPMI observed a conflict of interest between the composition of the Council, which exercises oversight over the Registrar, and the disciplinary and/or enforcement functions of the Registrar, who must discipline the very market agents who exercise that oversight.

4.10. The FPMI also observed that the composition of the fresh produce industry representatives is exclusively made up from the largest market agencies (on an effective rotating basis) to the exclusion of smaller agencies and market agents owned by Historically Disadvantaged Persons ("HDP").

Market concentration at the agency level

4.11. Although there appears to be a substantial amount of market agents operating across various NFPMs, there are only a few with significant market shares. In the main, the largest players are the RSA Group, the Grow Group, and Subtropico. The FPMI conducted a market structure assessment for Joburg, Tshwane, Durban and Cape Town Markets. These identified markets are by far the largest NFPMs in terms of volume and value of produce sold and constitute approximately 84% of the total value of produce sold (R21 billion) at the NFPMs nationally.

4.12. The top four market agencies at the Joburg Market accounted for approximately 90% of the total value of goods sold at this market in 2022 with a Four-Firm Concentration Ratio (CR-4 ratio) of 90% pointing to a highly concentrated market. Similarly, the Herfindahl-Hirschman Index ("HHI") is approximately 2 806, which confirms a highly concentrated market structure.

4.13. Tshwane Market is different from Joburg Market in that there is no clear dominant market agent. However, like Joburg Market, the market structure in Tshwane Market remains highly concentrated with the CR-4 of 84% and HHI of 2 155.

4.14. At the Durban Market, concentration levels are even higher than at the Joburg Market as there are only four market agents operating. The CR-4 score is 100% and HHI is 3 707. The top two market agents, being the RSA Group and Grow Port Natal (part of the Grow Group), account for approximately 82% of the total value of goods sold.

4.15. At the Cape Town Market, there are only five market agents. RSA is the largest and clearly dominant market agent. The CR-4 score is 98% and HHI is 3 354.

Determination of market agents commission fees

4.16. Although not part of the scope of the FPMI, it is important to note that the Commission previously investigated and referred to the Competition Tribunal ("Tribunal") allegations of price fixing (with regards to commission fees charged by market agents) which potentially contravenes section 4(1)(b)(i) of the Competition Act against several market agencies. The matter is currently before the Tribunal and, for the avoidance of doubt, the FPMI makes no findings in this respect.

4.17. The commission charged by market agents is governed by the APA Act, which commenced on 1 October 1993. The commission which is currently charged by market agents largely ranges between 5%-7.5%. There is no regulation on the maximum amount of commission fees that the market agents can charge to the farmers. Essentially therefore, market agents are free to negotiate with farmers the commission charged.

4.18. The agents indicated that they do not have a specific formula for calculating the commission charged. However, there are various elements considered when negotiating the fee such as exclusivity of supply, volume, consistency of supply and quality of goods.

4.19. Market agents rarely deviate from a range of 5% - 7.5% commission, except in instances where they offer additional services (such as packaging or cold storage) after receiving the consignment.

4.20. In instances where there is a transgression involving market agents about the fees, APAC is empowered to take action. Nonetheless, small-scale, SME and HDP farmers may be negatively impacted through higher than the norm commission fees that maybe levied against them by market agencies. Furthermore, it is crucial that farmers, especially small-scale, SME and HDP farmers are aware that they can negotiate the commission fees.

4.21. The FPMI assessed the level of commission fees charged by the market agents. Further, the FPMI undertook a comparative analysis of commission fees charged by market agencies to various farmers. It is the view of the FPMI that there is a disparity between commission fees charged to SME and/or HDP compared to their commercial counterparts.

4.22. The FPMI remains concerned about concentration in the market for market agencies across various NFPMs. This concern is heightened when considering that SME and/or HDP farmers may be faced with higher commission fees (either as a deterrent to avoid selling lower volumes or as a means to compensate for the lower revenue based on lower volumes). This may distort competition between HDP/SME farmers and their commercial counterparts.

Structural linkages between market agents

4.23. Cross shareholding between competing firms has been an area of interest for competition authorities and antitrust scholars across the world. The terms "cross-ownership", "crossholdings", "partial ownership" or "structural links" refer to a case when competing firms have direct ownership interests in each, whilst common ownership refers to where competing firms have shareholders in common (such as investors that own shares in competing companies in the same industry).

4.24. The FPMI found that there is cross-shareholding and that multi-market contact exists at the market agency level. However, in most instances such multi-market contact exists between firms in the same group of companies. For example, Subtropico Market Agents owns the Johannesburg Citifresh Market Agents, Johannesburg Wenpro Market Agents, Pietermaritzburg GW Poole Market Agents, Bloemfontein Modise Market Agents, the Kimberly Fresh Produce Market Agents and the Pretoria Protea Market Agents. As these firms are part of the same group, (with controlling shareholding by Subtropico), competition concerns may not necessarily arise given that these entities may be characterised as a single economic entity.

4.25. There is a significant concern arising from a common shareholding between Subtropico and the RSA Group - the two largest market agencies at some of the NFPMs. In this regard, the FPMI noted that African Rainbow Capital (Pty) Ltd ("African Rainbow Capital") has shareholding in both Subtropico and the RSA Group.

4.26. The FPMI noted (i) high concentration levels at the market agency level broadly (in terms of value and/or floor space allocation at the NFPMs) and (ii) high concentration levels in narrow segments of the markets by focusing on specific produce e.g. tomatoes which found that both RSA and Subtropico held high market shares specifically on a per product analysis.

4.27. The issue for the FPMI is that, against the backdrop of the highly concentrated market structure within which RSA and Subtropico participate, the existence of large cross-shareholdings raises a concern with respect to alignment of economic interests and incentives.

Challenges faced by HDP market agents

4.28. One of the requirements for a market agent to attract farmers and successfully compete at the NFPM is having adequate floor space to operate on. It was previously reported that the manner in which floor space is allocated is a barrier to entry as floor space was allocated to market agents based on turnover (which represents both value and volume traded).

4.29. The FPMI observed that there are floor space allocation formulas that operate at all the NFPMs and that these allocations make favourable provision for new entrants and HDPs wishing to enter the markets.

4.30. The FPMI noted that, despite preferential allocation of floor space on the market trading floors, HDP market agents have been impeded from participation by not being able to influence historical ties and long-standing relationships between large (often white) producers and their preferred market agent.

4.31. Indeed, in addition to having adequate floor space allocation, market agents are required to have consistent large volumes to sell at the NFPM to become effective competitors. According to the CBMA, one of the biggest challenges is establishing relationships with big commercial farmers. The CBMA indicates that the current arrangements between the big existing market agencies and established commercial farmers have been in existence over generations and therefore it is difficult to break such relationships. The CBMA submits that one of the reasons for commercial farmers being reluctant to switch is because the risk associated with the transaction is always with the farmer, i.e. the farmer bears risk until the produce is sold.

4.32. The FPMI found that small-scale farmers and HDP-owned farmers' access the NFPMs to a very limited extent. For example, according to the CBMA, sales by SME and HDP producers account for less than 1% of proceeds in the NFPMs. This concern is echoed in the Agriculture and Agro-processing Master Plan ("AAMP"), which sets a target of a 3% annual increase of the share of sales of black farmers in the NFPMs.

5. RETAILING OF FRESH PRODUCE

5.1. Before the enactment of the the 1996 Marketing Act, the marketing of fresh produce in South Africa was done mainly through the fresh produce markets. Post the enactment of the 1996 Marketing Act, which effectively deregulated the market, the marketing of agricultural products could be done through various platforms. For example, producers were at liberty to choose whether they would market their produce through the fresh produce markets, deal directly with retailers, wholesalers and processors or make use of all the available channels.

5.2. The enactment of the 1996 Marketing Act saw an overall decline in the volume of produce marketed/sold through the NFPMs. This was partly in line with a global trend in fresh produce marketing shifting from traditional wholesale markets towards supermarket chains. Supermarket chains were vertically integrating into a complex supply network and rapidly increasing their market share.

