Government Notices • Goewermentskennisgewings

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 5755 **14 January 2024**

PUBLICATION OF THE FRESH PRODUCE MARKET INQUIRY FINAL REPORT

The Competition Commission ("the Commission") initiated the Fresh Produce Market Inquiry ("FPMI") 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 ("the Competition Act"). The FPMI was initiated because the Commission had reason to believe that there exist market features which impede, distort or restrict competition in the market(s) for fresh produce in South Africa.

The Scope of the Inquiry was contained in the final Terms of Reference, published in the Government Gazette on 14 February 2023 (GN 3037 of GG 48037).

On 18 June 2024 the FPMI published a provisional report.

The FPMI was set to conclude on 1 October 2024, which period was subsequently extended by the Minister of Trade, Industry and Competition ("the Minister") until 15 January 2025 in terms of section 43B(4)(b) of the Competition Act, and published in the Government Gazette on 20 September 2024 (GN 5226 of GG 51278).

In terms of section 43E(1) of the Competition Act, the Commission hereby publishes the Final Report of the FPMI.

The Final Report will be submitted to the Minister, in terms of section 43E(1) of the Competition Act. The Minister is then required to table this report in Parliament, within the prescribed timeframes, in terms of section 21(3) of the Competition Act.

The full report can be accessed on the Commission's website at https://www.compcom.co.za/fresh-produce-market-inquiry/. The executive summary of the report is attached hereunder.

Inquiries can be made to freshproduceinq@compcom.co.za or ccsa@compcom.co.za.

FRESH PRODUCE

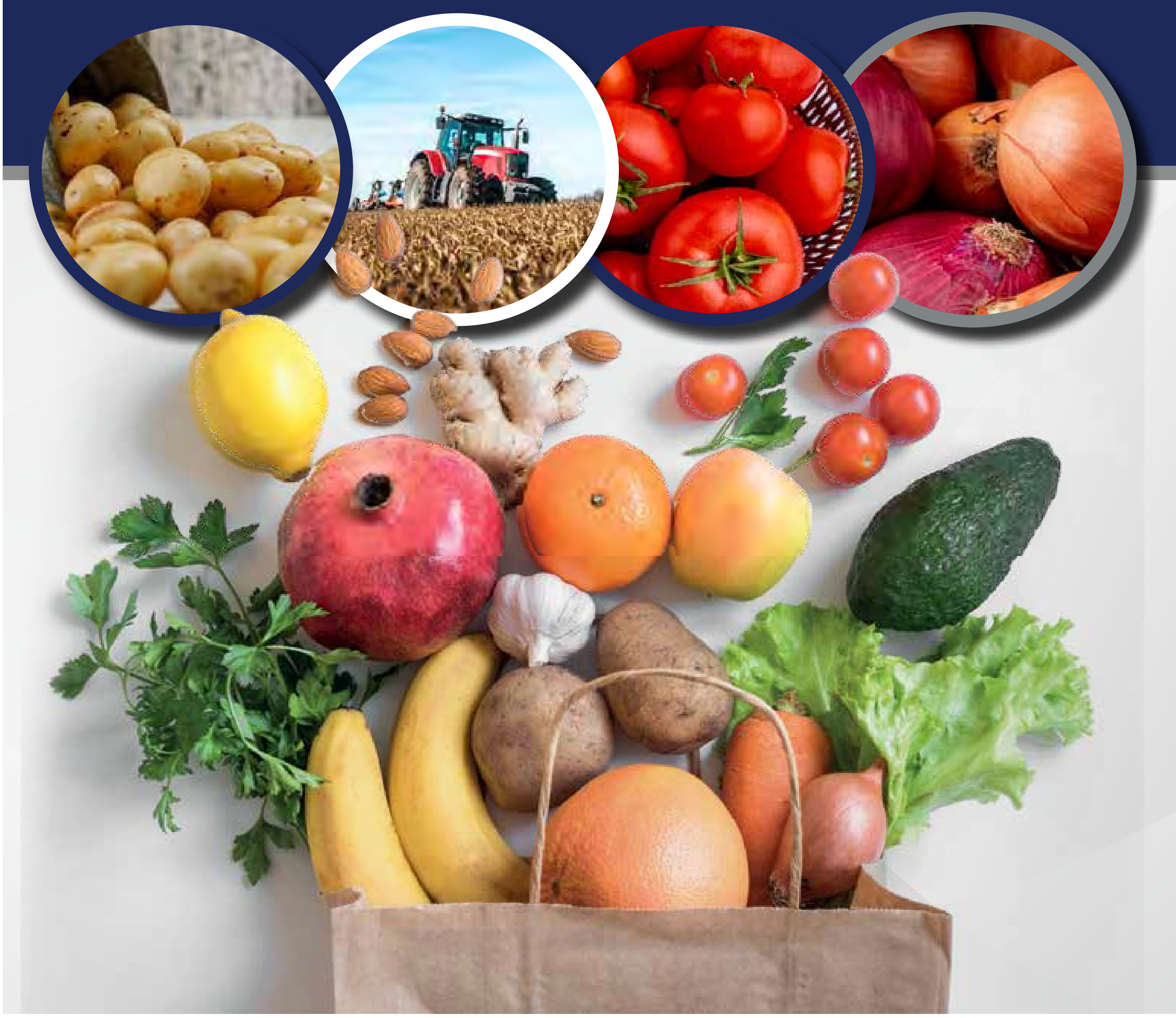
MARKET INQUIRY

FINAL REPORT

competition commission
south africa

EXECUTIVE SUMMARY

13 JANUARY 2025



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 ("the Competition Act"). The Inquiry was initiated because the Commission had reason to believe that there exist market features which impede, distort or restrict competition in the market(s) for fresh produce in South Africa.

1.2. The Scope of the Inquiry was contained in the final Terms of Reference ("ToR"), published in the Government Gazette 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 the economy and employment, and the nutrition and welfare of all 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), and 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 stemmed from concerns that the value chain, particularly at the level of the 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 impact on producers:*** Specific aspects relating to key inputs (namely, fertiliser, seeds and agrochemicals) were considered under this theme; and

1.3.3. ***Barriers to entry, expansion and participation:*** Specific consideration was given to the barriers faced by small and medium enterprises ("SMEs") and firms owned or controlled by historically disadvantaged persons ("HDPs"). In addition, the broader regulatory framework was 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 (non-confidential) documents and public submissions were made available on the Inquiry's website. Since initiation, the key Inquiry processes and proceedings have been as follows:

1.6.1. Release of the 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);

1.6.3. Issuing of second round of RFIs and information gathering (3 June 2023 until 31 July 2023);

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

1.6.5. 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);
1.6.6. First round of public hearings (18 October 2023 until 27 October 2023);
1.6.7. Second and third rounds of public hearings (8 to 9 February 2024, and 11 March 2024);
1.6.8. Engagements with affected stakeholders prior to publication of the FPMI's provisional report (18 April 2024 - 17 June 2024);
1.6.9. Publication of the FPMI provisional report (18 June 2024);
1.6.10. Period for public comments on the FPMI's provisional report (18 June 2024 - 16 July 2024);
1.6.11. Further information requests, meetings and engagements with stakeholders (17 July 2024 - 13 December 2024); and
1.6.12. Publication of the FPMI final report, with its findings, recommendations and remedial actions (13 January 2025).

1.7. The FPMI was set to conclude on 1 October 2024, which period was subsequently extended by the Minister of Trade, Industry and Competition ("the Minister") until 15 January 2025 in terms of section 43B(4)(b) of the Competition Act, and published in the Government Gazette on 20 September 2024.

1.8. In terms of section 43E(1) of the Competition Act, this report will be published in the Government Gazette and made available on the Commission's website.

1.9. This report will be submitted to the Minister, in terms of section 43E(1) of the Competition Act. The Minister is then required to table this report in Parliament, within the prescribed timeframes, in terms of section 21(3) of the Competition Act.

1.10. In what follows, this executive summary provides a further overview of the issues considered in the Inquiry, and concludes with a summary of the final findings, recommendations and remedial actions.

2. FUNCTIONING OF THE NATIONAL FRESH PRODUCE MARKETS

Introduction

2.1. The FPMI confirmed that (national) fresh produce markets are crucial to food security, food health and safety, and local economic development. These platforms can be classified as a low-cost market channel for farmers of any size, which allows fresh produce to be effectively integrated into the mainstream of the national economy.

2.2. The phrase "national fresh produce market" (or "NFPM") refers generally to platforms where farmers (sellers) bring their produce to be sold, usually but not exclusively in large volumes, to buyers. Sales occur through intermediaries, known as fresh produce market agents. Calling these markets "national" may be a misnomer in that they operate more locally than nationally. Nonetheless, technically, each market is open to receive fresh produce from any producer nationally and similarly, is able to sell to any buyer nationally.

2.3. The term also implies a public service element, where these platforms are not profit driven per se, but rather exist with the aim of providing a public service (akin to public healthcare facilities or public libraries). Even with the advent of wholly privately-owned fresh produce markets, the majority are still owned and operated by local governments who operate the markets in the public interest. For these reasons, the FPMI adopted the use of the phrase (or its abbreviation) to generally refer to all fresh produce market facilities, irrespective of whether they are public entities or privately-owned. The FPMI only makes a distinction between public entities and privately-owned entities where specifically indicated. For all other instances and unless the context clearly indicates the contrary, the term refers to both public entities and privately-owned markets.

2.4. Of central importance was that the FPMI found two distinct supply models through which fresh produce is supplied in South Africa – first, on a wholesale basis through NFPMs and, second, through formal retail channels (via their own distribution centres). Thus, a hypothesis that formal retail channels are continuously reducing the importance (or indeed relevance) of NFPMs is incorrect. The two supply chains are distinct, albeit that they co-exist, and each exercises some influence over the other.

2.5. NFPMs remain at the centre of fresh produce trading, particularly because the formal retailers use the NFPM prices as (one of their) benchmarks for negotiating with contracted farmers. NFPMs therefore exercise a price-disciplining effect over the negotiations between farmers and formal retailers, in that farmers, who may be dissatisfied with the price offered by a retailer, may freely elect to rather supply an NFPM instead. Retailers, who have continuity of supply as an important consideration, would naturally seek to offer (at least) comparable prices to what a farmer would have been able to obtain at an NFPM.

2.6. For this reason, the continued absence of exclusivity agreements and volume commitments between formal retailers and farmers are of crucial importance.

2.7. Therefore, 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.

Efficiency of NFPM operations

2.8. In considering how efficient NFPMs are managed, the FPMI observed four types of operating models used by NFPMs in South Africa, namely:

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

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

2.8.3. As a public-private partnership ("PPP"); and

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

2.9. The FPMI specifically considered the approach followed by the largest four NFPMs:

2.9.1. The Tshwane Fresh Produce Market and the Durban Fresh Produce 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.

2.9.2. The Joburg 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").

2.9.3. The Cape Town Market is operated in terms of a PPP. The immovable assets are owned by the Cape Town Metropolitan Municipality, but all operations are essentially outsourced to a private entity (which 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.

2.9.4. 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. This notwithstanding, 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. Examples of this model are the Freshlinq markets in, amongst others, Polokwane, Nelspruit and Rustenburg.

2.10. In considering the operating performance of the four large NFPMs (Johannesburg, Tshwane, Durban and Cape Town), the FPMI noted that, although the corporatisation model at the Joburg Market appears more effective than the business unit-model of Tshwane and Durban, the corporatised model is plagued by governance challenges – such as constant changes in board composition and the executive. The Cape Town Market's operating model, of a PPP, is stable and generating sufficient revenue to cover operating and capital expenditures.

2.11. NFPMs vary across South Africa, based on their size and the revenues generated. The total market size for NFPMs was estimated to be R21 billion in 2022. The four largest markets of fresh produce in South Africa (in Johannesburg, Tshwane, Cape Town, and Durban) had a combined market share based on turnover of approximately 84% in 2022. Markets classified as medium-sized include the fresh produce markets in Springs, Bloemfontein, Pietermaritzburg, Gqeberha, Klerksdorp, Welkom and East London, with a combined market share of 15%. The remaining markets are classified as small, and account for the remainder of the market share (of about 1% cumulatively).

2.12. 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 has been informed by indications that the volumes of fresh produce being sold at the NFPMs have been steadily declining over the years. This is largely attributed to the lack of upkeep and investments by the local municipalities, which are the custodians of these markets.

2.13. 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. While this may have been a factor in the retailers' move away from NFPMs, it was not the only consideration. Other factors, such as a shorter and more integrated supply chain, security of supply (volumes), control over the cold chain, and centralised supply out of distribution centres were equally relevant considerations which motivated the move of retailers away from securing supply from NFPMs.

2.14. The mostly dilapidated infrastructure at the different (municipal) 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.

