
GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 3037

14 February 2023

**PUBLICATION OF THE FRESH PRODUCE MARKET INQUIRY TERMS OF REFERENCE IN
TERMS OF SECTION 43(B) OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)**

Notice is hereby given that the Competition Commission (“Commission”) will conduct an inquiry into the fresh produce market in terms of section 43B of the Competition Act, 89 of 1998, as amended (the Act).

In terms of sections 43B(2) and 43B(4) of the Act, the Commission must publish a notice in the Government Gazette announcing the establishment of the market inquiry at least 20 business days before the inquiry commences, “*setting out the terms of reference for the market inquiry and inviting members of the public to provide information to the market inquiry*” and “*must include, at minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed*”.

The market inquiry will therefore commence on a date the Commission will announce, at least 20 business days after the publication of the Terms of Reference in the Government Gazette.



***competition*commission**
south africa

FRESH PRODUCE MARKET INQUIRY

TERMS OF REFERENCE

FINAL

13 FEBRUARY 2023

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1. INITIATION OF AND LEGAL BASIS OF THE MARKET INQUIRY

- 1.1. The Competition Commission (“the Commission”) will conduct a market inquiry into the Fresh Produce Market of South Africa. A “market inquiry” means a formal inquiry in respect of the general state of competition, the levels of concentration in and the structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular firm.
- 1.2. The Fresh Produce Market Inquiry (the “FPMI”) will consider if adverse effects are present in the fresh produce value chain arising from any feature or combination of features that impedes, restricts or distorts competition.
- 1.3. The FPMI is therefore initiated in terms of section 43B(1)(a), read with section 43A, of the Competition Act 89 of 1998, as amended (“the Act”).
- 1.4. On 25 March 2022 public comments were invited, subsequently received and considered on the proposed draft terms of reference of the inquiry (including its proposed scope). In addition, the Commission consulted with a wide range of industry participants and stakeholders at an organised level on the proposed scope of the FPMI.
- 1.5. As a consequence, these Terms of Reference (“ToR”) are published in terms of section 43B(2) of the Act read together with section 43B(4). In terms of sections 43B(2) and 43B(4) of the Act, the Commission must publish a notice in the Government Gazette announcing the establishment of the market inquiry at least 20 business days before the inquiry commences, “*setting out the terms of reference for the market inquiry and inviting members of the public to provide information to the market inquiry*” and “*must include, at minimum, a statement of the scope of the inquiry, and the time within which it is expected to be completed*”.
- 1.6. With public comments having been received and in further accordance with these provisions, these ToR set out the final scope as well as the expected timeline for the FPMI.
- 1.7. Although the ToR delimit the scope of the market inquiry as currently envisaged, additional and related matters not identified herein may arise during the conduct of the inquiry. If the Commission believes that the ToR should be amended in any way, either through the

addition of new matters or exclusion of matters currently identified herein, the ToR may be amended in terms of section 43B(5) of the Act.

- 1.8. Upon completing the market inquiry and in accordance with section 43C of the Act, the Commission will publish a report of the inquiry in the Government Gazette and will also submit the report to the Minister of Trade, Industry and Competition.¹
- 1.9. The Commission is committed to the principles of fairness, transparency and integrity and will conduct the FPMI in accordance with these principles. The Commission will allow stakeholders fair and reasonable opportunity to provide input, taking into account the legislated timeframe within which the inquiry ought to be completed. All submissions that are received will be considered by the Commission before final findings and conclusions are made.