5.3. There are various structural factors that also contributed to the rapid shift in fresh produce marketing from the fresh produce markets to alternative routes to market such as supermarkets. For instance, there has been a noticeable increase in urbanisation and strong consumer demand for high-quality food products, coupled with an increasing commercialisation of agricultural food systems. As a result, the food industry has increasingly become dominated by supermarkets and agro-industries.

5.4. Retailers and processors largely procure fresh produce directly from growers through contractual agreements and on the whole procure from the NFPMs on a supplementary basis. These arrangements allow retailers to maintain an element of control over supply volumes, quality, food safety requirements, and to a certain degree price volatility which is inherent in the pricing dynamics on the NFPMs.

The formal retail market

5.5. There is a market for national supermarket chains which the FPMI considers to be an appropriate departure for the purposes of this inquiry. This market consists of the big four national retail groups being Shoprite Checkers, Pick n Pay, Woolworths, and Spar; with Food Lover's Market a significant challenger firm. The four groups constitute a significant portion of the national supermarket chain retail market in South Africa.

5.6. The national supermarket chains market has not changed significantly since the Grocery Retail Market Inquiry ("GRMI") findings. Shoprite is by far the biggest retailer. Food Lover's Market is proving to be a significant competitor in this market. Evidence presented demonstrates its potential to grow and pose a competitive threat to the big four groups.

5.7. The FPMI has found that the national supermarket chains market is highly concentrated with the top four retailers (Woolworths, Pick n Pay, Shoprite and Spar) commanding a substantial share of the market.

5.8. However, the FPMI has noted that the formal retail market, despite substantial developments after the GRMI and settlements that ended exclusivity arrangements in shopping centeres/malls, remains highly concentrated. For instance, Food Lover's Market submitted that it experiences challenges related to access to adequate space in shopping centres where its competitors are located. In other words, once its competitor(s) have anchored a centre, it is unlikely that adequate space will be available for it to carry out its operations.

5.9. The FPMI notes that this was one of the fundamental recommendations of the GRMI related to the termination of exclusive leases between retailers and their landlords. Although this envisaged a significant shift in how landlords and retailers would henceforth conduct themselves when entering into lease agreements, the FPMI notes that thus far there appears to be no significant entry in shopping centres especially by SME retailers.

5.10. An important consideration amongst retailers when setting retail prices is the price for that particular product in the market. Accordingly, all retailers who participated in the inquiry confirmed that, in addition to overall demand and supply dynamics, they also track competitor prices and ultimately consider those prices when setting their own prices. In this regard, retailers track publicly available domestic industry prices (including weekly industry pricing as well as their own weekly comparative benchmarking) when setting weekly selling prices. In addition, they also monitor market cost prices paid to suppliers.

5.11. The national supermarket chains procure the majority of their fresh produce through supply agreements entered into with various farmers nationally. Food Lover's Market is the only retailer that also procures a significant portion of its produce from the fresh produce markets. Shoprite Checkers and Pick n Pay procure the majority of their fresh produce requirements directly from farmers and aggregators/wholesalers. Woolworths, on the other hand, procures exclusively from farmers whilst Spar, owing to its ownership structure and the relationship with its franchisees, allows for the franchisees to procure from any source although it also requires them to procure from its Distribution Centres ("DC").

5.12. Retailers have migrated towards a direct contracting or integrated supply chain system due largely to the advantages of security of supply that this method brings. The initial concerns were that the trend toward direct contracting would continue which would result in a further erosion of the NFPMs' income base and cause an eventual collapse of the NFPMs. The FPMI observes these two routes to market (traditional wholesale versus vertical integration) are not mutually exclusive but are complementary in nature and both are able to co-exist as two alternative routes to market.

5.13. Direct supply outside of the NFPMs provides a level of consistency of supply over a period of time, and ordinarily includes logistical and post-harvest solutions. Conversely, the most significant disadvantage for a retailer which is reliant on procuring fresh produce from NFPMs, is the risk to supply and the lack of consistency in the quality of products.

5.14. An unbroken cold chain is essential for retailers to ensure the shelf life of a particular product is maximised. By contracting directly with approved suppliers, the retailers can ensure that cold chains are strictly monitored and certified unbroken from harvest to delivery at the DCs. Delivery of produce to a central point such as the DCs also shortens the value chain and reduces the time and cost of transport from the NFPMs to the DCs.

5.15. Direct sourcing, through supply/production agreements, as an alternative route to market has significant benefits essential for both small-scale and large-scale farmers. It often provides a guaranteed off take or supply for a volume of produce at an agreed price prior to delivery.

Nature of the Supply Agreements and Trading terms

5.16. One of the key considerations of the FPMI was to assess the potential for large formal retailers being able to exploit their relatively strong market positions to extract rents of low prices to suppliers/farmers (relative to some benchmark), or large margins made by the supermarket chains may be suggestive (but not conclusive) of buyer power.

5.17. Concerns have been raised in the past about the perceived weak bargaining position of farmers, their apparent lack of outside options and their seeming financial dependency on supermarket chains.

5.18. The FPMI conducted a thorough analysis of the trading terms applicable to the direct supply of fresh produce by growers of all sizes to the retailers. Of particular interest was the way in which retailers negotiate price with growers, repayment terms offered by retailers and the applicable rebates synonymous with the formal retail trade.

5.19. The FPMI found that payment to growers takes place between 7 to 14 days of statement, with a few instances of payments being made in 30 days. This would still be in line with the acceptable time periods stipulated in the Commission’s Buyer Power Guidelines. There was also evidence of favourable terms being made to SME and HDI growers which include foregoing of rebates in some instances and shorter payment terms.

5.20. A significant finding in relation to the nature of these supply agreements is the complete lack of exclusivity in relation to suppliers and retailers, and the absence of volume commitments. This materially changes the landscape for growers who are free to supply product to competing retailers as well as into the alternative channels such as the NFPMs.

5.21. In addition, the absence of volume commitments shows that the inherent unpredictability of farming is factored into these supply agreements in that if farmers cannot meet a specific volume for a particular week, they will not be held liable for those volumes.

5.22. The FPMI finds that the nature of the agreements are such that they allow for competitive dynamics to play out between retailers who are competing for the supply of fresh produce from growers. In addition, the lack of volume commitments ensures that farmers are not severely prejudiced in instances where they cannot meet orders due to factors beyond their control such as inclement unseasonal weather. Thus, the unpredictable nature of farming is catered for in the agreements and growers are not as vulnerable as they could be.

The impact of diesel on the costs of supplying fresh produce.

5.23. Loadshedding has a negative impact on trading operations and associated costs. This mainly leads to retailers investing in alternative energy such as diesel generators or solar power installations (but to a lesser degree than diesel generators). This investment in, amongst others, diesel generators leads to increased costs for retailers which they, at least in part, pass on to consumers.

Supermarket prices, margins and mark-up analysis

5.24. The FPMI assessed supermarket trends in the context of understanding the options that farmers have in terms of the routes to market they can sell their produce through. Accounting for 50-60% of the total fresh produce sold in the country (excluding volumes sold through farm-gate and direct export), the supermarket chains have considerable power and may be able to exploit their relatively strong market positions to extract rents from farmers.

5.25. Analysis of pricing data from various retailers shows that the presentation of prices by various retailers to consumers is not transparent enough. It would be difficult for a consumer to compare the prices of various retailers and make an informed choice. This therefore may lead to consumers being unable to reasonably compare prices in-store or across retailers for a particular produce.

5.26. The FPMI further observed instances of higher markups for certain produce such as tomatoes and onions. However, retailers' response to these observations suggest that further engagements are required with the retailers to resolve data interpretation issues and where relevant, additional data be provided to the FPMI.

5.27. The FPMI further observed that it is not always the case that retailers pay farmers higher prices than what they can achieve from the NFPMs. As such, it is not absolute that prices received by farmers from retailers will always be higher than the NFPMs. In some cases, prices attained from the NFPMs and retailers are comparable. The FPMI however notes that no farmer targets retailers or NFPMs exclusively. In other words, NFPMs and retail markets are not mutually exclusive.

Processors

5.28. Processors play a pivotal role within the fresh produce value chain, offering an alternative market avenue for farmers dealing with the perishable and seasonal nature of fruits and vegetables. The value proposition of processors is particularly valuable, given that the value of fresh produce diminishes if not sold within a specified timeframe.