2.15. 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.

2.16. The FPMI also considered past attempts to revitalise the NFPMs. In 2006, the National Agricultural Marketing Council ("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.

2.17. 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 ensuring transformation at the markets.

2.18. 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 of the Republic of South Africa, 1996 ("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) would likely be unconstitutional. The Bill was withdrawn, and no subsequent developments have occurred in this regard.

2.19. Both the South African Local Government Association ("SALGA") and the South African Union of Food Markets ("SAUFM"), an industry association for NFPMs, uphold this jurisdiction from the Constitution in local governments. However, the SAUFM recognised the need for a national oversight body to coordinate efforts between regional markets.

2.20. 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 to 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 a lack of prioritisation of capital expenditure.

2.21. The FPMI focussed on the largest four markets, but did not conclude that these are the only markets where intervention is needed. In fact, because the smaller markets generate a fraction of the revenue of the largest four markets, their problems are exponentially worse. The SAUFM has urged that any intervention aimed at any of the largest four markets be extended to the remaining smaller markets, insofar as such intervention is reasonable and practical.

Provisional findings and remedies

2.22. The FPMI made a series of provisional findings and remedies around NFPMs in June 2024, which revolved around three concerns. In broad summary, these concerns and their related provisional remedies were:

2.22.1. NFPMs (particularly at Johannesburg, Tshwane and Durban) are not operating efficiently, which can be characterised as a structural funding problem. The provisional remedies were:

2.22.1.1. NFPMs should change their operating models to a corporatised or PPP model; and

2.22.1.2. Profits from NFPMs should be ringfenced

2.22.2. A lack of access by SME and HDP farmers at NFPMs pointed to barriers to entry, participation or expansion. The provisional remedies were:

2.22.2.1. NFPMs must set targets to increase annual sales of SME and HDP farmers, and should at least increase by 10% annually;

2.22.3. Inconsistent bylaws worsened barriers to entry, participation or expansion. The provisional remedy was:

2.22.3.1. Municipalities should harmonise certain bylaws, and review the bylaws every five years.

Stakeholder views on provisional findings and remedies

2.23. Stakeholders were in general agreement with the FPMI's provisional findings and remedies. In particular, there was no disagreement that the municipal-owned NFPMs are deteriorating, and that intervention is required.

2.24. The Durban Fresh Produce Market and the RSA Group differed with the FPMI's conclusion that the issues facing the municipal NFPMs are related to funding. Both indicated that it is rather the centralised supply chain management system which causes long delays (for both operational and capital expenditures), which in turn negatively affect the provision of services such as repairs, maintenance and capex projects.

2.25. Regarding SME/HDP farmer participation at NFPMs, stakeholders did not disagree with the FPMI's conclusion that there is minimal participation by SMEs and HDPs at NFPMs, and that participation has not materially increased over the last few decades.

2.26. In relation to the harmonisation of bylaws, some stakeholders urged the FPMI to provide clarity on how the bylaws should be harmonised.

Final findings and remedies

2.27. Based on stakeholder comments on the above provisional findings and remedies, the FPMI largely retained its provisional findings. Certain changes to the remedies were however required

2.28. With regard to the limited disagreement with the provisional finding (that inefficiencies are related to problems that can be characterised as funding related), the FPMI noted that, irrespective of whether one characterises the root cause of inefficient NFPMs as funding, complex (and extensive) procurement systems, or mismanagement, this does not change the overwhelming evidence that most of the municipal NFPMs are in fact inefficient. As a consequence, the provisional remedies sought to rather address the ailment (of inefficiency) than certain of its symptoms (insufficient funding, slow procurement, ever-changing management and mismanagement).

2.29. Consequently, the FPMI makes the following final findings:

2.29.1 The inefficiencies at most municipal-owned NFPMs impede, restrict or distort competition. At the core of these inefficiencies is inadequate funding;

2.29.2 The lack of participation by SME and HDP farmers at NFPMs impedes, restricts or distorts competition; and

2.29.3 The inconsistency of several key bylaws impedes, restricts or distorts competition.

2.30. The FPMI accordingly makes the following recommendations:

Remedy 1: Recommendation

2.30.1. Municipalities, in collaboration with SALGA and the SAUFM, must change the operating and governance models for the NFPMs which they own and/or operate, and adopt the following in line with the relevant municipal legislative frameworks:

2.30.1.1. 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

2.30.1.2. The creation of a PPP, with municipalities retaining ownership of the NFPMs' infrastructure.

Remedy 2: Recommendation

2.30.2. Municipalities must ringfence profits earned from the fresh produce market they own/operate to fund capital expenditure and, where feasible, increase budget allocations for NFPMs from municipal budgets, over and above the revenue generated by the NFPMs.

Remedy 3: Recommendation

2.30.3. DALRRD should introduce measures to increase annual sales of small-scale and HDP farmers through NFPMs. To this end, DALRRD should undertake a review of the legal framework in which NFPMs currently operate. Such review should consider the relevance, coherence and effectiveness of existing legislation in regulating the core activities of NFPMs, and possible changes that could be affected to improve the existing legal framework.

Remedy 4: Recommendation

2.30.4. Municipal-owned NFPMs should introduce measures to increase annual sales of small-scale and HDP farmers through NFPMs.

Remedy 5: Recommendation

2.30.5. Municipalities should, within three (3) years, harmonise their bylaws with respect to trading hours, market agent rules and the use of cold storage and ripening facilities. The manner in which these bylaws should be harmonised is left to the discretion of the municipalities, who should work in collaboration with SALGA and the SAUFM to achieve harmonisation. Following harmonisation, municipalities should revise bylaws every five (5) years, where revisions are required to keep up with the developments in the economy. The purpose of harmonisation should be to ensure that the playing field, particularly for SME and HDP players, is as level as possible between various NFPMs.

3. CONDUCT OF FRESH PRODUCE MARKET AGENTS

Introduction

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 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. The NFPMs are vital in linking the farmers to a variety of buyers. 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. 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 are well versed in 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.

3.3. The farmer (or producer) is responsible for the logistics, including but not limited to storage, the cold chain (if they choose to have a cold chain), grading, selection, packaging, and transportation incurred in moving 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 an average 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.

3.4. 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, in order to be competitive in the market.

3.5. The FPMI considered a number of issues relating to the behaviour of fresh produce market agents, namely:

3.5.1 Specific practices which may distort price discovery mechanisms and, by extension, competition too. These practices were (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;

3.5.2 Issues directly affecting the sector regulator;

3.5.3 The determination of market agent commission fees; and

3.5.4 Challenges faced by HDP market agents

Fresh produce market agent practices

3.6. As indicated, various practices by market agents have been identified as problematic in the past, specifically by DALRRD. 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.

3.7. Agents utilising their own buying cards entails market agents utilising their own cards to purchase from themselves. The use of own buying cards implies that agents become principals. This is contrary to the rules of the sector regulator, the Agricultural Produce Agents Council ("APAC"), which require market agents to act in the best interest of the principal (farmers).

3.8. The extension of credit by market agents to buyers, may – in the words of the NAMC – pose a conflict of interest between acting in the best interests of producers (as required by the Agricultural Produce Agents Act 12 of 1992, the "APA Act") and facilitating the recovery of money that has been lent to buyers.

3.9. Reserve buying (sometimes called reserve stock or stock reservation) is a practice where produce is reserved by a market agent for a particular buyer. The result of such "transaction" is that stock cannot be removed from the sales floor until reservation has been converted to a normal sale, thus creating a false impression of volumes, which in turn could distort prices for a particular period.

3.10. After-hours trading involves sales that occur outside of trading hours (usually between 5:00am and 10:00am each day). Keeping sales within the trading hours allows for equal access of buyers to product offerings, and an adequate price discovery process (supply and demand). Sales that occur after trading hours are not transparent, and distort price discovery.

3.11. These practices have been flagged due to the likelihood that they have a negative impact on price determination or discovery at the NFPMs. The control of these practices firstly falls within the purview of APAC that, amongst other industries, regulates the conduct of fresh produce market agents. However, insofar as these practices have adverse effects on competition, the Commission has concurrent jurisdiction.

3.12. The Inquiry found evidence that these practices (particularly stock reservation/reserve buying and credit sales/credit buying) are prevalent in major NFPMs and require stronger regulation.

Provisional finding and remedy

3.13. Given the lack of transparency in pricing around these practices, as well as a lack of effective oversight, the FPMI provisionally found that such practices distort price discovery at NFPMs.

3.14. To address this distortion, the FPMI provisionally recommended that APAC must develop and enforce a Code of Good Practice governing these practices, in accordance with the relevant provisions of the APA Act, for market agents and market authorities to comply with.

Stakeholder views on provisional finding and remedy

3.15. This recommendation was supported by the Durban Fresh Produce Market, the Grow Group of market agents and the RSA Group. All understood the remedy to prohibit these practices.

3.16. Initially APAC was not in support of the recommendation, as the recommendation could be interpreted to mean that such practices be allowed, as long as they are regulated by a Code of Good Practice. As a result, APAC submitted that they did not support the provisional recommendation, and requested for an amendment. DALRRD shared the same view, i.e. that as long as the remedy can be read in such a way that it allows for these practices, they would not support it.

3.17. APAC agrees that the practises discussed in the FPMI's provisional report distort market outcomes, and therefore ought to be more closely regulated. APAC further indicated that these practices may be considered unethical, as per the APA Act and Rules. It indicated that its Rules would have to be enhanced to expressly prohibit these practices (insofar as the Rules do not already do so).

3.18. During subsequent engagements, APAC however appeared to reconsider its approach to the above practices where, for example, it stated in relation to credit that:

"APAC acknowledges that potential conflicts of interest could arise. However, these issues can be managed by amending the Rules to require agents to disclose to APAC, their principals, and market authorities whenever credit is extended. This approach mitigates potential conflicts of interest and is preferred over an outright prohibition on extending credit by any means. APAC does not believe that an agent extending credit by allowing a buyer to use their buyer card distorts the market or acts in an anti-competitive manner."

3.19. In light of APAC more permissive approach to these practices, the FPMI remains concerned that inadequate regulation of these practices may occur, thereby preserving distortions in competition and adverse effects, particularly for SME and HDP farmers. Consequently, the Commission will continue to monitor these practices, to determine whether an enforcement investigation, and possible referral to the Tribunal in due course, is required.

Final findings and remedies

3.20. The FPMI therefore makes the following final findings in relation to certain market agent practices, that is, abuse by market agents in the use of market agent buying cards, the extension of credit, reserve buying, and after-hours trading, leads to a lack of price transparency, price discovery and price setting, and accordingly, impedes, restricts or distorts competition.

Remedy 6: Recommendation

3.21. APAC should enhance and increase its regulatory focus regarding the following market agent practices, with the aim of promoting transparency around these practices:

3.21.1 The manner in which fresh produce market agents utilise their buying cards;

3.21.2 The APAC Credit Policy; and

3.21.3 Harmonising reserve buying and after-hours trading practises as applied by different market authorities.

Remedy 7: Recommendation

3.22. APAC must use its powers to promote transparency in produce distribution practices through, inter alia, incentivising partnerships, supporting infrastructure development, training and skills development, and collaborative programs with farmers.

Issues around the sector regulator (APAC)

3.23. APAC (or "the Council") is a sector regulator that regulates the occupations of the fresh produce, export, and livestock agents. Its mandate is to maintain and enhance the status and dignity of those occupations, and the integrity of persons practicing those occupations. For purposes of the FPMI, APAC's role over fresh produce market agents was the focus.

3.24. The behaviour of fresh produce market agents is governed by the Rules in Respect of Fresh Produce Market Agents, 2005 ("the Rules"). The Rules seek to regulate the way in which market agents interact with farmers, and conduct which is deemed to be unacceptable for market agents.

3.25. The APA Act stipulates the composition of the Council. It requires that three members who are deemed to represent the fresh produce industry be appointed on the Council every three years.

3.26. The full composition of the Council is stipulated in section 3 of the APA Act. It states that the Minister of Agriculture must appoint members of the Council for a maximum period of three years, as follows:

3.26.1 two persons who in his or her opinion represent producers of the agricultural products set out in Part A of Schedule 1;[1]

3.26.2 two persons who in his or her opinion represent producers of the agricultural products set out in Part B of Schedule 1;[2]

3.26.3 three persons who in his or her opinion represent fresh produce agents;

3.26.4 three persons who in his or her opinion represent livestock agents;

3.26.5 three persons who in his or her opinion represent export agents;

3.26.6 two persons designated by him or her;

3.26.7 two persons who in his or her opinion represent consumers; and

3.26.8 one person representing the Department of Agriculture.

3.27. The Council thus consists of stakeholders within Government, and market participants in the industries which are regulated by APAC. The APA Act, in its current form, combines an element of self-regulation with governmental oversight in constituting the Council.