2. BACKGROUND TO THE SOUTH AFRICAN FRESH PRODUCE MARKET

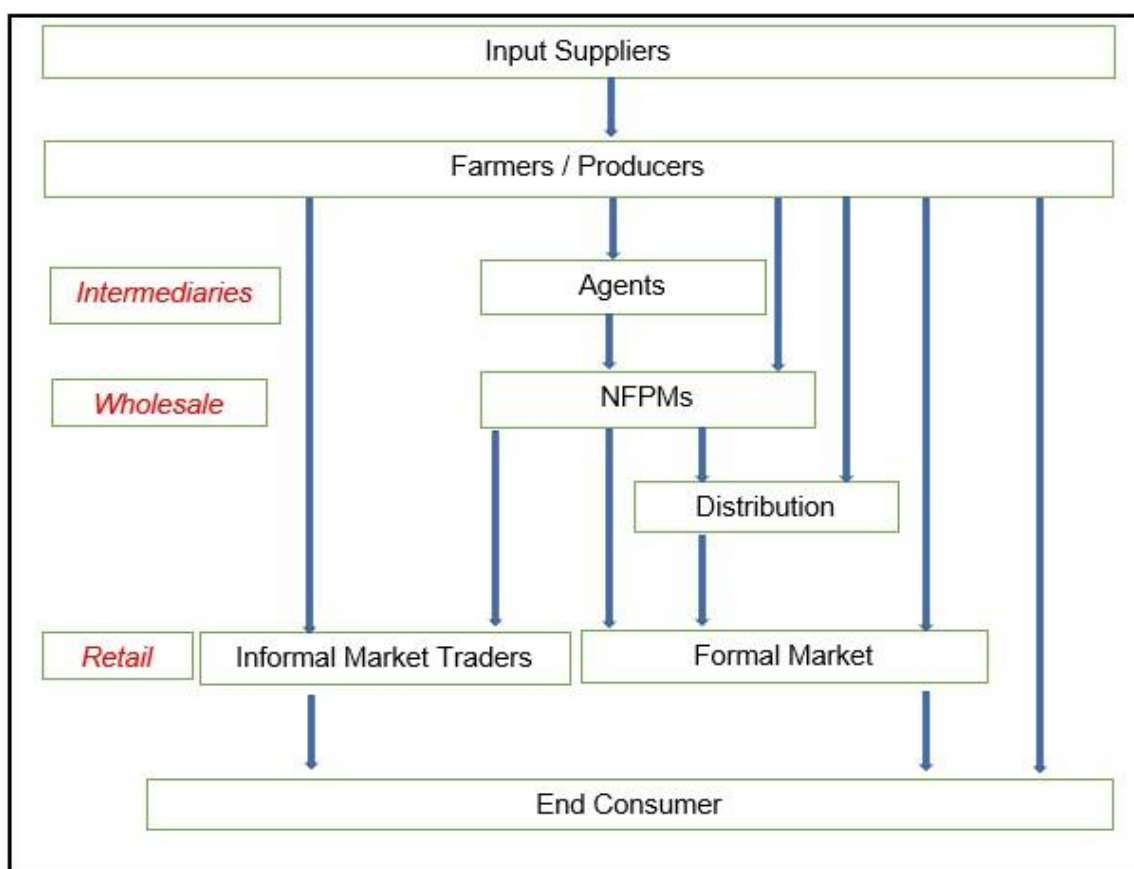
- 2.1 Agriculture plays a significant role in the South African economy as it contributes to food production, job creation, raw material supply to agro-industrial and manufacturing sectors, as well as export-driven foreign exchange income. The Commission has prioritised the food and agro-processing sector in its Prioritisation Framework since 2008. This was because the sector is a source of staple food and has the potential to create significant employment opportunities, thereby serving as a driver of inclusive growth in the South African economy.²
- 2.2 Essential foods are critical to the socio-economic wellbeing of a nation, and in particular to its poorest consumers for whom essential foods comprise a significant portion of household expenditure relative to other (wealthier) consumers. In the context of the COVID-19 pandemic, it was again demonstrated that nutrition and affordable healthy foods are important for household health as well as maintaining a country's food security.
- 2.3 For the purposes of the FPMI, fresh produce includes products such as fruit and vegetables (whether processed or not). The main fruits produced and consumed in South Africa include apples, bananas, oranges (and other citrus), stone fruit, pears, avocados, grapes and nuts. The main vegetables include potatoes, onions, tomatoes, sweetcorn, carrots and cabbage.

¹ Section 21(3) of the Act requires the Minister to table the report at the National Assembly.

² Competition Commission. 2020. Priority Sector Review 2017/2018 – 2018/2019.

2.4 Public comments and stakeholder engagements on the draft ToR emphasised the wide variation between different fresh produce value chains, often determined by the exact produce in question. As a result, a generalised illustration of the fresh produce value chain will necessarily not contain all nuances and differences between the different types of produce and their concomitant value chains. Despite this however, and for illustrative purposes, the following figure seeks to provide a basic illustration of some of the common features of most fresh produce value chains:

Figure 1: Simplified illustration of a basic fresh produce value chain



Source: Commission's own compilation. "NFPMs" refer to the national fresh produce market facilities.