5.29. The processing of fruits and vegetables encompasses various techniques, including but not limited to canning, drying, freezing, and the production of juices, jams, and jellies. Core processing activities involve the initial preparation of raw materials through cleaning, trimming, and peeling, followed by subsequent treatments such as cooking, canning, or freezing.

5.30. The FPMI initially considered fresh produce processing as an important route to market for SME growers as it is characterised by low barriers to entry mainly because the quality and standards requirements are less stringent compared to those applicable to the fresh produce markets as well as the retailers. The FPMI focused on large scale processors as buyers of fresh produce inputs to their processed products. These were considered to be large powerful buyers in the value chain and thus their views were obtained in relation to their procurement patterns and their ability to influence the market from the buyer's side.

5.31. Processors do not procure fresh product inputs from the NFPMs. In this regard, they cited efficiencies in purchasing directly from the growers and the security of supply provided by entering into these supply agreements. Processors purchase very low-quality grade produce at low prices which reflected that grade of product and thus purchasing from the NFPMs would not be cost effective.

5.32. There were initial concerns that these large processors would be able to leverage off their market power in the buyers' markets and offer SME or HDI growers lower prices than what was offered to larger growers. Upon analysis of the various submissions including the agreements entered into by the processers, it was clear that prices were set upfront on a willing buyer / seller basis and that there was no distinction between the prices paid to smaller growers and those paid to large scale growers. In addition, due to the low value produce relative to the high cost of transport, these processing plants would tend to be in areas close to the growers and that preference would always be given to nearby growers to minimize these transport costs.

5.33. Overall, the FPMI observes that processors constitute a very low volume option for growers which is made worse by the fact that they only purchase low grade fruit which they pay a deeply discounted price for. Whilst this is obviously an attractive option for growers who are provided with an avenue to earn revenue from essentially waste or near waste products which they would otherwise have thrown out, it is not a route to market that could sustain a grower's business.

6. MARKET DYNAMICS OF KEY INPUTS

6.1. Regarding inputs, the FPMI assessed market features in three different types of inputs for farming of fresh produce under consideration (both fruits and vegetables). The FPMI assessed market features in the following markets: (i) fertilisers, (ii) seeds, and (iii) agrochemicals (pesticides and herbicides) as these are significant inputs in farming of fresh produce and form an integral part of the fresh produce value chain.

Fertiliser market

6.2. Historically, the market for fertilisers in South Africa has always been concentrated with few vertically integrated firms active in the raw material and blending of fertilisers level of the supply chain. The FPMI confirmed that South Africa is a net importer of fertiliser. As such, disruptions in global supply chains put the country in a vulnerable position and exposes the country to exchange rate fluctuations. A case in point is how the fertiliser prices were affected by the Russian-Ukraine conflict and the COVID-19 pandemic. The FPMI found that this reliance on imports affects how efficient farmers can compete as price fluctuations have direct consequences on their cost of production. The FPMI focused on MAP, DAP and Urea.

6.3. Currently, Foskor is the only entity that manufactures and produces MAP and Phosphoric Acid in South Africa. A significant portion of MAP and Phosphoric Acid in South Africa is imported. Sasol produces LAN whereas Omnia produces Calcium Nitrate. Three firms account for more than 30% of the broader fertiliser products market in South Africa, namely, Kynoch, Omnia and Foskor. Over the past 5 to 7 years, Kynoch has been involved in a number of mergers and acquisitions directly or indirectly through the ETG Group and associated entities.

6.4. The FPMI noted how local pricing generally follows international pricing trends, albeit that South African prices can take between four to six months to adjust (whether with increases/decreases). The FPMI found that suppliers of fertiliser use international benchmarks to determine the local price of fertilizers. Stakeholders in the market stated that the import price forms the basis for domestic fertiliser pricing. In order to highlight the issues around price transmission, the FPMI compared fertilizer prices in two distinct periods, 2017 and 2023. It was observed that there is a huge disparity in international and domestic prices of Urea, DAP and MAP. For Urea and DAP/MAP (local and international prices), the price differentials remain over 30%, with Urea not having changed under the periods assessed. Notably, this comparison does not account for costs such as transport and other charges incurred when importing. Once these costs are included, the price differential narrows significantly.

6.5. South Africa imported 51% (2019), 47% (2020), 59% (2021) and 52% (2022) of its MAP requirements. The rest was produced locally by one firm, namely, Foskor. On the other hand, all the Urea requirements in South Africa are imported, as there is no firm that currently manufactures Urea locally.

6.6. Considering the above, the FPMI is of the view that South Africa's reliance on imported fertilisers exposes the fresh produce supply chain to global price fluctuations and creating uncertainty in the market. The AAMP also recognises the need to improve the efficiency and effectiveness in the production and distribution of, amongst other inputs, fertilisers, and chemical components.

Agrochemicals market

6.7. The FPMI confirmed that, similar to fertiliser, South Africa is a nett importer of agricultural remedies such as pesticides, fungicides, and herbicides. The FPMI found that the market for agrochemicals and other agricultural remedies is fragmented, with multiple players involved in the blending of various chemicals to remedy different types of infestations of crops. However, there are not so many players active in the production of active ingredients in South Africa. The majority of agrochemicals are produced from imported active ingredients. In some cases, manufacturers of active ingredients directly import finished products into South Africa for sale or distribution.

6.8. The role of distributors is crucial in delivering the agrochemicals to farmers. However, due to the involvement of crop advisors who serve as agents for distributor or agrochemical firms, there appears to be criteria used when determining the final price to farmers which may inherently be discriminating against small-scale farmers.

6.9. In addition, distributors, in some instances, have demarcated areas in terms of the distribution agreements they have with manufacturers, which may be limiting competition between distributors.

6.10. The FPMI noted various terms in the distribution agreements between a particular supplier of agrochemicals and several of its appointed distributors. In the main, these terms require appointed distributors to only distribute products within demarcated territory. This implies that appointed distributors can only sell products in their allocated territory and nowhere else.

Seeds market

6.11. The FPMI found that the seed industry in South Africa is fragmented with over one hundred (100) suppliers of seeds registered with the South African National Seed Organization ("SANSOR"). The leading local suppliers of vegetable seeds in South Africa are Monsanto, Syngenta, Bayer, Sakata Seeds, Starke Ayres, Hazera Seeds, Alliance Seeds, Nuvance, Hydrotech, and Enzen Zaden, amongst others. Although the market appears to be fragmented with many players, the top four firms account for over 50% market share which signifies a highly concentrated market.

6.12. There are a few instances where some firms appear to have a sizeable part of the market. In particular, the FPMI found the pricing of various seeds of one of the biggest manufacturers and suppliers of various vegetable seeds in South Africa concerning. The FPMI observed that between 2022 and 2023, this supplier's price increases were alarming. In addition, the FPMI also found that this firm's mark-ups were extremely high for some seeds. These mark-ups also correspond with commodities wherein this firm had high market shares.

6.13. The FPMI examined closely the South African potato industry, as it is the most important vegetable crop in South Africa, constituting approximately 50% of the total gross value of vegetable production.

6.14. The FPMI noted that there are debates around plant breeding innovations and licensing, intellectual property rights such as Plant Breeders Right's ("PBRs") are often perceived as hindering access to plant genetic resources for small breeding companies or restricting access to varieties for farmers. As such, the inquiry analysed access (or the lack thereof) to varieties of potato seeds by small-scale breeders or farmers in South Africa.

6.15. There were 142 registered potato seed varieties in South Africa in January 2023 and under twenty-one (21) PBR holders/ local distributor. The inquiry found that more than a quarter of registered potato seed varieties are held by three firms. As such, the FPMI observed that there is skewed ownership when it comes to PBRs. The FPMI also observed that in South Africa, more than 70% of PBRs are owned by international firms. These international firms will grant licences to South African firms which contain a right to the variety and to distribute the variety to farmers.