3.28. The Registrar of APAC is the Council's executive and accounting authority, and is responsible for enforcing the APA Act and its Rules. The powers to investigate and discipline salespersons and market agencies for transgressions rests in the Registrar.

1 These agricultural products, at time of this report, refer to: flowers, ornamental plants, pot plants, certain vegetables, certain fruits, certain culinary herbs and certain miscellaneous products.

2 These agricultural products, at time of this report, pertain to: certain livestock, certain meats, certain by-products from livestock and certain cured hired/skins.

3.29. The FPMI observed a conflict of interest between the composition of the Council's industry members, who exercise oversight over the Registrar, and the regulatory/enforcement functions of the Registrar – who must regulate the conduct (including disciplining aberrant conduct) of the very market agents who exercise that oversight. The conflict does not arise from all the positions making up the Council, and this concern only relates to the members who are constituted from firms who compete in the market (i.e. the market agent members).

3.30. The FPMI noted that a degree of conflicting interest may, in theory, always be present where self-regulation forms part of the regulatory framework of a particular market. Ordinarily, such conflict would not in itself raise (competition) concerns, particularly where appropriate governance measures are in place. However, for market agents the conflict of interest is particularly of concern, given the market position of the market agents in the Council. Concentration levels amongst market agents are exceptionally high, resulting in a small number of firms exercising disproportionate influence or power when they self-regulate.

3.31. To demonstrate the concern, following the publication of the FPMI's provisional report (which also raised this issue), the FPMI received an anonymous letter supporting the FPMI's view on a conflict of interest. The anonymous submission contains allegations against a member of the Council "who happens to be a major role player in the industry". The submission alleged that there was an incident where the major role player allegedly conspired against a small role player to ensure that the supply of products listed under the APA Act do not reach the small role player, in favour of the major role player.

3.32. Whilst the FPMI does not express an opinion on the veracity of these allegations, and whilst the FPMI believes this to be an internal dispute best left for APAC and its structures to resolve, the fact that a discontented role player saw fit to bring these allegations to the FPMI's attention (albeit anonymously), highlights the actual or perceived conflict that role players may experience in how the Council is constituted.

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

3.34. The APA Amendment Bill ("the Amendment Bill)"), sought to address some of the broad issues related to APAC, including the composition of the APAC's council. The Amendment Bill was however withdrawn from Parliament in October 2022, due to unrelated concerns about its constitutionality.

3.35. Nonetheless, market agents pointed out that the membership of similar structures in the legal, medical, accounting and other professions is drawn from the respective professionals. Currently, the majority of the members of APAC are drawn from agents. There are also producers and consumer representatives. This notwithstanding, there are no black agents or producers on APAC.

3.36. The FPMI has also considered the viewpoints that other professions share similar practices (of appointing market participants to their regulatory bodies). However, those professions are distinguishable in that the markets in which those professionals operate are not nearly as concentrated as fresh produce market agents. The competitive dynamics for each profession are further unique, and caution is needed before applying the principles of other industries summarily to the current circumstances, without a similar in-depth consideration.

Provisional findings and remedies

3.37. The FPMI made 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. This may lead to instances where the Registrar is unable to fully exercise his/her authority when dealing with the conduct of market agents broadly, but specifically in relation to practices such as stock reservation – which inherently have an impact on pricing outcomes at the NFPMs.

3.38. The FPMI also provisionally found that the lack of adequate rotation of the fresh produce Council members has excluded adequate SME and/or HDP representation on the Council.

3.39. Based on the findings above, the FPMI made provisional recommendations which sought to address transformation within the APAC Council, and ensure that it was inclusive of SME and/or HDP representation.

Stakeholder views on provisional findings and remedies

3.40. The RSA Group and the Grow Group supported the FPMI's provisional recommendation which sought to minimise conflicts of interest and enhance SME/HDP participation in the Council. In particular, the Grow Group is of the view that having a diverse Council will ensure a broader perspective and decision-making process. It agrees that by periodically rotating members, accountability and impartiality can be maintained. This approach prevents undue influence and fosters transparency.

3.41. APAC agreed with the FPMI's recommendation regarding the composition of the APAC Council, and has indicated that it will be considered during the current amendments of the APA Act (which is underway).

3.42. DALRRD indicated that the existing composition of the Council sought to create a balance of power, as 50% of the members are other industry (non-governmental) role players. However, insofar as it concerns market agents (for fresh produce at least) the appointment of HDP market agents should be considered. DALRRD has indicated that it supports the recommendation, and will ensure that it is considered during the appointment process.[3] DALRRD also indicated that, in light of the concerns raised by the FPMI, it may need to reconsider whether a partly self-regulating model remains feasible. As indicated above, the APA Act is currently undergoing an amendment process, and this issue will likely be considered during that process.

Final findings and remedies

3.43. In light of the broad support for the provisional recommendations regarding the composition of the Council, the FPMI will proceed with these remedies.

3.44. Accordingly, the FPMI makes a final finding that the lack of transformation in the composition of fresh produce members on APAC's council, whether through insufficient rotation of members or the lack of presence of SME or HDP members, impedes, restricts or distorts competition.

Remedy 8: Recommendation

3.45. To remedy this, the FPMI recommends that DALRRD should, within three years or as part of the current legislative amendments, review the composition of the APAC Council to minimise conflicts of interest for fresh produce market agents when considering matters that regulate the conduct of fresh produce market agents. In addition, amendments or practices should also include rotating the membership of the APAC Council's industry representatives, to include at least one small or 100% HDP-owned market agent to represent SMEs and/or HDPs on the Council.

Market agent commission fees

3.46. 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.

3.47. The commission which is currently charged by market agents largely ranges between 5%-7.5%. There is no regulation on prescribed (maximum, minimum or range of) commission fees that the market agents can charge to the farmers. Essentially, market agents should negotiate commissions fees with farmers, subject to certain guidelines (rules) promulgated by APAC.

3 DALRRD submission in response to the FPMI provisional report (Undated).

3.48. Market agents indicated that they do not have a specific formula for calculating the commission charged. However, they indicated various elements which are considered when negotiating the fee, such as exclusivity of supply, volumes, consistency of supply and the quality of produce.

3.49. The FPMI noted minimal instances in which some grower bodies or farmer associations (such as Potatoes South Africa) negotiate for a fixed commission fee across all NFPMs. As an example, market agents earn a commission fee that is lower than the average, for selling potatoes across all NFPMs in South Africa – after an agreement between Potatoes South Africa and the Institute of Market Agencies of South Africa (a trade association that represents market agents).

3.50. Despite the ostensible negotiation of commission fees, the FPMI noted that market agents rarely deviate from the range of 5% - 7.5% commission fees, except in instances where they offer additional services (such as packaging or cold storage) after receiving the consignment. In such instances, the commission fee is higher as it includes additional services.

3.51. In instances where there is a transgression involving market agents about commission fees, APAC is empowered to act. Nonetheless, the FPMI found that SME and HDP farmers may be negatively impacted (through higher than the prevailing commission fees that maybe levied against them by market agencies). Therefore, it is crucial that farmers, especially SME and HDP farmers, are aware that they can negotiate the commission fees.

3.52. The FPMI was concerned about the high levels of concentration in the market for market agents across various NFPMs. It found disparity between commission fees charged to large and small farmers. SME and/or HDP farmers may be faced with higher commission fees, often used as a deterrent to selling lower volumes – or as a way for market agents to compensate for reduced revenue from lower volumes.

3.53. The FPMI was concerned that the lack of competition on commission fees, and the likelihood of exploitation of SME/HDP farmers, are because such farmers inevitably have little to no bargaining power.

Provisional finding and remedy

3.54. Consequently, the FPMI made a provisional finding that the absence of price competition on commission fees distorts competition.

3.55. To remedy this, the FPMI made a provisional recommendation that:

3.55.1 DALRRD should amend the APA Act to allow for regulating the maximum commission fee which may be charged by market agents (i.e. place an effective cap on commission fees); and

3.55.2 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.

Stakeholder views on provisional finding and remedy

3.56. The FPMI provisionally recommended that a maximum amount (cap/ceiling) be placed on market agents – to prevent smaller producers from having to pay higher commission fees simply because they are unable to submit larger volumes to the NFPMs.

3.57. The FPMI received a number of submissions, with some stakeholders supporting the proposed remedy, whilst others objected to it. Objections mostly centred around the removal of the negotiation dynamic when the price is regulated.

Final finding and remedy

3.58. Having considered all the comments on the proposed cap on commission fees, the FPMI remained unconvinced that leaving the commission fee as a purely "negotiated" fee mitigates any of the concerns which the FPMI found. In particular, the objections do not address the unequal bargaining position, and likelihood for exploitation, which SME/HDP farmers may face when seeking to negotiate commission fees.

3.59. Despite some claims that it is essential that the commission fee remains open to negotiation, the FPMI noted little to no variance in the commission fees charged to farmers, despite the removal of a regulated price in 1997. Thus, despite nearly 30 years of inflation and 'competition', the price for the market agent's service remains largely the same. The conclusion is inescapable that little to no actual negotiation takes place, and that the fees are rather already regarded by industry players as set.

3.60. Furthermore, the FPMI does not intend that a fixed price be set, only a maximum price (cap/ceiling). If any competitive dynamics remain (or wish to be exercised in future) farmers, market agents and industry associations will still be free to negotiate any price, as long as it is lower than the regulated maximum price.

3.61. Accordingly, the FPMI makes a final finding that the lack of maximum and regulated market agent commission fees impedes, restricts or distorts competition.

3.62. To remedy this, the FPMI recommends that:

Remedy 9: Recommendation

3.62.1 DALRRD should, within three years, alternatively as part of the current legislative amendments to the APA Act, submit to Parliament amendments to the APA Act to regulate the maximum commission fee which may be charged by market agents (i.e. place an effective cap on commission fees). Such commission 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, in line with the Rules in Respect of Fresh Produce Agents in its current format.

Remedy 10: Recommendation

3.62.2 APAC and all NFPMs' management (whether public or privately-owned) should use advocacy measures to educate farmers that they can negotiate lower commissions with market agents.

Access by HDP market agents

3.63. The FPMI distinguished between a market agency and a market agent (or a sales agent). A market agency refers to the corporate entity, usually responsible for carrying the costs of overhead expenses and other common costs, whilst a market agent is the salesperson who sells the produce at the market, and is usually an employee of the market agency.

3.64. To provide context to this discussion around the issue of HDP market agent representation – in 2020/21, out of close to 1 000 licensed fresh produce agents in South Africa, only about 250 (or 25%) were classified as black (African, Indian or Coloured).

3.65. Out of a total of 98 market agencies registered in 2022/23 across South Africa, the number of market agencies with at least 50% black ownership only stood at 33 (or 33.7%). When market agencies that form part of the same larger group (such as the RSA Group, the Grow Group and Subtropico) are combined, the number drops to 20 market agencies/groups (or 20.4%). Market agencies that are 100% black-owned only stood at 13 (or 13.3%).

3.66. In addition, 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. However, the method of floor space calculation inherently favours large market agents. Despite special allocations of floor space by market authorities to HDP market agents, those agents have nonetheless 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 agents.

3.67. As such, preferential floor space is but a single measure and, on its own, does not ensure consistent large volumes that are needed to sell effectively at the NFPM.

Provisional findings and remedies

3.68. Consequently, the FPMI provisionally found that HDP market agents are impeded from participation by not being able to obtain fresh produce from large and established farmers

– due to the 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.

3.69. 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, the FPMI provisionally found that HDP agents inevitably remain small and unable to expand, as long as the historical ties between existing market agents and large producers remain in place.

3.70. In light of the above provisional findings, the FPMI proposed the following provisional remedies:

3.70.1 NFPMs should put a programme in place to introduce new HDP market agents and ensure that they have access to highly traded produce of potatoes, onions, tomatoes and bananas;

3.70.2 Large farmers should put a programme in place to introduce new HDP agents and ensure that they have access to highly traded produce of potatoes, onions, tomatoes and bananas;

3.70.3 APAC should develop an HDP salesperson development programme, to develop skills and contribute to the successful new entry of HDP market agencies;

3.70.4 Dominant market agencies 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; and

3.70.5 DALRRD should, 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 (the Broad-Based Black Economic Empowerment Framework for Agriculture).

Stakeholder views on provisional findings and remedies

3.71. In relation to the above provisional findings and remedies, the FPMI received varying support from stakeholders. There was widespread support for HDP development programmes and advocacy-type remedies.