- 2.5 The first key element in the fresh produce value chain is the input level. Significant inputs for fresh produce production include seeds, fertilisers, agrochemicals (herbicides, fungicides and pesticides), farm equipment, as well as irrigation equipment.
- 2.6 A further key input which is necessary for the production of fresh produce, is water. Water

is a scarce resource, and its use is regulated by the National Water Act 36 of 1998.

- 2.7 Following the input stage, the next key segment of the value chain is production, which occurs for either fresh consumption or processed fruit and vegetable products. Commercial production occurs across small- and large-scale growers that may supply various players in the value chain, including wholesalers, intermediaries, exporters, processors and retailers.
- 2.8 After production, the next level of the value chain involves wholesalers and intermediaries. At the intermediary level of the fresh produce value chain, processing activities add value to the raw product. For example the shelf life of fruit or vegetables produce may be increased through canning or it may be processed into concentrates or juice. The bulk of fresh produce production in South Africa however appears to be sold fresh.
- 2.9 Fresh produce market agents can also be categorised as intermediaries. In the main, they act as agents between producers and buyers (often at wholesale level).
- 2.10 The National Fresh Produce Markets ("NFPMs") refer to the physical infrastructures, and accompanying services, where the (mostly) wholesale of fresh produce takes place between producers and buyers. These ToR will either refer to these facilities as NFPMs or "fresh produce market facilities". For the sake of clarity thus, a reference to "the fresh produce market" only, does not refer to physical facilities, but rather to the broader market in an economic sense.
- 2.11 The next stage of the value chain, before the produce enters the retail market (whether formal or informal), is distribution and marketing. Produce is distributed to various channels including supermarkets, small retailers and food services. The fresh produce market facilities provide an outlet where large buyers are able to source fruits and vegetables, and where farmers are able to sell their produce.
- 2.12 The fresh produce value chain, as depicted in the diagram above, can apply to both small-scale and large-scale farmers. Small-scale growers generally harvest their fresh produce and sell directly at the farm gate for local consumption or to intermediaries, while large scale growers may transport their fresh produce harvest for washing and packaging in packing houses before distributing it to processing industries, NFPMs or directly to retailers.

2.13 The fresh produce industry has various forward and backward linkages to the rest of the economy and several key distribution channels. The food industry in general consists of a network of producers, wholesalers, distributors, processors and retailers, with varying levels of vertical integration. This makes the fresh produce value chain relatively complex.

3. RATIONALE FOR THE FRESH PRODUCE MARKET INQUIRY

3.1 The purpose of the FPMI is broadly to examine whether there are any features in the fresh produce value chain which impede, restrict or distort competition in the South African fresh produce market, in short whether adverse effects on competition are present because of any such feature(s).

3.2 The section that follows provides the basis upon which the Commission has reason to believe that adverse effects on competition may be present.

Commission's studies in the fresh produce market

3.3 In November 2021, the Commission published a study on the levels of concentration in the South African economy.³ The purpose of the Commission's Concentration Study was to assess patterns of concentration and participation in the South African economy and it revealed that, whilst large farms make up just 6.5% of all farms in South Africa, they accounted for 67% of total income in 2017/18. The study further revealed that there has been a significant reduction in the number of farming units in the course of over two decades. In this regard, there were just under 58 000 farming units in 1993 and just over 40 000 in 2017, representing a decrease of 31%.⁴

3.4 At a provincial level, there was a decrease in the number of farming units across all provinces, with KwaZulu-Natal, Mpumalanga and Limpopo experiencing the largest declines in percentage terms. The Commission's Concentration Study has not only revealed high levels of concentration but also an industry that is in decline in terms of farming units.

3.5 The picture is clearer when the analysis is product specific. Using potatoes as an example,

³ *Measuring Concentration and Participation in the South African Economy: Levels and Trends*, Main Report November 2021 ("the Commission's Concentration Study").

⁴ Commission's Concentration Study, page 33.

the study revealed that there was a 65% drop in the number of potato farmers between 1993 and 2008 and a gradual decline since then to 532 farmers in 2017, a trend that is consistent with the total decline in the number of farmers in the country.