6.16. The FPMI noted an apparent strategy by one of the biggest players in the potato industry in South Africa, which develops its own varieties, and then discontinues use of a closed variety shortly before expiry of its plant breeders' right. It seemingly replaces that variety with its new (fully protected) variety. This entrenchment strategy, means that access to a variety may be limited through the removal of the genetic material from circulation whilst it is still closed and protected by the PBRs.

7. BARRIERS TO ENTRY

7.1. The FPMI identified market access, access to finance and access to water as major barriers to entry facing small-scale and HDP farmers.

Market access

7.2. In terms of market access, the FPMI identified two main issues that affect the ability of SMEs and HDP farmers to access markets, namely, high regulatory requirements imposed by retailers as barriers for small-scale and HDP farmers and prohibitive costs to direct contracting.

7.3. Direct contracting requirements appear to have prohibitive costs to be met by the suppliers. In an attempt to solve challenges facing the agriculture and agro-processing sector, amongst other access to market by HDP and small-scale farmers, the AAMP was introduced. The AAMP is a social compact between government, the private sector and labour for purposes of harnessing the capabilities of all parties. The AAMP contains market access commitments, but these are yet to be realized.

7.4. The FPMI found that the use of global Good Agriculture Practices ("GAP"), instead of local GAP requirements, in particular, restricts market access for SME and HDP farmers and raises barriers to entry. FPMI is not against the application of high food safety standards and good agricultural practices, but rather that the use of such standards should be applied in a manner that does not restrict the participation of SME and HDP farmers in the market.

Access to finance

7.5. Regarding access to finance as a barrier to entry faced by SME and HDP farmers, the FPMI found that this category of farmers faced disproportionate difficulties when attempting to secure credit than those faced by their larger and more established farmers. The Blended Finance Scheme, implemented by both DALRRD and the Land and Development Bank of South Africa ("Land Bank") is mandated to provide credit to commercialize development and to ensure the integration of HDP farmers into the agricultural value chain.

7.6. The FPMI found that the number and value of the Land Bank's loans to farmers had been steadily declining between 2017 – 2022, due to its liquidity challenges. The FPMI also noted that the role played by commercial banks in providing credit facilities to farmers during this period had steadily increased.

7.7. The FPMI's findings regarding the lack of financial support from the Land Bank for HDP farmers have reportedly been addressed from the start of the 2023/24 financial year. However, the efficiency with which the Blended Finance Scheme, as a solution to accommodate SME/HDP farmers, is rolled out requires attention. Small-scale and HDP/SME farmers also face challenges accessing finance due to lack of water rights.

Access to water

7.8. Regarding access to water as a barrier to entry faced by SME and HDP farmers, the FPMI noted that water is a scarce resource in South Africa, with farmers relying on either surface water or ground water depending on their geographical location. The ability of farmers to gain legal access to this water is managed by the Department of Water and Sanitation ("DWS") through the issuance of water use licenses. The attainment of a water use license is also mandatory for a farmer to be eligible to receive any form of credit for their operations. The FPMI observed delays and frustrations faced by farmers in the process of obtaining water use licenses from the DWS. The DWS was noted to be taking steps to address these issues.

7.9. Although certain usages of water by farmers do not require licenses (i.e. for non-commercial purposes in reasonable quantities, and general authorizations issued by DWS for HDP farmers), the FPMI finds that these avenues are respectively inadequate for the commercial development of farmers, and are few in number.

8. PROVISONAL FINDINGS AND RECOMMENDATIONS

8.1. The provisional findings and recommendations are set out according to the issues identified and discussed in chapters 3 to 8 of the report.

The wholesale of fresh produce

8.2. The core issue for the FPMI was understanding the current role of NFPMs and whether they can still be regarded as playing a central and crucial platform for the trading of fresh produce and for competition in general. The FPMI noted that the current NFPM system is not only central to market access for SME/HDP stakeholders, price discovery and price discipline but also extends to food safety and food security.

8.3. The FPMI finds that the original hypothesis contained in the ToR, which was that the integrated supply chain of the retailers may be threatening the viability of the NFPM could not be sustained. The evidence shows that there are two distinct supply models through which fresh produce is supplied: one on a wholesale basis through NFPMs and another through formal retail channels. The FPMI found that the formal retail channel does not materially threaten the wholesale model employed at NFPMs.

8.4. Even so, the NFPMs remain at the centre of fresh produce trading, particularly because the formal retail players, among other factors, consider the NFPM prices when negotiating with their contracted farmers (albeit to various degrees of importance). As such, the NFPMs exercise some form of indirect competitive restraint on retailers as farmers can always switch particularly because retailers do not have exclusive agreements with their contracted farmers.

8.5. The overwhelming views of stakeholders were that the overall condition of major NFPMS, such as Johannesburg, Tshwane and Durban, are bad and deteriorating, mainly due to problems that can be characterized as funding issues. These issues also extend to the medium and smaller NFPMs.

8.6. <u>Provisional finding:</u> In light of the above, the FPMI reaches a provisional finding that there are inefficiencies in running most NFPMs as well as inadequate funding. Because this is a structural issue, FPMI finds that structural changes should be considered. The finding applies to all NFPMs where funding challenges are identified but more immediate to the City of Johannesburg Metropolitan Municipality, the City of Tshwane Metropolitan Municipality and the eThekwini Metropolitan Municipality on how to adequately fund these NFPMs. The FPMI has also noted that one of the main interventions and goals of the AAMP is to raise an estimated R9.4 billion for the fast-tracking of targeted infrastructure maintenance, which among others includes the NFPMs, which is a positive development.

8.7. <u>Provisional recommendation (1):</u> Municipalities, in collaboration with SALGA, should change the operating and governance models for NFPMs and adopt the following in line with the municipal legislative framework (including the MFMA and Municipal Systems Act):

8.7.1. The corporatisation of NFPM operations through SOCs owned by municipalities with particular emphasis on the need for accounting separation (i.e. a separate budget, procurement lines and accountability through a stable board of directors); and/or

8.7.2. The creation of Public Private Partnerships with municipalities retaining ownership of the NFPMs infrastructure.

8.8. <u>Provisional recommendation (2):</u> Municipalities should ringfence profits earned from the market to fund capital expenditure and, where feasible, increase budget allocations for NFPMs from municipal budgets, over and above the revenue generated by the NFPMs.

Lack of access to the NFPMs by small-scale farmers, particularly HDP farmers

8.9. The FPMI found that small-scale farmers and HDP-owned farmers access the NFPMs to a very limited extent. For example, according to the CBMA, sales by SME and HDP producers account for less than 1% of proceeds in the NFPMs. This concern is echoed in the AAMP, which sets a target of a 3% annual increase of the share of sales of black farmers in the NFPMs.

8.10. <u>Provisional finding:</u> The FPMI makes a provisional finding that whilst barriers to access NFPMs appear low, the NFPMs are inaccessible to SME and HDP farmers. Accordingly, an intervention consistent with the AAMP is required.

8.11. Provisional remedial action (3): All NFPMs to set targets to increase annual sales of small-scale and HDP farmers through NFPMs. These targets should be a minimum of 10% increase annually in sales from SME and HDP farmers combined.

Inconsistencies in NFPM bylaws

8.12. Municipal bylaws (i.e. a form of subordinate legislation) govern the rules of each particular NFPM. The FPMI observed significant disparities in the various NFPM bylaws, meaning that players (particularly SMEs) may find it difficult to switch between various NFPMS, thereby limiting their access to markets.

8.13. Provisional finding: The FPMI makes a provisional finding that the disparity in municipal bylaws may create distortions especially when SME and/or HDP players seek to switch between the various NFPMs. The purpose is to ensure that the playing field particularly for smaller players is as level as possible between various NFPMs.

8.14. Provisional recommendation (4): Municipalities should, within three years, harmonise the bylaws with respect to the (i) trading hours, (ii) passing of risk from farmer to buyer, (iii) market agent rules, (iv) use of cold storage and ripening facilities, (v) dispute resolution and appeal processes and (vi) rules around conflict of interest in respect of the NFPMs. In addition, SALGA, local municipalities and all NFPMs should, following harmonization, revise bylaws every three years to keep up with the developments in the economy. The purpose is to ensure that the playing field for smaller players particularly is as level as possible between various NFPMs.