3.72. However, remedies that require specific commitments were more challenging. In this regard:

3.72.1 The NFPMs, SALGA and the SAUFM indicated that, whilst they agree that HDP market agents require more support, they are concerned that NFPMS may not have direct authority to ensure certain produce is directed to certain agents;

3.72.2 The RSA Group of market agents was against most of the provisional remedies, and seemingly required that an additional framework is required to assist HDP market agents;

3.72.3 The Grow Group of market agents conditionally supported the provisional remedies, but indicated that implementation of the proposed remedies would require a multi-faceted approach involving collaboration, structured training programs, mentorship and continuous support for HDP market agents; and

3.73. Other comments revolved around proper oversight and enforcement of these remedies.

Final findings and remedies

3.74. Having considered the stakeholder views, the FPMI retains most of the provisional remedies, particularly relating to providing various forms of support for HDP market agents.

3.75. Given the concerns that NFPMs may not have the authority to direct sales to specific agents, the FPMI will remove the requirement that the NFPM programme must ensure access to specific produce. Instead, the remedy will only require the NFPMs to put a programme in place to introduce new HDP market agents. This is undoubtedly within their authority to do, given their mandate to manage and operate the facilities (including through binding bylaws).

3.76. Based on the stakeholder submissions, the FPMI will also not pursue a remedy which requires large farmers to introduce new HDP agents and ensure that they have access to highly traded produce of potatoes, onions, tomatoes and bananas. This remedy may be too onerous and may lead to unintended consequences.

3.77. Accordingly, the FPMI finds that the lack of participation at most NFPMs by HDP market agents impedes, restricts or distorts competition.

3.78. To remedy this, the FPMI makes the following remedies:

Remedy 11: Recommendation

3.78.1 DALRRD should, within three years or as part of the current legislative amendments to the APA Act, submit to Parliament an amendment of 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.

Remedy 12: Recommendation

3.78.2 Municipal-owned NFPMs should put a programme in place to introduce new HDP market agents.

Remedy 13: Recommendation

3.78.3 DALRRD, in collaboration with both APAC and the Agri-BEE Charter Council, should consider measures to introduce new HDP market agencies, and to make available to HDP market agencies (whether new or established) access to highly traded produce, namely potatoes, onions, tomatoes, apples and bananas.

Remedy 14: Recommendation

3.78.4 APAC should enhance its current measures aimed at career development for emerging salespeople (including HDP salespeople).

Remedy 15: Recommendation

3.78.5 APAC must implement measures to encourage all fresh produce market agents to develop emerging salespeople (including HDP salespeople).

Remedy 16: Remedial Action

3.78.6 Large market agents, by either product line or overall market share per major NFPM, (such agents being the RSA Group, Subtropico, the Grow Group, Dapper and Prinsloo & Venter Market Agents) must, for a period of 6 years, 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. The agreements should be implemented within 18 months. Each management agreement should last a minimum of two years, and only be between two parties (a large market agent and an SME/HDP market agent) at any given time.

4. MARKET STRUCTURE OF FRESH PRODUCE MARKET AGENCIES

4.1. As indicated above, NFPMs provide a platform that links farmers and buyers. By the same token, market agents are crucial to ensuring this link remains vibrant and dynamic.

4.2. For purposes of this report, the market structure of fresh produce market agents specifically refers to concentration levels, the extent of cross-directorships, and cross-shareholdings.

4.3. High concentration levels may have adverse potential consequences for markets, particularly in terms of participation. The FPMI considered the profile of the largest market agents across the top four NFPMs (in Johannesburg, Tshwane, Cape Town and Durban). It assessed concentration levels using recognised and accepted metrics, and also considered whether the cross-shareholding by African Rainbow Capital in two of the largest market agencies distorts competition.

4.4. Specifically, the FPMI's market structure assessment considered both revenue (or value) of the goods sold and floor space allocation as measures to indicate the structure of the relevant market. However, the floor space allocation formulae across NFPMs also includes revenue as a consideration. As such, in some instances, there is immaterial difference in market share estimates using either revenue or floor space.

High concentration levels among market agents

4.5. The fresh produce market agencies which were considered by the FPMI were:

4.5.1 The RSA Group;
4.5.2 Subtropico Market Agents;
4.5.3 The Grow Group;
4.5.4 Dapper Market Agents; and
4.5.5 Prinsloo and Venter Market Agents.

4.6. The FPMI noted that, although there appears to be a sizeable 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.

4.7. Market structures for the markets in Johannesburg, Tshwane, Durban and Cape Town were analysed using data for the 2021/2022 financial years. It should be noted that the market shares were analysed only in respect of the eleven commodities prioritised by the FPMI, which collectively account for the largest share of all produce sold or revenue generated.

4.8. These four markets are by far the largest NFPMs in terms of volume and value of produce sold. They accounted for approximately 84% of the total value of produce sold at the NFPMs nationally in 2021/2022.

4.9. The top four market agencies at the Joburg Market (being RSA Market Agents, Grow Marco, Botha Roodt & Kie[4] and Subtropico which includes DW Fresh Produce) accounted for approximately 81% of the total value of goods sold at this market in 2022. The Four-Firm Concentration Ratio (CR-4 ratio) of 81%, points to a highly concentrated market. Similarly, the Herfindahl-Hirschman Index ("HHI") is approximately 1 995, which confirms a highly concentrated market.[5]

4.10. Evidently for the Joburg Market, the biggest market agent is the RSA Group with approximately 24% of market share.

4.11. The position at the Tshwane Market is different from the Joburg Market in that there is no clear dominant market agent. However, Subtropico (through DW Fresh and Subtropico) holds between 20-40% market shares, followed by the RSA Group with between 15-30% market shares and the Grow Group with between 15-25% market shares. However, like the Joburg Market, the market structure in the Tshwane Market remains highly concentrated, with the CR-4 of 80% and HHI of 1 963.

4.12. In the Durban Market, concentration levels are even higher than at the Joburg Market, as there are only four market agents in operation. The CR-4 score is thus 100%, and the 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. Hanly Market Agents and Subtropico have minor market shares of less than 10%, each.

4.13. In the Cape Town Market, there are only five market agents. The biggest market agent by far is the RSA Group, with between 46-56%. The second biggest market agent is Subtropico, with between 13% -23%. The remaining three market agents (Boland Market Agency, Fine Bros and Rhoda's Market Agency) account for just over 30% market shares cumulatively. The CR-4 score is 98%, and HHI is 3 354.

4.14. A narrower consideration of market agent concentration per commodity, across six markets (the largest four, and including the medium-sized markets in Gqeberha and Mthatha[6] for comparative purposes) also clearly illustrated high concentration levels.

4.15. The four-firm concentration ratio across these six markets, per commodity for the eleven prioritised commodities, ranges between 70% and 100%. In the Joburg Market, four firms accounted for 73% of bananas sold, 99% of tomatoes, 97% of onions, 95% of potatoes, 78% of apples, 75% of cabbages, 92% of carrots, 91% of grapes, 77% of pears and 72% of spinach. This data can be interpreted as more or less the same for other markets and produce.

4.16. In the Joburg Market, the top four market agents for bananas are Dapper, Wenpro (Subtropico), Subtropico Johannesburg (Subtropico) and Botha Roodt & Kie (not part of the Grow Group). Notably, Subtropico controls approximately 60% of banana trade at the Joburg Market.

4 Botha Roodt and Co is not part of the Grow Group. There are however two Botha Roodt entities at the Joburg Market: one is part of the Grow Group (namely Botha Roodt Johannesburg) and the other is independent of the Grow Group (namely Botha Roodt & Kie). This is because of how the two entities developed over time, with a split in the original ownership prior to the Grow Group's establishment. Transcript of the Grow Group interrogation, p138-141.

5 According to the United States Department of Justice and the US Federal Trade Commission, markets in which the HHI is below 1 000 can be considered unconcentrated, an HHI between 1 000 and 1 800 can be considered moderately concentrated, and an HHI above 1 800 can be considered as highly concentrated. See https://www.justice.gov/atr/horizontal-merger-guidelines-0

6 The market in Mthatha, Eastern Cape is also known as the Kei Fresh Produce Market.

4.17. In respect of tomatoes, the RSA Group alone controls approximately 70% of the sales. Wenpro (Subtropico) and the RSA Group collectively account for 76% of onion sales. Botha Roodt & Kie (not part of the Grow Group), the RSA Group and Wenpro (i.e. Subtropico) collectively account for 88% of potato sales.

4.18. In apples, the RSA Group, DW Fresh (Subtropico), Grow Marco and Botha Roodt & Kie (not part of the Grow Group) account for 78% of the total sales. For grapes, the RSA Group commands 63%, whereas in pears the RSA Group, Grow Marco, DW Fresh (Subtropico) and Botha Roodt & Kie (not part of the Grow Group) account for 77%.

4.19. In Mthatha, Farmers Direct is the leading market agency, with a market share range of between 80% and 100%. Essentially, this firm has a near monopoly position in the Kei Fresh Produce Market and there are thus little to no competitive constraints on Farmers Direct for most, if not all, produce under consideration. There are only three market agencies in Mthatha. Notwithstanding, the FPMI noted that the Kei Fresh Produce Market in Mthatha is the smallest NFPM in the country with less than R4 million generated in revenue in 2021/2022. In Gqeberha, there are five market agencies, and they exchange leading positions depending on the produce, which may suggest specialisation at an agency level.

Structural linkages: cross-directorships

4.20. This analysis prompted further consideration into structural linkages between market agents. Given the extreme levels of concentration, further structural linkages would amplify any concerns, and worsen any adverse effects which high concentration may cause. In its analysis, the FPMI considered both cross-directorships (i.e. where the same individual holds directorships in competing firms) as well as cross-shareholding (i.e. where the same shareholder holds shares in competing firms).

4.21. In this regard, the FPMI noted that whilst cross-directorships are prevalent, they do not raise competition concerns since they occur in relation to the same group of companies. For instance, Subtropico Market Agents and the Grow Group opted to retain the trading names of the market agencies they acquired. As such it may not be immediately apparent that "DW Fresh Market Agents" or "Wenpro Market Agents" are in fact subsidiaries of Subtropico Market Agents. Similarly, while "Botha Roodt" and "Marco Fresh Produce Agents" may appear to be separate firms, they are in fact both subsidiaries of the Grow Group. Cross-directorships within the same group are part of normal business relationships. The FPMI did not find any cross-directorships outside of the same group of companies.

Structural linkages: the cross-shareholding by African Rainbow Capital

4.22. These findings prompted further scrutiny of cross-shareholdings in market agencies. The FPMI found that African Rainbow Capital initially owned more than 50% shareholding in the RSA Group. Since a share restructuring in June 2024, African Rainbow Capital now owns over 30% shares in the RSA Group and Subtropico, each.

4.23. The FPMI sought to understand the specific nature of the relationships between African Rainbow Capital and its investees, with regards to the governance mechanisms applicable thereto. Based on the evidence collected, the FPMI is of the view that African Rainbow Capital controls the RSA Group, and may also control Subtropico. The FPMI is concerned about the alignment of economic interest between competitors with a common shareholder, particularly in a highly concentrated market. The reduced incentive to compete and seize market share from each other is what raises competition concerns.

4.24. In essence, this is because there is no benefit or incentive for the RSA Group to take market shares away from Subtropico (and vice versa) if margins and quantities remain the same, since this will not change African Rainbow Capital's overall investment returns from this market. As demonstrated in the report, both Subtropico and the RSA Group have substantial market shares broadly (at the NFPMs) and narrowly within specific fresh produce commodities.

4.25. A weakening of competitive intensity occurs when some elements of the competitive framework lead to a less aggressive rivalry than would otherwise be expected. Less intensive rivalry could manifest in various ways, including less focus on price competition, quantity variables, the geographic scope of competition, product innovation, enhancements to existing products, or investment aimed at capturing customers from competitors.

4.26. Furthermore, weaker competitive intensity between two firms can result in greater profits for those two firms. Weaker competitive intensity that arises from avoidable features of market structure, such as common ownership, is consequently construed as distorting competition.

4.27. The FPMI, therefore, made a provisional finding that the substantial cross-shareholding by African Rainbow Capital in both the RSA Group and Subtropico distorts competition. It made a provisional remedy that African Rainbow Capital divest its shareholding in either Subtropico or the RSA Group. The provisional remedy stipulated that the buyer of the divested shares must be a firm wholly owned and/or controlled by HDP (in order not to dilute the divested firm's BEE status).

4.28. African Rainbow Capital disagreed with the FPMI's provisional finding that its cross-shareholding in Subtropico and the RSA Group distorts competition. It argued that while there may be a theoretical concern on the potential competitive risks that could emanate from cross-shareholdings, any such potential concerns only occur under particular circumstances, and their likelihood requires a specific investigation into the role the common shareholder plays in governing pricing decisions at the firms, as well as competitive dynamics that shape interaction between rivals in the market.

4.29. However, the FPMI observed that African Rainbow Capital has substantial knowledge and potential for influence at both the RSA Group and Subtropico, suggesting that its role extends beyond that of a mere "passive" investor.

