GOVERNMENT NOTICE
GOEWERMENTSKENNISGEWING

DEPARTMENT OF TRADE AND INDUSTRY

No. 1259 **31 December 2010**

COMPETITION COMMISSION

NOTICE IN TERMS OF SECTION 10(7) OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED):

GRAIN SOUTH AFRICA: 2010Jul5262

EXEMPTION REJECTED

Notice was given in the Government Gazette on 10 September 2010 (Government Notice 859 of 2010)[1] that Grain South Africa ("Grain SA") had, in terms of section 10 of the Competition Act, No 89 of 1998, as amended ("the Act"), applied to the Competition Commission ("Commission") for an exemption from certain provisions of Chapter 2 of the Act.

Grain SA is described as an autonomous specialist organization, specifically promoting the collective interests of grain producers in South Africa. It is a voluntary association of grain producers and is a legal entity independent of its members.

In particular, Grain SA has filed the application on behalf of its members requesting that they be exempted from the provisions of Section 4 of the Act so as to enable grain producers to engage collectively in the formation of an export pool, which will be used to export surplus maize from South Africa.[2] The export pool scheme proposed by Grain SA will result in a collective forum where maize producers will be co-operating with each other in order to set prices and/or allocate geographical markets for purposes of exporting the pooled surplus maize. This conduct would be a contravention of section 4(1)(b)[3] of the Act.

In its application Grain SA submits that the restriction on competition required by the proposed collective formation of an export pool should be exempt from the application of the Act as the restriction is required in order to achieve the objectives set out in sections 10(3)(b)(i), 10(3)(b)(iii) and section 10(3)(b)(iv) of the Act, namely the maintenance and

---

[1] Gazette Number 33518 53.

[2] GSA has submitted that the local maize market is currently out of balance with supply exceeding demand. GSA estimates that between the 2007/2008 and the 2010/2011 marketing seasons the domestic carry out figures of maize increased from just over one million tons to more than three million tons of maize. This has allegedly resulted in declining producer prices and a decrease in productivity. Pursuant to this, production has become unprofitable, with approximately 40% of grain farmers being negatively affected and many have been forced to exit the market. Financial institutions are also alleged to be refusing to grant financing for upcoming production seasons, given the surplus situation. Lastly, GSA submits that the above situation has negative effects on the farming community (employment), as well on emerging farmers. According to GSA, an attempt to deal with the surplus maize through normal free market activities has failed.

[3] 4 (1) :An agreement between, or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if :-

(b) it involves any one of the following restrictive practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services or,

iii) collusive tendering

promotion of exports, change in productive capacity necessary to stop decline in an industry and the economic stability of an industry designated by the Minister of Trade and Industry (Economic Development?).

Notice is given here, that the exemption application by Grain SA has been rejected, as provided in terms of section 10(7) of the Act.

The grounds upon which Grain SA relies on for the exemption do not meet the requirements of the Act. Our reasons are summarized as follows:

(i) Section 10(3)(b)(i) - Maintenance and promotion of exports

The promotion of exports, as envisaged by section 10(3)(b)(i) is unlikely to be viable through the proposed scheme due to the limited export market available for maize produced in South Africa. The circumstances giving rise to this situation are not likely to be improved by the proposed export scheme:

- A substantial portion of the maize produced in South Africa is genetically modified, which consumers in other countries generally find undesirable.
- The greater proportion of maize produced in South Africa is white maize which is not as widely consumed globally as yellow maize is.
- Most of South Africa's usual maize trade partners are also currently enjoying surpluses of their own.
- The total maize surplus that would be pooled for export would still be insignificant in the global market making it unlikely that higher prices could be negotiated as the volumes in the export pool are too small to confer any degree of market power; and
- The logistical problems associated with exporting grain in South Africa will remain a significant barrier and are not addressed by the proposed scheme.
- There are alternative solutions to the logistical challenges which do not require the collective action associated with the proposed export pool. This includes market entry by export traders who can achieve economies of scale to export profitably, without having to engage in collective action.

(ii) Section 10(3)(b)(iii) - Change in productive capacity necessary to stop decline in an industry

Grain SA fails to provide any factual evidence of an industry in decline; the information largely reflects an industry which is relatively healthy (hence the surplus) and not facing any catastrophic decline. Further, we are provided with no evidence as to how the exemption would yield benefits which would outweigh the proposed restriction in competition. We are also of the view that there are alternative less anti-competitive options which should be thoroughly investigated by the all the industry stakeholders including the following:

- Crop substitution;
- Bio-diesel;
- Value added products;
- Hedging and use of the Future's market;
- Storage for future use; and
- Entry by exporter traders.

(iii) Section 10(3)(b)(iv) - Economic stability of an industry designated by the Minister.

The objective of promoting the economic stability of an industry designated by the Minister fails on legislative and procedural grounds as this industry is not one which has been designated by the Minister of the Department of Economic Development and thus falls short of the requirements set out in section 10(3)(b)(iv) of the Act.

The objectives set out in terms of sections 10(3)(b)(i),(iii), and (iv) are not promoted by the proposed maize surplus scheme. Therefore the grounds upon which the applicants seek to exempt the restrictive conduct associated with the proposed scheme fail to pass muster.

In addition, the Commission is of the view that the collective action proposed by Grain SA would result in the following undesirable outcomes:

- Increased prices for food inputs (e.g. animal feed) and staple foods (e.g. maize and poultry products);
- Increased risk of a threat to the security of supply and accordingly food security;
- Reduced incentives for grain producers to be more efficient and innovative; and
- Produce the same anticompetitive outcomes that resulted from the legally sanctioned cartel of the now disbanded Maize Board.

Accordingly, the Commission rejects the exemption application by Grain SA.

Notice is further hereby given in terms of section 10(8) of the Act, that Grain SA, or any other person with any interest or affected by the abovementioned decision of the Commission, may appeal the decision to the Competition Tribunal in the prescribed manner.

Any queries in this regard should be directed to: **The Principal Analyst, Mapato Rakhudu, Enforcement and Exemptions Division, Private Bag X23, Lynnwood Ridge, 0040**; or at telephone **012 394 3268**; facsimile **012 394 4268**, citing case number **2010Jul5262.**