Market Agents

Limited access to the NFPMs by HDP market agents

8.15. The FPMI has confirmed the high concentration levels in the market for market agents operating at the NFPMs. The FPMI noted that, despite preferential allocation of floor space on the market trading floors, HDP market agents have been impeded from participation by not being able to obtain fresh produce from large established farmers due to long-standing relationships they have with their preferred market agents. As such, HDP agents have struggled to obtain most tradeable fresh produce such as potatoes, tomatoes, onions and bananas, amongst others.

8.16. In short, this issue means that even though HDP agents have prime trading floor space at the largest NFPMs, that space is often poorly stocked as they do not have regular supply of produce. As such, these agents inevitably remain small and unable to expand as long as the historical ties between existing market agents and large producers remain in place.

8.17. The FPMI was conscious of the regional dynamics for the various NFPMs and will thus be sensitive to concentration levels at specific NFPMs and in specific commodities.

8.18. Provisional finding: The FPMI makes a provisional finding that the high levels of concentration in the market for market agents and the long-standing historical ties between large producers and large market agents impedes and restricts competition.

8.19. The FPMI noted previous attempts by the NAMC who concluded that HDP market agencies do not have access to the most traded commodities at the NFPMs and their share of total volumes traded was less than 1%. A recommendation was made by the NAMC that at least 30% of the trade at NFPMs should be handled by the HDP market agents by 2014. To date, this target has not been achieved.

8.20. The FPMI notes that the 30% target remains impractical as it is, firstly, unclear who was expected to implement the target. In considering the remedy afresh, the FPMI resolved that it is still not feasible as it will either place obligation on (i) NFPMs to redirect produce as it enters the market and enforce sales that do not follow the allocation or (ii) on farmers to ensure that in their supply to NFPMs, 30% of the produce is allocated to HDP agents. The HDP market agents expressed a view that the 30% allocation is insignificant. The FPMI is of the view that this proposal should be considered by other authorities.

8.21. Notably, the NFPMs have an important role to play in ensuring transformation of the market agency market. Equally, farmers and particularly large commercial farmers who sell produce through these NFPMs have an important role to play in transformation. The AgriBEE Broad-Based Black Economic Empowerment Framework for Agriculture's main objective is to *"(a) promote equitable access and participation of HDI in the entire agriculture value chain (b) Unlocking the full entrepreneurial skills and potential in the sector of HDI, (d) facilitating structural changes in agricultural support and systems and development initiatives to assist black South Africans in owning, establishing, participating in and running agricultural enterprises."* It is the FPMI's view that large commercial farmers need to play their role as required by the AgriBEE framework to ensure not only transformation but competition amongst market agencies at the NFPMs.

8.22. In considering which remedies may be appropriate, the FPMI reflected on where transformational intervention is most needed and is of the view that, whilst the transformation of market agents is important, priority should rather be given to impactful transformational remedies aimed towards HDP farmers. In this vein, the FPMI noted the position adopted in the AAMP, which has no direct intervention aimed towards market agents, but instead sets a goal of achieving a 3% increase in the share of sales from black farmers at NFPMs.

8.23. <u>Provisional recommendation (5):</u> NFPMs (market authorities) must put a programme to: (i) introduce new HDP market agents (where there are none) and (ii) ensure that the HDP market agents have access to highly traded produce, namely potatoes, onions, tomatoes, and bananas at all NFPMs.

8.24. <u>Provisional recommendation (6):</u> Large and established fresh produce farmers (who have had an annual turnover of more than R35 million in the previous financial year and who employes more than 250 full-time employees)[1] must put in place a programme for (i) introduction of new HDP market agents (where there are none) and (ii) ensuring that the HDP market agents have access to highly traded produce, namely potatoes, onions, tomatoes, and bananas at all NFPMs.

8.25. <u>Provisional recommendation (7):</u> APAC must develop a quantifiable HDP salesperson development programme (to develop skills and contribute to the successful new entry of HDP market agencies). Priority must be given to the existing salespersons from market agencies that are wholly owned by HDPs.

8.26. <u>Provisional recommendation (8):</u> Dominant market agents by either product line or overall market share per major NFPM, namely the RSA Group, Subtropico, the Grow Group, Dapper and Prinsloo & Venter Market Agents must enter into management agreements with SME or HDP market agents for skills transfer as well as training on managing the fresh produce market agency business. There is existing precedent that this remedy was previously voluntarily adopted with success by certain market agents.

8.27. The FPMI also considered remedies to impose mandatory BEE ownership on existing market agents but resolved that such issue is best placed under the purview of the sector regulator, APAC, when issuing fidelity fund certificates to market agents. However, currently the APA Act does not empower APAC to regulate and enforce BEE ownership.

8.28. <u>Provisional recommendation (9):</u> The DALRRD must, within three years, amend the APA Act to confer powers to APAC to regulate market agencies' HDP ownership and participation. This should be in line with the AgriBEE

Broad-Based Black Economic Empowerment Framework for Agriculture.

Determination of market agent commission fees

8.29. The FPMI considered how commission fees (i.e. the "price" which agents require for selling a farmer's produce on their behalf) are determined and particularly why little to no variance in commission fees between market agents exists.

1 This large firm classification stems from the schedule of firm sizes for agriculture, published in the Government Gazette (Government Notice 987, Government Gazette No 42578 of 12 July 2019).

8.30. The FPMI observed the historical context that commission fees used to be regulated by legislation until 1997 (i.e. the commission fees were prescribed by the relevant control boards for agriculture until these boards ceased operation). For fresh produce, the various commodity control boards were replaced by the current sector regulator of market agents, namely APAC. To this day, the APAC Rules still require that no commission fee may be at a higher rate or scale than usually claimed by that agent unless the prior written approval of the farmer has been obtained.

8.31. Provisional finding: The FPMI is concerned about the high levels of concentration in the market for market agents across various NFPMs. There is some degree of disparity between commission fees charged between large and small farmers. This concern is heightened when considering that SME and/or HDP farmers may be faced with higher commission fees (either as a deterrent to avoid selling lower volumes or as a means to compensate the lower revenue based on lower volumes).

8.32. Further, the FPMI makes a provisional finding that, if uncapped, higher commission fees may be likely charged to smaller farmers which may distort competition at the NFPMs as platforms through which farmers compete, as such a cap may be necessary. This may ensure that smaller producers are not charged higher commission fees simply because they are unable to submit larger volumes to the NFPMs.

8.33. Provisional recommendation (10): The DALRRD should amend the APA Act within three years to allow for regulating the maximum commission fee which may be charged by market agents (i.e. place an effective cap on commission fees), such that the revised cap should not lead to increases in the current commission fees and should provide for discounts. In addition, the costs associated with transport, palletising and packaging, should be negotiated or set outside of the commission fee structure.

8.34. Provisional recommendation (11): APAC and the NFPMs management must use advocacy measures to educate farmers that they can negotiate lower commissions with market agents and either that a maximum fee applies or that they cannot be forced to accept an ostensible standard commission rate.

Practices by market agents that may be distorting market outcomes

8.35. There are concerns about certain practices by market agents such as (i) reserve buying, (ii) credit sales (iii) product reservations and (iv) late sales. These practices have a potential to distort price discovery process at the NFPMs and thus competition.

8.36. Provisional finding: The FPMI found some evidence of the extent of practices such as stock reservation/ reserve buying and credit sales/ credit buying in Tshwane and Durban Markets. The FPMI is also aware of the prevalence of this conduct in other NFPMs. Given lack of transparency around these practices, as well as lack of effective oversight on these practices, the FPMI finds that such practices may distort price discovery at NFPMs.

8.37. Provisional recommendation (12): APAC must develop and enforce a Code of Good Practice governing these practices, in accordance with the relevant provisions of APA Act, for market agents and market authorities to comply with.

Lack of transformation in the composition of fresh produce members on APAC's council

8.38. The FPMI observed a conflict of interest between the composition of the Council, which Council exercises oversight over the Registrar, and the disciplinary and/or enforcement functions of the Registrar who must discipline the very market agents that exercise that oversight.