4.30. Moreover, whether the board member is completely silent or even never attends meetings is irrelevant to the potential for influence. Managers would pay careful attention to ensuring that their large external shareholders benefit from their management decisions – like other shareholders, and keeping such shareholders, as potential marginal voters, satisfied with their performance.

4.31. The FPMI is further of the view that even shareholders with no board presence can have substantial influence on management decision-making. This is evidenced by activist investors who often influence corporate strategy and behaviour while holding smaller stakes than those in question and lacking board roles.

4.32. The FPMI is confident that even without an involvement in day-to-day decision making, African Rainbow Capital has substantial influence over key actions of the company. In particular, for example, one of the key actions of a company is to decide whether to compete "aggressively" or "weakly" against particular companies, or in general. These general decisions can influence market outcomes.

4.33. If the board has a say over incentive mechanisms (adopted for reimbursing managers and day-to-day decision makers) or the board, and its members or major shareholders have a say over compensation, hiring and firing, these may be construed as having a major role in corporate decisions.

4.34. The ability of a board to influence the intensity of competition between companies demonstrates the significant role played by board members. Such influence includes strategic directions given by the board, investment decisions, management incentive structures (e.g., whether they are based on profits, and whether they reward taking market share from competitors) and other informal communications to management.

4.35. This may be illustrated by an example where a company has a (simple) decision to make over whether to compete aggressively or not. If it competes aggressively, it may constantly seek to undercut competitors and focus on building up market share. In contrast, if it does not compete aggressively, the management may be encouraged to maintain the status quo, or to ignore market share to the exclusion of focusing on profits.

4.36. A joint shareholder of two large players in an industry, even with only partial shareholding in each (which is not the position of African Rainbow Capital), may still have an incentive to seek and encourage, through all of its means of shareholder influence, a focus on profits instead of attempting to capture market share from competitors it owns. Influencing strategic behaviour at only one of two companies may be sufficient to change competitive dynamics within an industry, and reduce competitive intensity.

4.37. The FPMI recognises the inherent difficulty of fully identifying all the ways which board interactions occur. This challenge may lead to prophylactic rules concerning common ownership and interlocking directorates (which likely explains why such rules have generally not been set out). This may thus require a balancing of public interest – to prevent anti-competitive harm, and private interest – that could constrain private ownership and participation across competitors.

4.38. Based on the foregoing, the FPMI concluded that substantial common shareholdings raise the likelihood of anti-competitive conduct between the owned companies. When the owned companies are themselves accounting for a high share of a product market, and the common shareholding is of unavoidable importance to executives, the risks are greater.

4.39. The risks cannot easily be eliminated via formal monitoring. This is precisely one of the reasons that merger policy envisions structural measures such as divestiture.

4.40. Accordingly, the FPMI found and remains of the view that a combination of a highly concentrated market structure, within which the RSA Group and Subtropico participate, and the existence of large cross-shareholdings adversely affects the competing firm's incentives to compete, which leads to a distortion of competition within the market.

4.41. Accordingly, the FPMI finds that African Rainbow Capital's cross-shareholding in the RSA Group and Subtropico impedes, restricts or distorts competition in the trading of fresh produce at NFPMs.

Remedy 17: Remedial Action

4.42. To remedy this, the FPMI recommends to the Competition Tribunal that African Rainbow Capital must divest its shareholding in either Subtropico or the RSA Group, and that the buyer of divested shares must be a firm wholly owned and/or controlled by an HDP. This recommendation is suspended for six months, to allow African Rainbow Capital an opportunity to voluntarily comply with this remedial action.

5. MARKET DYNAMICS IN THE FORMAL RETAIL OF FRESH PRODUCE

5.1. Before the enactment of 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.

5.5. The formal retail market mainly consists of the big four national retail groups, being Shoprite Checkers, Pick n Pay, Woolworths, and SPAR. Food Lover's Market – the fifth market participant, remains a significant challenger firm. These groups constitute a significant portion of the national supermarket chain retail market in South Africa.

5.6. The FPMI notes the importance of Food Lover's Market as an important player in this market. Despite being the largest privately-owned retailer in South Africa, it is nonetheless dwarfed by its listed competitors.

5.7. In this regard, the FPMI observed that Food Lover's Market had to adopt a similar distribution model as its larger competitors, namely using centralised, large and complex distribution centres. In addition, it also had to expand its product offering with a similarly wide product range of groceries as its larger competitors (which includes fresh produce, dairy, meat, baked goods and general groceries). This evolution – from a predominantly fruit and vegetable grocer to a sophisticated national retailer – has been remarkable.

5.8. However, adopting such a distribution model increases the cost of supply immensely, and necessarily influences the agility of pricing. It further illustrates the argument that, if a new entrant seeks to compete with the large formal retailers, it will have to become like them. That has definitive implications for barriers to entry, the effectiveness of competition and, ultimately, consumer choice, innovation and participation of SMEs and/or HDPs.

5.9. Accordingly, the FPMI noted that the national retailer's market remains highly concentrated, with the top four retailers (Woolworths, Pick n Pay, Shoprite Checkers and SPAR) commanding a substantial share of the market.

5.10. The FPMI has considered that this remains true despite substantial developments after the Grocery Retail Market Inquiry ("GRMI"), and settlements with the affected formal retailers. Food Lover's Market submitted that it experienced challenges related to access to adequate space in shopping centres where its competitors are located. In other words, once its competitor(s) has anchored a centre, it is unlikely that adequate space will be available for it to carry out its operations. As an example, Food Lover's Market stated that they would require larger floor space for a site and if the space is below this, it becomes unsustainable or not feasible to open a store.

Price transparency concerns

5.11. The FPMI considered the state of competition between the formal retailers. In doing so, the FPMI considered the different pricing datasets of the retailers. During this assessment, the FPMI noted that the majority of prices for fresh produce are not comparable between retailers. This is mainly because prices are presented on per unit basis, and these units are different for the different supermarkets. For instance, units might include 1kg, 1.5kg, 2kg, 3kg, 7kg, or pockets.

5.12. The FPMI finds that similar challenges are also faced by consumers when shopping in store or across various retailers. This is because the prices of retailers mostly do not allow a like-for-like comparison, given the different unit sizes or measurements. Concretely put, it is unreasonable and impractical to expect a consumer to convert the per kilogram price where one retailer opts to sell its potatoes in unit sizes of, for example, 1.5kg, 3.5kg or 7kg, whilst another opts to sell their potatoes in 5kg or 10kg unit sizes. As such, a true comparison of which retailer is cheaper – from a consumer's perspective – is impractical and not consumer friendly.

5.13. This issue, dubbed "price transparency" in retail prices, has been flagged in other jurisdictions, notably by the United Kingdom's Competition and Markets Authority ("CMA") during its retail market inquiry in 2015, and the Australian Competition and Consumer Commission ("ACCC").

5.14. In a recent study undertaken by the CMA (following its 2015 Grocery Market Investigation) to assess the utilisation of in-store and online unit pricing in the retail sector, it was found that unit pricing assists consumers to compare relative costs of products, irrespective of unit sizes. The CMA further found that unit pricing can also assist shoppers in identifying the cheapest option per unit within a range of products, which may not be easily observable by only observing the selling price. Amongst others, the CMA found that unit pricing is beneficial when comparing selling prices of loose and prepacked fruits and vegetables.

5.15. Similarly, the ACCC enforces a Unit Pricing Code, which is a mandatory code under the Australian Competition and Consumer Act 2010. This code sets out the rules for which businesses must display unit prices, where and how, and for what products. Unit pricing shows how much a product costs, using a standard unit of measurement, and helps consumers compare prices and find the best value for money.

5.16. On 17 December 2021, the European Commission (EC) adopted the Price Indication Directive to address the issue of transparency of price reductions, by introducing specific rules to ensure that they are genuine reductions.

5.17. In New Zealand, Unit Pricing Regulations came into effect in August 2023. The Commerce Commission of New Zealand ("CCNZ") requires certain grocery retailers to display unit prices for goods clearly and legibly, at no less than 25% of the marked price.

5.18. Neither the age of these considerations, nor the follow-up work, detract from the fact that South Africa faces very similar problems, which these jurisdictions have already solved, and with success. To this day, price transparency and unit pricing remain a concern for competition and consumer authorities across the world. The challenges faced by the FPMI to accurately compare prices of fresh produce is likely to affect the average consumer, who has even less access to pricing information than the FPMI.

5.19. Accordingly, the FPMI made a provisional finding that the large five retailers (Woolworths, Shoprite Checkers, 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 kilogram or gram* pricing displayed below the unit prices in their stores.

5.20. The retailers largely rejected the provisional remedy and claimed, amongst other reasons, that this will add another layer of cost – the current labelling space does not have enough space to accommodate the display of price per kilogram, this will require a number of systems from shelving to labelling across all of its stores countrywide, and it is impractical for some products (such as bunched products) to display a price on per kilogram basis.

5.21. Despite the retailers' initial disagreement with the provisional price transparency remedy, the FPMI engaged with each one individually. These engagements presented both parties a better understanding of the issues, and led to further constructive discussions. The binding factor in relation to this remedy is the consumer's welfare, which both the FPMI and the retailers regard as vital.

5.22. One of the retailers raised a concern that Massmart had not been included as a formal retailer of fresh produce. Massmart had initially been excluded from consideration because of its relatively small size in fresh produce retail. Nonetheless, the FPMI subsequently engaged Massmart on the feasibility of implementing per unit prices on fresh produce, as well as the reasonable timelines required to implement the same.

5.23. Massmart submitted that the intended price transparency remedy may incur extensive technical infrastructure development costs to implement from the ground up. It indicated that any implementation would require a timeline of two to three years, as such systems would first have to be developed and tested. Accordingly, the FPMI includes Massmart as a supermarket which is required to introduce the same price transparency remedy as indicated above, but with its own circumstances in mind.

5.24. Consequently, most of the retailers agreed to implement price transparency, albeit that all deny that their pricing methods distorted competition. The SPAR Group is the only retailer that has refused to voluntarily implement price transparency, but the FPMI will nonetheless impose a binding remedial order on SPAR to this effect.

5.25. Accordingly, the FPMI finds that the lack of transparency in the pricing of fresh produce on a weighed price (per kilogram/gram) impedes, restricts or distorts competition.

Remedy 18: Remedial Action

5.26. To remedy this, the FPMI requires retailers (Shoprite Checkers, Pick n Pay, Woolworths, SPAR, Food Lover's Market, and Massmart), to display pricing on a "per 100 gram" basis for all packed fresh produce products of the FPMI,[7] in addition to any other pricing display chosen by the retailer. These retailers should, to the best of their endeavours, extend this pricing to all other fresh produce sold at their stores, and the weighed price should be displayed in such a manner that a consumer can clearly and easily identify that price.

Direct contracting and concerns of buyer power

5.27. The migration towards a direct contracting (or integrated supply chain) system are largely fuelled by the advantages of security of supply that this method brings. The FPMI observed that the 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.

5.28. 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.

5.29. An unbroken cold chain is essential for retailers to ensure that 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 as unbroken from harvest to delivery at their Distribution Centres ("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.

5.30. The FPMI's concern in relation to how large retailers procure fresh produce was that large supermarket chains could be leveraging possible buyer power against farmers when contracting with them directly. In this context, buyer power refers to the ability of a dominant firm to exploit its relative strong market position to extract rents of low prices or other unfair trading terms from farmers.

5.31. The FPMI used two indicators to assess the presence of buyer power: the retailers' trading terms relative to SME/HDP farmers, and an analysis of each retailers' pricing (where large margins could be indicative of buyer power). The FPMI's analysis on retailer pricing is contained in a separate chapter.

5.32. After assessing the trading terms of each large retailer, the FPMI noted that no retailer requires that a farmer trade exclusively with them. This materially benefits the competitive landscape for growers, who are free to supply product to competing retailers as well as into the alternative channels such as the NFPMs.

5.33. In addition, the absence of volume commitments across all the retailers shows that the inherent unpredictability of farming is factored into these supply agreements. Farmers who thus cannot meet a specific volume for a particular week, are not held liable for those volumes.

7 That is, the eleven commodities that form the focus of the FPMI's analysis, namely: apples, citrus (particularly oranges and soft citrus), bananas, pears, table grapes, potatoes, onions, carrots, cabbage, tomatoes and spinach/swiss chard. Bunches of spinach and cabbage will be excluded.

5.34. Accordingly, the FPMI found that the nature of the agreements is such that they allow for competitive dynamics to play out naturally 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 or unseasonal weather.

5.35. In relation to payment terms, the FPMI also noted that the repayment terms from retailers are reasonable, considering the payment terms observed on other product categories such as fast moving consumer goods.