8.39. The FPMI also observed that the composition of the fresh produce industry representatives is exclusively made up from the largest market agencies (on an effective rotating basis) to the exclusion of smaller and HDP market agents.

8.40. Provisional finding: The FPMI makes a provisional finding that the composition of the Council, insofar as fresh produce is concerned, creates a conflict of interest by having market participants exercise oversight over the executive officials of the sector regulator. The conflict of interest is particularly of concern given the market position of the market agents in the Council. Furthermore, the FPMI makes a provisional finding that the lack of adequate rotation of the fresh produce Council members has excluded adequate SME and/or HDP representation on the Council.

8.41. Given that the composition of the Council is determined by legislation, the FPMI can, at best, recommend that either the composition of the Council be reviewed as part of the current amendments to the APA Act (which do not include changes to the composition of the Council) and that additional measures be put in place to safeguard against undue influence being exerted over the Registrar when disciplining members of the Council. Either way, the conflict of interest is a concern, as this could distort market outcomes.

8.42. Provisional recommendation (13): DALRRD should, as part of the current legislative amendments, review the composition of the APAC Council to minimise conflicts of interest on market agents. In addition, amendments should also include rotating the membership of APAC Council to include at least one small or 100% HDP-owned market agent to represent SMEs and/or HDPs on the Council.

Structural linkages between market agents distort competition

8.43. The FPMI noted that many market agencies operate as subsidiaries of a parent company. This is especially true for the three largest market agencies, namely, the RSA Group, the Grow Group and Subtropico Ltd. However, with respect to RSA Group and Subtropico, there is a significant concern arising from a common shareholding between Subtropico and the RSA Group - the two largest market agencies at some of the NFPMs. In this regard, the FPMI noted that African Rainbow Capital effectively owns a majority stake in RSA Group and a significant minority stake in Subtropico.

8.44. The FPMI noted that although there appears to be a sizeable amount of market agencies operating across various NFPMs, there are only a few with significant market shares. The concern for the FPMI is that, against the backdrop of the highly concentrated market structure within which RSA Group and Subtropico participate, the existence of large cross-shareholdings raises a concern with respect to alignment of economic interests and incentives.

8.45. Provisional findings: The FPMI finds that African Rainbow Capital's cross shareholding in Subtropico and RSA distorts competition in that it erodes the incentive for either to compete with the other. This is prevalent more for RSA (due to African Rainbow Capital's majority stake) wherein it does not have any incentive to take away market shares from Subtropico as the ultimate shareholder's return on investment will not increase as a result.

8.46. Provisional remedial action (14): African Rainbow Capital should divest its shareholding in either Subtropico or RSA Group. The buyer of divested shares must be a firm wholly owned and/or controlled by HDP.

Retail prices and markups

8.47. The FPMI made several observations regarding retail prices, mark-ups and margins for various retailers, namely, Woolworths, Shoprite, Pick n Pay, Food Lover's Market and Shoprite. These observations included, amongst other, instances of price increases even though sales volumes do not decline, relatively high mark-ups and un-explained gross and/or net margin estimates.

8.48. The FPMI communicated these observations to the affected retailers who subsequently responded raising concerns about the FPMI's approach to the analysis. This therefore necessitates further engagements between the FPMI and affected retailers to resolve differences. It is important to note that retailer prices, markups and margins are imperative for the FPMI's assessment and henceforth further engagements with the retailers will help the FPMI to answer questions about fresh produce prices, markups and margins and understand competition between retailers better.

8.49. The FPMI does not, at this stage, make findings on retail prices, mark-ups and margins pending further engagements with the affected retailers. This process is ongoing and will continue even after the publication of the Provisional Report.

8.50. The FPMI further made observations that prices of various fresh produce sold by retailers are not transparent enough. The prices are not presented to consumers on *per kg* or *gram* basis and this makes it difficult for consumers to compare prices in-store and across different retailers. The FPMI communicated this observation with affected retailers and proposed that retailers should adopt a method to display fresh produce prices on *per kg* or *gram* basis over and above unit prices.

8.51. In response, retailers indicated that this may be costly for their operation and will also have an impact on shelving in their stores. Furthermore, some retailers raised limitation on the labelling which will not accommodate the display of per kilogram or gram. The FPMI is unconvinced by the retailers' response particularly because none quantified the costs that will be associated with this undertaking.

8.52. Provisional finding: The FPMI makes a provisional finding that the lack of transparency in unit pricing (per kg/g) distorts competition in that consumers are (less) able to compare pricing between retailers. It is important that this concern be remedied as this will allow consumers to compare pricing of differentiated products instore and across the retailers. The FPMI is open to engage retailers on the scope of fresh produce to be included and the form of unit pricing to be adopted.

8.53. Provisional remedial action (15): Retailers (Woolworths, Shoprite, Spar, Food Lover's Market and Pick n Pay) must ensure that, in addition to unit prices displayed on various fresh produce, there should also be *per kg or gram* pricing displayed below the unit prices in their stores.

High levels of concentration in retailing of fresh produce

8.54. The FPMI found that the national retailer's market is highly concentrated with the top four retailers (Woolworths, Pick n Pay, Shoprite and Spar) commanding a substantial share of the market.

8.55. The FPMI has considered that this remains true despite substantial developments after the Grocery Retail Market Inquiry and settlements with the affected formal retailers.

8.56. Provisional finding: Despite elimination of exclusivity clauses in shopping centre lease agreements, there has not been any meaningful entry in the retailing space. The FPMI makes a provisional finding that expansion by small challenger retailers is inhibited by a lack of adequate trading floor spaces in shopping centres (which are still dominated by the formal retailers). There is a need to enhance competition in this market which will likely lead to more price competition between retailers.

8.57. Provisional recommendation (16): The DTIC must set-up a fund to assist new entrants in the retailing of fresh fruits and vegetables in shopping centres.

8.58. Provisional remedial action (17): South African Property Owners Association (and its members) and other large owners of retail property should commit to make available a minimum allocation of retail space to enable effective entry of new entrants including HDP and SME and well as emerging challenger retailers for fresh produce in the shopping centres and/or malls.

Market dynamics of key inputs (fertiliser, seeds & agrochemicals)

8.59. The FPMI confirmed that South Africa is a net importer of fertiliser. As such, disruptions in global supply chains place the country in a vulnerable position and exposed to exchange rate fluctuations. A case in point is how the fertiliser prices were affected by the Russian-Ukraine conflict and the COVID-19 pandemic. The FPMI found that this reliance on imports affects the domestic farming sector across the board as price fluctuations have direct consequences on the price of key inputs.

8.60. The FPMI noted how local pricing generally follows international pricing trends, albeit that South African prices can take between four to six months to adjust (whether with increases/decreases). The AAMP also recognises the need to improve the efficiency and effectiveness in the production and distribution of, amongst other inputs, fertilisers and chemical components.

8.61. Provisional finding: The FPMI makes a preliminary finding that South Africa's reliance on imported fertilisers exposes the fresh produce supply chain, and the agricultural sector broadly, to global price fluctuations, thereby creating uncertainty in the market. In instances where South Africa has local manufacturing capacity, such as in the current production of mono-ammonia phosphates (MAP) and in the past, production of urea, government and relevant stakeholders in the fertiliser industry consider mechanisms to revitalise the local industry, where such revitalisation is viable. Implement measures to support the domestic fertiliser industry.

8.62. Provisional recommendation (18): The DTIC should implement measures to support the local/domestic fertiliser industry where there is domestic capability.

Territorial clauses in Bayer's distribution agreements distort competition

8.63. The FPMI noted various terms in the distribution agreements between Bayer and several of its appointed distributors. In the main, these terms require appointed distributors to only distribute products within demarcated territory. This implies that appointed distributors can only sell products in their allocated territory and nowhere else.

8.64. Provisional finding: The FPMI finds that these territorial allocation clauses limit competition between appointed distributors and ultimately limit the farmer's choice.

8.65. Provisional remedial action (19): Bayer should remove the territorial clauses from their distribution agreements.

High markups and prices harm farmers

8.66. The FPMI considered the markups for various seed suppliers to the South Africa market. The FPMI noted how the markups for seeds supplied by Starke Ayres, notably cabbage, tomatoes and spinach, are high. In addition, these mark-ups also correspond with commodities wherein Starke Ayres has relatively high market share in cabbage, spinach and tomatoes seeds.