5.36. In particular, payment of SME/HDP suppliers are within 30 days, which is within the timeframes stipulated in the Competition Commission's Buyer Power Guidelines.

5.37. In the case of Woolworths' longer payment terms, the FPMI found that farmers are firstly offered a choice of payment terms, with a sliding scale of settlement discounts relative to the payment term, and secondly, that Woolworths offers specialist and scientific expertise to its farmers as part of its supply process. Those facts negate a conclusion of exploitation through buyer power as, on balance, the SME and HDP farmers receive reasonable terms from Woolworths.

5.38. In relation to rebates, the FPMI noted that most retailers also offer more favourable rebate terms to small farmers. If the rebate terms are not more favourable, then they are the same as for larger suppliers, thus not raising buyer power concerns.

5.39. In addition to payment terms and rebates, the FPMI also considered whether retailers are setting prices upfront which endure for long periods of time. All the retailers submitted that pricing was negotiated on a weekly basis, and that there was considerable scope to factor in, variables such as rising costs of inputs, fluctuations in market price of the produce based on supply and demand, and quality of produce, which is often affected by climatic conditions in the growing regions.

5.40. The FPMI subsequently found that the symbiotic nature of these supply arrangements stems from the fact that most growers appear not to be in a vulnerable bargaining position. Growers in South Africa, largely due to the presence of the NFPMs as a significant alternative route to market, have options when it comes to selling their produce, and are not beholden to the retailers as is the case elsewhere in the world. This not only highlights the current healthy condition of farmer-retailer relationships, but also the vital importance of efficient NFPMs.

5.41. The NFPMs are thus crucial to the entire value chain, and provide not only a credible way of establishing price and value of produce on a daily basis, but also create checks and balances in the value chain which provide credible alternative routes to market for growers, and thus establish their bargaining power to obtain fair value for their produce.

6. PRICES, MARGINS, PROFITABILITY AND TRENDS IN THE SALE OF FRESH PRODUCE

6.1. The FPMI assessed prices and trends in the trading of fresh produce at the NFPMs as well as in formal retail between 2017 and 2022. Retail prices were obtained from various retailers operating in this market, whereas NFPM data was sourced from various NFPMs as well as Freshmark systems, with the permission of the markets.

6.2. Variability in pricing and volumes could be observed for all product markets, with periods of steep peaks and low troughs. While some of this variability could be due to seasonal changes, it could also be due to changes in market dynamics or other factors such as storage conditions, field curing or drying processes, and external factors such as weather conditions. Exploring the impact of inventory levels on pricing dynamics warrants dedicated attention. Delving into an analysis of inventories and their correlation with pricing, particularly during periods of low inventory, could yield valuable insights.

6.3. Moreover, an examination of storage conditions alongside inventory management would provide a deeper understanding of the pricing dynamics being observed. In the case of onions for example, with a long shelf life, less price variability would be expected. In other words, the expectation is that there would be fewer steep or unexpected price fluctuations, given that farmers (with adequate storage facilities) would theoretically be able to manage supply in response to sudden changes or shifts in demand.

6.4. The issue of storage and transportation costs in sales through NFPMs becomes particularly important in the context of the market for tomatoes. This product market exhibited several anomalies, which were unexpected given the nature of the product and its area of production. Tomatoes are mostly grown in the Limpopo region, followed by Mpumalanga and the Eastern Cape. Given that the Joburg Market sells the highest volumes of tomatoes, and is located close to the major producing province of Limpopo, it would be expected that the price of tomatoes would be relatively cheaper compared to prices at the coast.

6.5. However, the FPMI noted that the average price of tomatoes at the Durban Market were much lower than the average price of tomatoes at the markets in Johannesburg, Tshwane and Cape Town. Given the location of the Durban Fresh Produce Market, and the fact that the majority of tomatoes are transported a further distance to that market, it would be expected that the average price of tomatoes would be higher at the coast. This is also in the context of the higher costs of specialised transport, given the need for temperature-controlled trucks.

6.6. The results of the FPMI's analysis not only revealed that there was a long-run relationship between the average price of all tomatoes at the markets in Johannesburg, Tshwane, Cape Town and Durban, but that the pricing dynamics at the Durban Market influenced pricing at the Johannesburg and Tshwane Markets. Given that Durban Market only holds a 9% market share for tomatoes, this was surprising, and suggests that there is an additional factor influencing pricing at these markets, not revealed by the FPMI's analysis. One factor could be agent concentration and cross-shareholding. Another factor is the issue of market agents being allowed to operate as both agents and buyers at the Durban Fresh Produce Market.

6.7. The FPMI's analysis comprised an assessment of:

6.7.1 Price and volume trends per produce (per market).

6.7.2 Price volume correlations: price and volume correlations assist in the detection of possible coordinated conduct. These correlations, taken together with other investigative methods, can help to provide a comprehensive understanding of market dynamics.

6.7.3 A structural break analysis: to detect if there had been any abrupt shifts or changes in the underlying time series data. These shifts can be observed for various reasons, which may include periods of instability of cartel conduct, external shocks, cyclical changes, or other changes in supply and demand.

6.7.4 Estimation of a VAR model: Vector Autoregressive ("VAR") models are primarily designed to analyse the dynamic relationships among multiple time series variables. They can be employed to explore patterns in economic data that might indicate coordinated action, or changes in market behaviour. The VAR model allowed for the analysis of interdependencies between prices and volumes, and lagged effects between these variables over time. It also offered the possibility to detect structural breaks due to sudden changes in the relationships among variables, which could be associated with coordination or other significant events.

6.7.5 Estimation of a Vector Error Correction Model ("VECM"): the VECM has the potential to identify unusual trends or correlations that may indicate coordination. Sudden shifts or irregularities in market behaviour could serve as indicators of potential collusion, prompting the value of further investigation. The model provides insights into both short-term and long-term relationships between variables, and unexpected changes in these relationships might suggest coordination or other forms of market manipulation.

6.7.6 Calculation of demand estimates but without correcting for endogeneity: This allowed for the determination of how the volumes of the product sold changed at a specific market in response to changes in the average price of the same product at other markets.

6.8. The products and markets were selected on the basis that they are the most common fruit and vegetables consumed, the largest volumes of products sold, and are staple food items for most South African households.

6.9. At the NFPM level, the FPMI could not establish any signs of price distortions utilising data analysis techniques and methods adopted for the purposes of this report. There are certain data limitations that were identified which, if better quality data is obtained, may lead to different conclusions.

6.10. The mark-up, gross margin and net margin data presented in this report are not conclusive with regard to whether or not retailers are profiteering from the retail sale of fresh produce, and the FPMI makes no finding in this regard.

6.11. However, it is important to note that in some cases, there appear to be greater mark-ups for certain produce (per pack size) for some retailers. In other cases, some retailers' net profit margins are negative for some produce. The FPMI is of the view, and based on the economic and econometric analysis above, that a combination of high mark-ups and low (sometimes negative) net margins, implies that the business model of the top five retailers (Food Lover's Market included), incurs costs in the supply chain (from distribution centre to the retail floor) that are passed on to consumers, thereby yielding prices that may be higher than what prevails in other routes to market.

6.12. Lastly, the FPMI tested the notion that retailers pay higher prices to farmers than what farmers would have obtained at the NFPMs. The FPMI found that in most cases, retailers do in fact pay higher prices to farmers, compared to the prices farmers would have achieved at the NFPMs.

7. UPSTREAM DYNAMICS IN INPUT MARKETS: FERTILISER, SEEDS AND AGROCHEMICALS

7.1. The FPMI assessed the market features in three different types of inputs for farming of fresh produce, namely fertilisers, seeds, and agrochemicals (pesticides and herbicides). Notably, there are no inputs specifically dedicated to the production of the fruits and vegetables selected for this inquiry (apart from seeds). These inputs can be used interchangeably across a contour of horticultural crops, field crops, pastures and fruits. Where relevant however, the FPMI drew a distinction to avoid generalisation.

7.2. The three inputs under consideration are significant inputs in farming of fresh produce, and form an integral part of the fresh produce value chain. Seeds form the basis of the produce value chain, as they are the source of the plant. Fertilisers provide plants with the nutrients they need to grow. Agrochemicals such as pesticides and herbicides are used to control pests and diseases that can damage crops.

7.3. Under each category of inputs, market features were assessed, and conclusions were drawn based on information received. To the extent possible, the FPMI also made recommendations to address distortions observed.

Fertilisers

7.4. There are fundamentally three major fertiliser producing regions in the world, being the Black Sea region (Eastern Europe), USA Gulf of Mexico, and the Middle East. More specifically, Russia, China, Canada, United States, Morocco and Belarus are the top six countries responsible for over half of the world's export of fertilisers. Furthermore, the US estimates that Russia accounted for approximately 16% of urea exports, and 12% of phosphate exports. Combined, Russia and Belarus supplied approximately 40% of global potash exports. It is therefore evident that Russia plays an integral role in the global fertiliser trade. Geo-political and other events in these major producing regions have major consequences on the global fertiliser markets, due to the sheer volume produced in these areas.

7.5. The FPMI noted that some of the big fertiliser manufacturers globally are associated or owned by the governments in their countries. As an example, the government of Norway has an approximately 40% stake in Yara. Sinofert is controlled by Sinochem, which is a Chinese state-owned company, and OCP Group is controlled and owned by the government of Morocco. The Saudi Arabian government has shareholdings in Ma'aden and SABIC, which produce phosphate and nitrogenous fertilisers respectively.

7.6. South Africa is a nett importer of fertilisers, with approximately 80% of its requirements being imported from more than seventy countries globally. However, the top five countries where significant volumes are imported from are Saudi Arabia, Russia, Qatar, Oman, and China (in that order). This therefore implies that the agricultural sector in South Africa is inherently exposed to shocks in the international environment.

7.7. The FPMI noted that there has been significant disruptions in the global fertiliser markets over the past 3-5 years. South Africa, being a nett importer, was not spared from the spiralling effects of such events. International fertiliser prices sharply increased from about January 2021, and reached their peak around April – June 2022 (for Di-Ammonium Phosphate ("DAP"), Muriate of Potash ("MOP"), and ammonia) and July 2022 for urea. Notably, since April 2022 the prices have been declining significantly across all fertiliser products under consideration. Between October of 2022 to October 2023, certain fertilisers (MOP, ammonia, urea and DAP) decreased by 56%, 44.3%, 36.7% and 15.8% respectively.

7.8. Fertiliser prices in South Africa have also declined considerably, even though the ZAR/USD exchange rate has depreciated between November 2021 and November 2023. The NAMC notes that between November 2022 and November 2023, prices of Potassium chloride ("KCL" or MOP) decreased by 42.4%, urea declined by 30.7%, Limestone Ammonium Nitrate ("LAN") declined by 26.2%, and Mono-Ammonium Phosphate ("MAP") decreased by 15.5%.

7.9. Apart from the exchange rate, there are other domestic factors that affect the price of fertiliser in South Africa. Issues such as shipping and associated costs at the harbour affect the ultimate prices. Fuel prices also have a significant impact on the cost of transporting fertiliser inland to the production areas.

7.10. In determining the price of fertilisers in South Africa, the FPMI noted that the key cost drivers are labour, water and electricity, research and development costs, the cost of capital purchases (e.g., specialised equipment to be used in the formulation of fertilisers), freight cost, port costs, and the price of raw materials. In addition, the foreign exchange rate and the inflation rate influence the cost of fertilisers. This in turn influences the price charged to farmers for fertiliser.

7.11. The FPMI noted wide price differentials in local prices versus international prices over a 5-year period (2017 - 2022). Furthermore, the FPMI also analysed the differences in domestic prices of MAP versus international prices for four consecutive years (2020 - 2023). The FPMI noted wide disparities in international and domestic prices of MAP for the four-year period, with 2020 having the largest difference of 40%. The FPMI noted that import parity pricing ("IPP") is utilised to price in the domestic market. However, when additional costs are considered of moving MAP to South Africa, the gap between domestic prices and international prices narrows significantly.

7.12. The FPMI also noted that local urea prices are substantially higher than international prices, but again the disparity does not account for the costs in moving urea to South Africa.

7.13. Based on the above, the FPMI made a provisional 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 this regard, the FPMI concluded that in instances where South Africa has local manufacturing capacity, such as in the current production of MAP and in the past, production of urea, government and relevant stakeholders in the fertiliser industry should consider mechanisms to revitalise the local industry – where such revitalisation is viable, and implement measures to support the domestic fertiliser industry.

7.14. Stakeholder comments, mainly from Omnia, did not warrant a different final finding or remedies.

7.15. Considering the above, the FPMI finds that South Africa's reliance on imported fertilisers exposes the fresh produce supply chain to global price fluctuations, which create uncertainty in the market. The FPMI notes further that the Agricultural and Agro-processing Masterplan recognises the need to improve efficiency and effectiveness in the production and distribution of, amongst other inputs, fertilisers and chemical components.