8.67. Provisional finding: The FPMI makes a provisional finding that these high markups and Starke Ayres ability to implement higher prices increases are indicative of excessive pricing.

8.68. Provisional remedial action (20): Starke Ayres should reduce the mark-ups of cabbage, spinach, and tomato seeds to the average of the mark-ups of its entire seeds category.

Defunding of the ARC will have detrimental impact on the domestic agricultural sector

8.69. The FPMI noted concerns relating to the withdrawal of certain industry associations such as Hortgro from funding the ARC's gene banks. The purpose of a gene bank is the conservation and management of genes or plant genotypes, from wild and cultivated species outside of their natural habitat, for current or future use. Gene banks should be a reliable source of open varieties which are not protected by intellectual property and can be a crucial tool to allow market access.

8.70. Provisional finding: The FPMI finds that the withdrawal of funding will have a negative impact on the ability of the ARC to deliver on its mandate. This may lead to market distortions in that it makes farmers dependent mostly on the use of protected varieties and small-scale, SME or HDP farmers may be excluded due to affordability.

8.71. Provisional recommendation (21): DALRRD should ensure adequate funding for the ARC to maintain the gene bank.

8.72. Provisional recommendation (22): The Agricultural Input Control, a directorate under DALRRD, should collaborate with private firms in the industry or industry bodies to build capacity at the AIC.

8.73. Provisional recommendation (23): DALRRD should ensure that seed companies sponsor new entrants when testing varieties for South African conditions.

The role (or lack thereof) of cooperatives (or former cooperatives) in the provision of competing inputs

8.74. The FPMI noted how the lower prices that can be achieved by co-operatives are, at times, at the expense of technical advice and sound product stewardship. Stakeholder submissions indicated that co-operatives may be more price focused and do not always offer technical advice to their members. The lack of technical knowledge can in turn impact on farmer's yield and product quality.

8.75. <u>Provisional finding:</u> The FPMI makes a provisional finding that the current role of co-operatives does not enable sufficient support or benefits to SME and/or HDP farmers. Another concern with co-operatives is that they are not very effective in their current form, as such there is need to consider the formalisation of co-operatives, including a consideration of independent third-party administrators who manage the co-op on behalf of members, similar to the grocery buying group-model in FMCG markets. However, a model of this nature may require an exemption from certain provisions of the Competition Act. The FPMI notes that the recently gazzetted Block Exemption Regulations for Small, Micro and Medium-Sized Business, on 03 May 2024, will address challenges identified in the Inquiry related to the lack of bargaining power by the SME/HDP farmers. As such, there is no need for a targeted Exemption for the SME/HDP farmers as the provisions in the abovementioned Exemption caters for them as well.

8.76. <u>Provisional recommendation (24):</u> DALRRD should develop a single programme which leverages existing structures (such as co-ops and extension officers) to provide support to small scale farmers in relation to technical advice, marketing and the benefits of bulk-purchasing.

Access to seeds/varieties after expiration of the Plant Breeders Rights (PBR)

8.77. The FPMI also considered the usage of PBR in relation to Simba, a subsidiary of PepsiCo. The FPMI noted an apparent strategy by Simba, which develops its own varieties, to discontinue use of a closed variety before expiry of its plant breeders' right. It seemingly replaces that variety with its new (fully protected) variety. This entrenchment strategy, means that access to a variety (which will imminently be open) may be limited through the removal of the genetic material.

8.78. The FPMI engaged Simba which denied that it stops a variety before the expiry of PBR. The FPMI considered Simba's submission but remains unconvinced particularly because as it stands, there is no access to this cultivar even if farmers may try to obtain it.

8.79. <u>Provisional finding:</u> In light of this, the FPMI makes a finding that Simba's decision to discontinue the FL2006 without making this cultivar available to the market distorts competition. This is mainly because the competitors of Simba or new entrants will not have access to this variety.

8.80. <u>Provisional remedial action (25):</u> Simba should make available to the ARC its potato variety FL2006 gene material to the ARC for preservation and ensuring that it is available to any member of the public.

8.81. <u>Provisional recommendation (26):</u> The DALRRD should consider measures to open up access to the FL2006 potato variety.

Barriers to entry in the fresh produce value chain

Market access - quality standards which distort competition for SMEs/HDPs

8.82. The FPMI noted a multitude of quality and food safety-related standards which apply to farmers of fresh produce. These standards range from legislated, to voluntary to mandatory requirements set by retailers. Some of these standards (which are widely applied by large farmers) are difficult and expensive to comply with and raise concerns around market access for, particularly, SME and HDP farmers.

8.83. The FPMI compared the various standards, with an emphasis on a set of requirements called Good Agricultural Practice (or GAP standards), which have wide-ranging application in South Africa. There are various levels of GAP (from entry level to Global GAP) which generally set requirements that are broader than food safety or the quality of produce. GAP standards include requirements around the environment, workers' health, traceability and production processes.

8.84. The FPMI noted that the formal retailers apply the top two tiers of the GAP standards, namely the Intermediate Level (with 128 requirements) and Global GAP (with 190 requirements) as supply requirements.

8.85. Provisional finding: The FPMI makes a provisional finding that the mandatory use of Global GAP, in particular, distorts competition for SME and HDP farmers by raising and enforcing barriers to entry. This finding does not mean that the FPMI is against the application of high food safety standards and good agricultural practices, but rather that the use of such standards should be applied judiciously and with SME and HDP farmers in mind.

8.86. Based on the written submissions and oral presentations at the public hearings, the FPMI noted that most of the large formal retailers offer more favourable terms to small scale farmers that have joined their respective supplier development programmes (SDP).

8.87. Whilst current efforts by retailers are noted, the FPMI finds that the SME and/or HDP farmers still constitute a relatively small proportion of retailers' procurement spend of fresh produce. The AAMP echoes similar supplier development solutions. In relation to interventions in the agro-processing value chains, the AAMP requires the expansion of supplier/enterprise development programs of supermarkets and large agro-processors to build supplier capabilities at the local (district), national and regional levels. It sets a target of a 3% spend of Net Profit After Tax ("NPAT") by retailers and agro-processors on enterprise development programmes.

8.88. Provisional remedial action (27): Retailers (Woolworths, Shoprite Checkers, Spar, Pick n Pay and Food Lover's Market) should expand their existing supplier development programmes (which already focus on allowing SME/HDP access) in line with the commitments of the AAMP, namely a 3% spend of Net Profit After Tax (NPAT) on their SDPs, alternatively, an increase in supplier development baseline by 10% annually for a period 5 years.

Access to finance by SMEs farmers

8.89. The FPMI noted the circumstances surrounding the financial challenges of the Land Bank and how the gap in agricultural funding is being filled by the commercial banks. The FPMI's analysis of the funding provided by the Land Bank to farmers for the 6-year period between 2017 until 2022, revealed a significant decline in both the number of loans provided as well as the total value of funding. However, the FPMI also noted that the commercial banks have played a pivotal role in providing credit to the agricultural sector.

8.90. Despite this, the FPMI is of the view that the Land Bank remains a turnkey funding institution whose core function is the provision of agricultural-based credit services. As such, and despite the increased uptake of agricultural funding by the commercial banks, the Land Bank remains central to the industry.

8.91. Although the FPMI observed that small-scale farmers[2] received a disproportionately lower amount of funding from the Land Bank than larger farmers, the FPMI found no evidence that these applications are discriminatory in terms of their qualifying criteria. The issue may thus rather be that lending criteria for credit are strictly regulated and that agricultural finance remains a high-risk undertaking, especially for smaller farmers.

8.92. Provisional finding: The FPMI makes a provisional finding that the decline in the funding provided by the Land Bank is negatively affecting farmers, and that the delays in the implementation of the Blended Finance Scheme disproportionately affects SME and HDP farmers. These farmers are more likely in need of a grant which, in some instances, acts as their contribution (or deposit) when seeking to secure a loan. The FPMI noted how a different financing model can contribute to easier access to finance. Here the blended finance schemes are of particular importance.