Remedy 19: Recommendation

7.16. The FPMI recommends that DTIC should implement measures to support the local/ domestic fertiliser industry where there is domestic capability.

Agrochemicals

7.17. China was the world's largest exporter of agrochemicals in 2022, with approximately 22% of global exports. Other countries which also command a sizeable market in the context of global exports include India (11%), United States (11%), and France and Germany with 11% respectively. The global agrochemicals market was valued at approximately USD36,4 billion in 2019, and approximately USD49,8 billion in 2022.

7.18. The top four firms in the world accounted for approximately 62% of the global supply of agrochemicals. These firms are Syngenta Group, Bayer, BASF and Corteva.

7.19. Similar to fertiliser, South Africa is a nett importer of agricultural remedies such as pesticides, fungicides, and herbicides. Multinational firms such as Bayer, Syngenta, Corteva, BASF and other local formulators produce a large number of these products in South Africa, from imported active ingredients.

7.20. The FPMI found that most active ingredients are sourced from overseas, where they are formulated in various parts of the world (including South Africa). These formulated products are then packaged and labelled, and then sold to agrochemical distributors. The agrochemical distributors will then market and sell these crop-protection products to growers through their own agents.

7.21. Distributors play a particularly important role in advising growers/end producers on the application of agrochemicals, and in most cases not only sell a product to the customer, but also deliver a value-added service to producers by developing bespoke crop spraying programs that are crop specific and area specific.

7.22. Various manufacturers of active ingredients enter into different agreements with formulators and distributors of agrochemicals in the South African market. There are some firms that directly supply finished products through their local subsidiary, or independent distributors. Others supply active ingredients to their local subsidiaries for formulation, whereas others supply directly to distributors in the local market. There are various arrangements in place to ensure that the South African market, and broadly the Sub-Saharan Africa market, is catered for.

7.23. The FPMI initially noted a non-compete clause in Bayer's distribution agreements with two distributors. The exclusivity clause essentially required its distributors not to carry products by Bayer's competitors. Bayer later indicated that that it had in fact removed this clause from its Distribution Agreement during 2018, after the approval of the Bayer and Monsanto merger. Bayer agreed that this clause was not aligned to the provisions of the Competition Act. In addition, Bayer submitted updated agreements to the FPMI which evidenced that the exclusivity clauses have been removed.

7.24. The FPMI also noted various terms in Bayer's agreements with its distributors relating to specific assigned territories. Each distributor would be allocated a territory to sell Bayer's products, and would not be allowed to sell Bayer's products outside of this specified territory.

7.25. The FPMI made a provisional finding that the territorial allocation in Bayer's agreements inherently limits competition between distributors of Bayer's products in those geographic markets.

7.26. Following the FPMI's provisional finding and remedial action, it received a number of stakeholder comments. The FPMI also reached out to additional stakeholders, notably Bayer's distributors, to verify some of the assertions.

7.27. Following these submissions, the FPMI noted that the distribution market for agrochemicals is fragmented, with more than active 20 firms.

7.28. The FPMI noted that Bayer's business model entails appointing distributors to market and sell products on its behalf. Whilst Bayer reserves the rights to distribute directly in its agreements with distributors, it does not do so. The FPMI also noted overlaps in the territories assigned by Bayer to its distributors, thus minimising intra-brand concerns.

7.29. Bayer provided additional (confidential) justifications for its use of territorial clauses, which in the FPMI's assessment fall in line with the guidance provided by the Competition Appeal Court in *Competition Commission v South African Breweries Limited and Others* [8]regarding the use of territorial allocations.

7.30. The FPMI concluded that a remedial action is no longer necessary, as the concern which was to be remedied was sufficiently justified.

Seeds

7.31. Canada and the USA are the leaders in the global commercial seeds market, with approximately 32% market share in 2021.

7.32. Although no comprehensive data on global market structure is available covering the produce that the FPMI is concerned with, generally, studies suggest elevated levels of concentration in various crop seed markets. The OECD study in 2018 estimated CR4 index in maize seeds of approximately 60% in 30 of the 32 countries covered, and above 40% in the other two countries. The same study also found that the HHI is over 1,500 in 27 countries. If the market shares are based on volume instead of value, CR4 is over 60% in 28 countries, and HHI is above 1,500 in 24 countries.

7.33. The top four firms that constitute the 58% global market share are Bayer CropScience-Monsanto (30.1%), DuPont-Dow (22.7%), Syngenta (7.8%) and Vilmorn and Cie (4.4%).

7.34. The seed industry in South Africa appears fragmented at first glance, with over eighty six (86) seed companies registered with SANSOR, of which only 34 are in the vegetable business. The leading local suppliers of vegetable seeds in South Africa are Syngenta, Bayer-Monsanto, Sakata Seeds, Starke Ayres, Hazera Seeds, Alliance Seeds, Nuvance, Hygrotech, and Enza Zaden, amongst others.

7.35. Prices of seeds in South Africa are determined based on value addition, as well as international cost prices of commodities as applicable, inflationary factors, foreign exchange, and freight/transportation. The limited or lack of local (South African) companies with established research and breeding capabilities to meet the needs of local farmers is a concern. This creates reliance on international seed companies, which provide disease-resistant varieties at higher prices.

7.36. Additionally, inputs used in the seed business, such as fuel and fertiliser for farming, are also imported. All these costs drive local costs of production for manufacturers, which are passed down the value chain (partially or wholly). An increase in any of the costs mentioned above affects the price charged to growers/farmers. A percentage of the costs are absorbed by distribution, but the majority is passed onto growers, as stakeholders submitted that distribution companies will not remain viable if price increases are not absorbed accordingly.

Apparent high mark-ups from Starke Ayres and Sakata Seeds

7.37. Starke Ayres considers itself the biggest manufacturer and supplier of various vegetable seeds in South Africa. It was therefore prudent for the FPMI to consider its pricing of various seeds, together with some seed distributors. The FPMI observed that between 2019 and 2022, price increases for various seed cultivars were modest, at below 10%. However, between 2022 and 2023, some price increases were alarming, and ranged close to 50% in some instances.

7.38. In addition, the FPMI also found that Starke Ayres' mark-ups were high for certain seeds.

8 Case no: 129/CAC/Apr14. Also reported with reference: 2015 (3) SA 329 (CAC) and [2014] 2 CPLR 339 (CAC).

The FPMI notes that the price increases observed pertain to seeds where Stark Ayres has high market shares, and are the same products for which it can potentially extract higher mark-ups.

7.39. The FPMI acknowledges that a pure mark-up (i.e. the production price for Starke Ayres vs what it sells at) does not consider additional costs that Starke Ayres may incur. Nonetheless, given the extent of these mark-ups, it does point to a concern and may be an indicator (though not conclusive) of possible excessive pricing.

7.40. Starke Ayres, in their explanation of these high mark-ups, submitted that while most competitors in South Africa rely on importing seeds from international companies worldwide, Starke Ayres stands apart. They are the only vegetable seed company that not only breeds new varieties, but also produces the majority of their seeds in South Africa.

7.41. Starke Ayres stated that this necessitates substantial investment in breeding programs, production teams and specialised equipment. In addition, Starke Ayres submits that they pay a royalty fee to a company for the breeding programs. However, even with additional costs incorporated, the mark-ups remained high enough to warrant a concern from the FPMI.

7.42. Similar to Starke Ayres, the FPMI noted how the mark-ups for seeds supplied by Sakata Seeds, notably cabbages, tomatoes and spinach, appear to be over 100%. Sakata Seeds submitted that whilst the mark-up data, taken at face value, appears to be excessive, it is not a true reflection of the actual mark-ups to seed pricing. Sakata Seeds submitted that, if its other costs are considered, its net profit after tax would be at consistently reasonable levels.

7.43. While Starke Ayres and Sakata Seeds sought to explain the reasons for the apparent high mark-ups, neither had been able to quantify specific R&D costs, and further commercialisation costs. Both claimed that they were unable to provide the FPMI with updated data which considered all the costs they claim as having an influence on the original mark-up.

7.44. As a result, the FPMI's initial concerns were not fully allayed. The FPMI acknowledges that mark-ups (i.e. the difference between what a seed supplier procures its stock at and what it sells for) does not account for all costs. For a price to qualify as an excessive price, the Competition Act requires that it be shown that the price be unreasonably higher than a competitive price. A mark-up analysis does not purport to do that, but nonetheless serves as an informative tool to indicate if concerns may be present.

7.45. In light of the confines of the FPMI's analysis, and the parties' claimed data restrictions, the FPMI needed to consider whether a referral for further investigation in terms of section 43E(3)(b) was warranted.

7.46. On a balance of the available evidence, and against the submissions from both Starke Ayres and Sakata Seeds, the FPMI instead requested these firms to consider development programmes for small-scale farmers – to address concerns of possible exploitation through pricing conduct.

7.47. Whilst Sakata Seeds and Starke Ayres deny that they have contravened the Competition Act, they have – as a measure of good faith – agreed to each establish a development programme for small-scale farmers.

Remedy 20: Remedial Action

7.48. Sakata Seeds and Starke Ayres will establish a development programme for small-scale farmers within the next 12 months. The programme will be dedicated to the development of small-scale farmers (at least 60% of these farmers must be HDPs) in South Africa by providing training, resources and technical support. This will include but not be limited to the following initiatives

7.48.1 Developing and providing technical training to small scale farmers. This should include training small-scale farmers to produce good quality produce, and training also on the types and cultivars that are best suited for their specific local areas.

7.48.2 Access to high quality seeds by offering discounted pricing of up to 10% to small-scale farmers participating in the programme.

7.48.3 The development programme must target at least three hundred and fifty (350) small scale farmers in 3 years. The targets should be fulfilled as follows: eighty (80) farmers in the first year; one hundred and twenty (120) farmers in the second year; and one hundred and fifty (150) farmers in the final year.

7.48.4 Sakata and Starke Ayres to each contribute an amount of R30 000 per year to the SANSOR Development Fund, for a period of 3 years, commencing in 2026 and ending in 2028.

Access to a variety post-PBR expiration

7.49. Intellectual property rights, such as plant breeders' rights ("PBRs") are often perceived as hindering access to plant genetic resources for small breeding companies, or restricting access to varieties for farmers. The general notion is that plant variety laws favour the interests of multinational firms that are developing varieties at the expense of farmers and consumers, by preventing the economic participation of small farmers in developing countries.

7.50. A PBR is a form of intellectual property right granted to breeders of new plant varieties, for the protection of varieties against exploitation without their permission. In South Africa, PBRs are valid for 20 years for vines and trees, and 25 years for all other varieties. These innovations are protected by PBRs so that the breeding company which produced the variety may earn back the investment. This may be realised by selling the variety, or by licensing it to a third party.

7.51. Essentially, any firm that has not been granted a licence by the holder of the PBR is not allowed to reproduce the protected variety, and/or propagate the protected variety.

7.52. The FPMI considered the usage of PBRs in relation to Simba, a subsidiary of PepsiCo Inc. The reason the FPMI considered Simba, and no other potato chip producers, was because it is the only producer which has a vertically integrated supply chain, where it develops and uses its own potato variety. Further, given Simba's strong market position in the downstream potato chips market, the FPMI deemed it prudent to specifically consider Simba.

7.53. The FPMI provisional report noted what appeared to be behaviour by Simba to discontinue use of a closed variety shortly before expiry of its plant breeders' right. The FPMI raised concerns that access to such variety (which should imminently become free from intellectual property protections) may be limited through the removal of the genetic material from Simba's circulation whilst it is still closed.

7.54. In response to the preliminary findings, Simba disagreed that it engages in any concerted efforts to restrict access to a variety with the intention of harming farmers. Simba stated that in South Africa, it has only commercialised two potato varieties, namely, FL2006 and FL2108, both of which are, to date, subject to PBRs. These rights are only due to expire in 2026 and 2031 respectively. Simba submitted that FL2006 is the only potato variety where it decided to discontinue the genetic material in South Africa before the expiry of its PBR.

7.55. Simba further submitted that there is no restraint placed on farmers insofar as growing other varieties is concerned. Farmers are not, therefore, contractually precluded from growing any potato variety, and from supplying such varieties to both Simba and Simba's competitors. Simba also states that it is not dominant in the supply of potatoes, with the large amount of readily accessible open varieties, and it does not follow that a farmer's inability to grow FL2006 would preclude them from effectively participating in the market.

7.56. Simba also urged the FPMI to consider that neither PepsiCo (Simba's parent company) nor Simba grants licences to South African firms with rights to distribute its potato varieties. Simba only uses its own varieties for its own production purposes, and does not commercialise seed potatoes (as for example Wesgrow).

7.57. Simba and the FPMI consequently engaged on the concerns. The FPMI clarified that it was not opposed to intellectual property protections, and that any varieties that remain closed deserve to be for the sole use of the owner of the PBR, as intended by the PBR Act. This is an important factor to incentivising firms to innovate and develop new products.

7.58. The FPMI's concern related to what would occur when the variety becomes open, i.e. when its intellectual property protections cease. It is a principle of the South African (and global) intellectual property regime that firms be afforded a specific period within which to recoup their investment, and maximise profits as reward for their innovation. However, the commercial exploitation afforded by the intellectual property regime cannot last indefinitely as that, in itself, stifles further and renewed innovation.

7.59. The FPMI thus sought to ensure that Simba's FL2006 variety would in fact become free for use by any stakeholder after expiry of its PBR. It remains the commercial choice of any farmer or actual/potential competitor of Simba to exercise that choice, as long as the FL2006 variety does not, in effect, remain closed or inaccessible.

7.60. Following engagements with Simba, it confirmed its position that any decisions to terminate the ongoing commercial use of FL2006 was premised on moving to better-suited potato varietals for its processing purposes.

7.61. Even so, Simba indicated that it was not opposed to making the FL2006 genetic material available to the Agricultural Research Council ("ARC"). Simba emphasised that its willingness to make available the FL2006 genetic material to the ARC is a gesture of goodwill and not an admission of any kind, and is reasonably feasible against specifications to be agreed with the ARC at the appropriate time.

7.62. Simba further provided the FPMI with a Memorandum of Understanding with the ARC, wherein it undertakes to provide the genetic material of its FL2006 variety to the ARC. No remedy is thus required, following the agreement reached with Simba in this regard.

7.63. Further remedies that seek to address concerns relating to the South African markets for inputs considered by the FPMI are the following:

Remedy 21: Recommendation

7.64. DALRRD should ensure continued funding to the ARC, to maintain the National Gene Bank.

Remedy 22: Recommendation

7.65. The directorate for Agricultural Inputs Control, under DALRRD, should collaborate with private firms in the industry or industry bodies, to build capacity.

Remedy 23: Recommendation

7.66. DALRRD should ensure that seed companies sponsor new entrants, when testing varieties for South African conditions.

Remedy 24: Recommendation

7.67. 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.

Remedy 25: Recommendation

7.68. The DALRRD should consider measures to enable open access to the FL2006 potato variety, once it is deposited with the ARC.

8. BARRIERS TO ENTRY IN THE FRESH PRODUCE VALUE CHAIN

8.1. It is undeniable that farmers play a crucial role in the country's fresh produce value chain, as they are involved in the primary agricultural activities of producing fruits and vegetables. Therefore, they play a crucial role in achieving the country's food security.

8.2. The lifestyles of consumers, along with shifting demographics, and a growing appreciation of the link between diet and health, have contributed to different eating patterns, and influenced food demand by consumers. The supposition is that growing populations and urbanisation generate opportunities to expand domestic markets for those farmers of fresh produce, who can consistently link production with sales.

8.3. The production and distribution of fresh produce in South Africa resonates with the dualistic economic system of the country, where a sophisticated, developed economy exists alongside a developing economy. Fresh produce is produced by a small number of relatively large, established commercial producers ("large-scale producers") on the one hand, and a multitude of small-scale producers on the other.

8.4. The main risks that limit the participation of small-scale farmers in formal, high income-value chains are at two levels. At the production level, farmers face risks from the procurement of inputs through to the post-harvest stage of the food supply chains. At the retail and consumption level, risks are tied to meeting the quality and quantity standards (which include packaging, grading, and labelling), and traceability and transport requirements. Because of these risks materialising, small-scale farmers tend to resort to distributing their products in informal, low-income markets. Consequently, this implies that these farmers are less likely to effectively participate in the fresh produce market facilities, and thus, market access may be limited.

8.5. It is for the above reasons that the FPMI considered the barriers to entry, expansion, and participation faced by small-scale farmers. In this respect, the Inquiry is particularly interested in the following aspects relating to the participation of SME and/or HDP producers:

8.5.1 Market access for SME/HDP farmers;

8.5.2 Discriminatory practices against SME/HDP farmers (for inputs and outputs) covered elsewhere in this report;

8.5.3 SME/HDP farmers' access to financial support; and

8.5.4 Challenges relating to access to water.

Market access for SME/HDP farmers

8.6. The Inquiry identified two main issues that affect the ability of SMEs and HDP farmers to access markets:

8.6.1 The impact of quality standards on market access; and

8.6.2 The impact of high levels of concentration by supermarket retailers on SME and HDP farmers.

8.7. In relation to quality standards, the FPMI distinguished between legislated standards and Good Agricultural Practice ("GAP") standards. The former mostly relates to food health and safety requirements, whilst the latter extends beyond those obligations to include environmental sustainability, economic viability, and social acceptability standards. The FPMI's approach entailed assessing whether SME and HDP farmers are able to participate in direct contracting with the large retailers, in light of the application of the additional GAP standards.

8.8. Linked to this, the FPMI considered that, in the absence of direct intervention on pricing levels of fresh produce, new entry at the retail level may address concentration levels, and therefore considered a remedy to assist new entrants. In relation to the impact of high concentration levels at the formal retail level, the FPMI noted little progress since the GRMI's report prohibited exclusive leases in shopping centres (which excluded smaller challenger retailers).

8.9. In relation to access to finance, the FPMI noted the circumstances surrounding the financial challenges of the Land Bank, and how the gap in agricultural funding is being filled by 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 commercial banks have played a pivotal role in providing credit to the agricultural sector.

8.10. In relation to access to water, 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 licence. Of note is the requirement that a technical assessment 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.

8.11. Consequently, the FPMI made a number of provisional findings and remedies:

8.11.1 In relation to quality standards, the FPMI noted that some of these standards (which are widely applied by large farmers) are difficult and expensive to comply with, and raise concerns around market access particularly SME and HDP farmers. Thus, even though these farmers may comply with the legislated food health and safety standards, they would still not be able to contract with large retailers, who require various levels of GAP certification.

8.11.2 Given that it is the retailers who require the additional standards, the FPMI assessed the levels of assistance that the large retailers offer for SME and HDP farmers to comply with these standards. It provisionally found insufficient assistance being provided, when measured against the standards set out in the Agricultural and Agro-Processing Masterplan ("the Masterplan").

8.11.3 Consequently, the FPMI made 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.

8.11.4 The FPMI also noted that, despite the elimination of exclusivity clauses in shopping centre lease agreements, there has not been any meaningful entry in the retailing space. The FPMI thus made 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).

8.11.5 To remedy these concerns, the FPMI made a number of provisional remedies aimed at shopping centre owners and the South African Propery Owners Association ("SAPOA") to facilitate entry. Additional provisional remedies also recommended the DTIC to provide assistance to new entrants.

8.11.6 In relation to access to finance, the FPMI made a provisional finding that the decline in the funding provided by the Land Bank negatively affects farmers, and that the delays in the implementation of the Blended Finance Scheme disproportionately affect 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. In this respect, the blended finance scheme is of particular importance.

8.11.7 The FPMI noted that delays in finalising water licence applications disproportionally affects SME and HDP farmers, and that the requirement for a technical assessment makes it more difficult for SME and HDP farmers to secure water licenses – due to the cost of these assessments. Nonetheless, the FPMI recognises the critical need for the Department of Water and Sanitation to properly regulate water as a scarce resource. Furthermore, the FPMI noted the positive steps already taken by the DWS to finalise a completed application within 90 days (in terms of promulgated regulations).

8.12. The FPMI received submissions from SAPOA, following the provisional findings and remedies. SAPOA provided compelling reasons for why the FPMI's provisional remedies required adjustment. In addition, the FPMI also engaged key shopping centre owners directly, to canvass their views on the provisional findings and remedies.

8.13. In relation to the provisional remedy on formal retailers to increase their supplier development spend in line with the Masterplan, the FPMI noted strong objections. The formal retailers, in summary, submitted as follows:

8.13.1 The Masterplan is a social compact between various stakeholders to improve access in the agricultural sector. It is thus not a legally binding document and should be aspirational at best, to achieve the goals set out in the Masterplan by 2030. It would therefore not be appropriate to incorporate a non-binding pact into a binding remedial action;

8.13.2 The retailers indicated that they did not make any commitments regarding the Masterplan (particularly to contribute 3% of NPAT to SME/HDP farmers), and neither did they participate in the Masterplan consultation process;

8.13.3 Retailers are already contributing a substantial amount to their supplier development funds, and there is no basis to require them to increase their spend. For some retailers, increasing their spend as required would risk their financial viability; and

8.13.4 The alternative proposal (of an increase of 10% annually over five years) is equally as burdensome on retailers, and does not consider the additional expense that this will impose on the retailers.

8.14. Consequently, the FPMI engaged the large retailers on their views, and requested additional information with the goal of establishing a baseline for future reference. As a result, the FPMI noted that establishing an objective standard across all the retailers is unfeasible, as each retailer adopts a different interpretation of which firms qualify as SME or HDPs.

8.15. Subsequent engagements with DALRRD also confirmed that the Masterplan did not involve the supermarkets, and the 3% NPAT goal was not considered to be a binding commitment. DALRRD clarified, however, that the Masterplan itself is meant to be aligned with the B-BBEE Act and Agri-BEE Sector Code.

8.16. Accordingly, the FPMI makes the following findings:

8.16.1 The mandatory requirement by a retailer that an SME and/or an HDP farmer must comply with Global GAP certification, without concomitant assistance or benefits from a supplier development programme of such retailer, impedes, restricts or distorts competition;

8.16.2 The lack of meaningful entry by SME and/or HDP retailers of fresh produce in shopping centres impedes, restricts or distorts competition;

8.16.3 The decline in the funding provided by the Land Bank negatively affects farmers. Further, the delays in the implementation of the Blended Finance Scheme impedes, restricts or distorts competition by disproportionately affecting SME and HDP farmers; and

8.16.4 Delays in finalising water license applications impedes, restricts or distorts competition in that SME and HDP farmers are disproportionately affected by a slow licensing process.

8.17. To address these concerns, the FPMI makes the following remedies:

Remedy 26: Recommendation

8.17.1 The SAPOA should promote industry initiatives aimed at facilitating entry by potential new entrants for the formal retail of fresh produce (or related products).

Remedy 27: Recommendation

8.17.2 Certain large and/or strategic property owners (namely: Accelerate Property Fund, Atterbury Property, City Property Administration, Hyprop Investment, Mowana Properties, Old Mutual Property, Pareto, Redefine, Resilient Property Fund, SA Corporate Real Estate and Vukile Fund) should use reasonable commercial endeavours to provide vacant floor space to SME retailers, on terms and conditions that are acceptable to both parties.

Remedy 28: Recommendation

8.17.3 The DTIC should work towards the creation of a fund to assist new entrants in the retailing of fresh fruits and vegetables in shopping centres

Remedy 29: Remedial Action

8.17.4 Large retailers (namely, Woolworths, Shoprite Checkers, SPAR, Pick n Pay and Food Lover's Market) must use their best endeavours to maintain and expand these programmes, in accordance with existing obligations.

Remedy 30: Recommendation

8.17.5 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 projects' feasibility studies, including water licencing and acquisition of land.

Remedy 31: Recommendation

8.17.6 DWS should 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 the input level down to retail. In doing so, the FPMI sought to identify any market features or a combination of features that may impede, restrict or distort competition in various markets along the fresh produce value chain. The FPMI paid particular attention to SME and HDP participation in these various markets.

9.2. Among other concerns, the FPMI noted instances in the fresh produce value chain which have high concentration levels, high barriers to entry, and limited competition.

9.3. In total, the FPMI makes 31 remedies to address the issues identified during the course of the Inquiry. The FPMI has also endeavoured, for posterity, to provide a comprehensive and accurate depiction of the fresh produce value chain.

9.4. The FPMI believes that its work will lead to impactful change by contributing to efficient NFPMs in the service of all farmers and buyers. Further, by enabling the entry and effective participation of HDP market agents at NFPMs (through incubation and skills development), the FPMI seeks to reduce concentration levels, and lower barriers to entry. Through the provision of access to a potato variety, the FPMI seeks to stimulate entry of SME or HDP farmers, in line with previous work by the Commission. By securing the development of seed farmers by large seed suppliers, the FPMI aims to lower barriers to entry and enable inclusive participation. By seeking to stimulate entry of fresh produce retailers and ensuring that pricing is more transparent, the FPMI seeks a greater amount of healthy competition in the retail of fresh produce, with an ultimate outcome in view of lowering prices for these essential foods.

9.5. The FPMI thus seeks to lay a foundation for a fresh produce value chain that is not only competitive, inclusive and transformed, but also sustainable.

[Notes]

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