2 Annual turnover between R50 000 – R1m.

8.93. Provisional recommendation (28): DALRRD, Land Bank and commercial banks should work jointly to fast track and accelerate the implementation of the blended finance scheme. The blended finance scheme should cater for costs for agricultural project's feasibility studies including water licencing and acquisition of land.

Access to water

8.94. The FPMI noted the tension between water as a scarce resource in South Africa (thus requiring strict regulation) and the resultant difficulty in accessing water resources. The FPMI considered the regulatory requirements and process to obtain a water license. Of note is the requirement that a technical assessment study must be included in certain applications. The FPMI noted how such a requirement makes it more difficult for SME and HDP farmers to secure water licenses due to the cost of these assessments.

8.95. The Department of Water and Sanitation ("DWS") requires such reports to ensure a responsible and safe allocation of water resources. The FPMI also noted that smaller farmers may be disproportionately affected by slow licensing processes, which highlights the importance of a level regulatory playing field.

8.96. The FPMI has however noted positive steps by the DWS to process a completed application within 90 days (in terms of promulgated regulations). However, delays may also be experienced during the pre-application process, which in part pertains to the requirement of submitting a technical feasibility report(s).

8.97. Provisional recommendation (29): DWS to continue its efforts to fast track the licensing regime, including during the pre-application phase.

9. CONCLUSION

9.1. The FPMI assessed the fresh produce value chain from input level up to retail and wholesale. In doing so, the FPMI sought to identify any market features or a combination of features that may distort, restrict or distort competition in various markets along the fresh produce value chain. The FPMI also assessed the level and extent of HDP/SME participation in various markets.

9.2. The FPMI's assessment of output markets for farmers revealed various concerns relating to retail and wholesale level. Starting with the wholesale, the FPMI found that the state of NFPMs infrastructure, as widely reported, is deteriorating and problems associated with maintenance of these key public goods are prevalent. The FPMI also found that, although NFPMs generate enough revenue to sustain themselves, profits generated are not ringfenced to cater for current and future capital expenditure. Although these assessments were mainly for the top 4 NFPMs (Joburg, Cape Town, Tshwane and Durban Markets), these problems are prevalent at all NFPMs.

9.3. The FPMI also found inconsistencies in the NFPM bylaws. This is a particular concern especially for the smallholder, HDP/SME farmers, who may be required to comply with different sets of rules across various NFPMs. Differences in trading hours, for example, may imply that certain farmers are not able to access their ideal markets and be forced to sell through markets closer to them. This therefore may lead to distorted competition between farmers.

9.4. The FPMI also found that HDP/SME farmers find it difficult to sell their produce in the NFPMs, despite their being the least costly route to the markets. It has been estimated that less than 1% of gross value of sales in the NFPMs come from smallholder or HDP/SME farmers. The HDP/SME market agents also find it difficult to enter and grow in the NFPMs. Where entry occurs, this is limited and the survival rate is low. These HDP market agents find it difficult to compete with established agencies as they do not have access to the most tradeable produce such as potatoes, tomatoes, onions and bananas.

9.5. The FPMI also found high levels of concertation with respect to the market for market agencies operating at the NFPMs. Allied to this, concerning structural linkages between market agents were also uncovered. These structural linkages have an effect of chilling competition between market agencies in a highly concentrated market, regardless of the measure of concentration employed.

9.6. Some concerning practices by market agents were also uncovered. These practices have the likely effect of distorting market outcomes where they are practiced. In order to resolve instances of practices such as stock reservation and credit sales, industry regulators together with NFPMs needs to play an active oversight role. However, the FPMI found conflict of interest in the composition of the APAC council in relation to the fresh produce representatives. This may imply that the Registrar of APAC may not be able to exercise his/her duties of disciplining market agencies, if found to be engaged in undesirable practice, as she/he reports to a council that the same market agents are appointed to.

9.7. In relation to retail, the FPMI found instances where retail prices of various fresh produce act contrary to the norm. It is expected that when sale volumes increase, prices should come down but this was not the case for some of the analysis conducted by the FPMI. The mark-up estimation also revealed, not only high mark-ups, but these were also sustained over a period. High mark ups that retailers are able to sustain over a period of time could be a good indicator of lack of competition.

9.8. In particular, the FPMI found that since the GRMI and following disbandment of the exclusive leases, there has not been new entry to challenge the to five (Shoprite, Pick n Pay, Woolworths, Spar and Food Lover's Market) retailers in shopping centres. The FPMI confirmed that the structure of the retail landscape especially in respect of national supermarket chains has not changed.

9.9. These five retailers account of a substantial share of the national grocery retail market share. The FPMI further found that prices of fresh produce are not transparent enough to enable consumers to reasonably compare prices in-store and across retailers. This is because pricing of fresh produce is not on per kg basis but per unit basis (e.g. 7 kg potatoes). Lastly, there is still slow progress in integrating SME/HDP farmers into various retailers supply chains.

9.10. In relation to input level of the value chain, the FPMI assessed markets for fertilisers, agrochemicals and seeds. In essence, South Africa relies extensively on imports of these key products. This makes the agricultural sector in South Africa exposed to global risks. This has been observed during COVID-19 period and when Russia invaded Ukraine.

9.11. The FPMI makes recommendations to the industry players and the DTIC to engage on expanding local capabilities especially in relation to MAP and Urea where there is current and/or past expertise. This will not only expand productive capacity in the country but also cushion domestic agricultural sector against global risks.

9.12. The agrochemical sector in South Africa is moderately concentrated with various domestic and global players. However, the FPMI found that the majority of active ingredients are imported from abroad. Similar to fertiliser, the domestic farming sector is exposed to developments elsewhere as well as currency risks. Nonetheless, the FPMI found that some firms in the sector engage in practices or conducts that may distort competition. This centres mostly around the use of exclusive clauses and territorial allocation.

9.13. In the seeds industry, the FPMI found instances where a firm appears to be involved in charging farmers what could be characterised as exploitative prices. The FPMI noted that price increases for certain seeds where this firm has high market share as well as mark-ups are not only high but have also been increasing over a period of time. The FPMI found that these price increases and high markups are a good indicator of a lack of competition in this sector and that they have the ability to impede competition especially because HDP/SME farmers may not be in a position to afford such increases.

9.14. In addition, access issues have also been uncovered in relation to seed potatoes. This problem relates to early termination of seed variety before expiry of its PBR to ensure that competitors do not get hold of it after expiry. Linked to this, is the challenge where ARC is facing funding challenges following withdrawal of some industry associations who previously played a key role in funding the organization, particularly with the potato gene bank. HDP/SME farmers may not be in a position to participate in certain seed schemes which makes the ARC the only avenue through which they stand a chance to obtain access to seeds, potato seeds included. As such, the defunding of the ARC by various industry associations has wider implications.

9.15. Barriers to entry in the value chain, especially at the farming level, is plagued by many problems. Access to finance remains one of the most important elements to successfully participate in farming. However, the FPMI found interdependence between access to finance and access to water. Some, if not all, commercial banks in South Africa require farmers to demonstrate their ability to undertake farming but at the same time their source of water for farming. Some of the loans declined were declined by the banks solely on the basis that the farmer did not have access to water rights. However, the FPMI found that the DWS appears to be fast tracking its water application process to cater for the demand.

9.16. Innovative financial instruments are crucial to address the challenges faced by farmers, especially the HDP/SME farmers. Blended Finance Scheme is one of those tools that is used to cater for greater access. However, certain issues have been raised with respect to the speed of implementing the Blended Finance Scheme.

9.17. In order to alleviate some of the concerns raised above, the FPMI has identified 29 practical and reasonable provisional remedial actions and recommendations that could address distortions in the fresh produce market.

competition commission
south africa

Telephone Number:
+27 (012) 394-3200 | +27 (012) 394-3320

WhatsApp / SMS Line:
+27 (0) 84 743 0000

Email Address:
ccsa@compcom.co.za

Physical address:
The DTI Campus, Mulayo (Block C),
77 Meintjies Street,
Sunnyside, Pretoria

Website:
www.compcom.co.za

a growing, deconcentrated and inclusive economy