- 3.6 The Commission's Concentration Study also found high and/or worsening levels of concentration in relation to potato seeds. The study found that the *"Commission's analysis on potato seeds shows that prior to a consent order between Wesgrow and the Commission at the beginning of 2020 regarding its most popular potato seed, Mondial, Wesgrow distributed four of the most popular potato seeds, which together accounted for 65.9% of the country's total potato yield in 2019/20. This represented a worsening of concentration from previous years"*.⁵
- 3.7 It is also worth noting that the Commission's research into essential food prices consistently highlighted that the sharp decline in the number of commercial farms may be indicative of the difficulties smaller farmers face in reaching the necessary economies of scale to decrease costs and maintain profitability. In this regard, the Commission's Essential Food Pricing Monitoring Report of August 2021 highlighted that *"the need for scale in commercial farming is partly tied to the adverse market structure facing small market players for inputs and outputs as both these layers of the value chain are concentrated with larger players able to exert market power on smaller players. Such dynamics can negatively affect the transformation of the sector as potential new entrants (including emerging black farmers) struggle to become established and sustainable without entering at scale"*.
- 3.8 The information gathered by the Commission from existing research indicates that the cost of fresh produce has largely been increasing above inflation levels. For instance, according to the report published by the National Agricultural Marketing Council titled *"The South African Food Cost Review"*, the market prices for selected vegetables were on average higher in 2019, when compared to 2018. In nominal terms, the average increases in market prices per ton of cabbages, tomatoes, and potatoes were 9.6%, 8.2%, and 6.9% respectively in 2019 compared to 2018. The average market price of onions was 8.8% lower in 2019 compared to 2018. The fruit sector was also subjected to increase in prices. For example, the average market prices per ton of bananas, oranges and apples were 9.3%, 8.3% and 5.1% respectively higher in 2019 than in 2018.

⁵ Commission's Concentration Study, page 144.

- 3.9 According to the studies, there appears to be broad concern over price levels and volatility of pricing for fresh produce in South Africa. The studies show that high prices of fresh produce have a disproportionate effect on the poor and low-income earners who have to spend a greater portion of their income to purchase essential products. A fuller understanding of the main drivers of the apparent high prices of fresh produce in South Africa is a critical area that this inquiry may address.
- 3.10 It is worthwhile to note that the COVID-19 pandemic also affected supply and demand within the fresh produce markets, with initial surges in pricing of some fresh produce and evidence of continued volatility in a market that has seen a number of events in the past two years. Beyond the observations from research on pricing and other market concerns for fresh produce – including for instance the series of Essential Food Pricing Monitoring Reports released by the Commission – there have been a number of complaints and/or investigations in the sector over previous years.

Price gouging investigations

- 3.11 Following the onset of the COVID-19 pandemic and the resultant declaration of the state of national disaster, the Commission investigated a large number of complaints with respect to price gouging conduct. Basic food and fresh produce products accounted for the vast majority of complaints and subsequent investigations.
- 3.12 The Commission's records show that, of 1 254 excessive pricing investigations relating to COVID-19, 713 (or nearly 57%) related to basic food and fresh produce. Of these, 322 related to ginger and garlic for which significant price increases (some of more than 300%) were observed over the second wave of infections of late 2020 and early 2021.
- 3.13 This shows the importance of fresh produce, but in the same breath, may show the potential for abusive conduct relating to essential food items where market circumstances change suddenly.

Challenges faced by the fresh produce farmers (especially emerging and small-scale farmers)

- 3.14 Various investigations and research conducted by the Commission in the fresh produce

market in 2021 highlighted various challenges faced by fresh produce farmers, and emerging and small-scale farmers in particular. Some of the challenges relate mainly to insufficient finance and technical capabilities, a lack of operational knowledge, the inability to create scale economies, low bargaining power, a lack of market access and access to important production inputs (like quality seeds and fertilisers) which may also limit farmers' ability to reach food safety levels accepted by retailers.

- 3.15 Further aspects affecting small farmer production include poor infrastructure (such as limited storage facilities) and logistics (due to the poor condition of available transportation systems like road and rail), unsustainable farming practices which have caused the degradation of agricultural soils in South Africa.
- 3.16 Other challenges include climate change which is increasingly affecting crop production levels due to more severe weather patterns such as droughts, heavy rainfall and/or flooding.

Example of Government's efforts to assist small scale farmers

- 3.17 Government's role in assisting small scale farmers was particularly expressed in the context of the COVID-19 pandemic. Whilst Government's role has been crucial in agriculture and not limited to assistance during the pandemic, the pandemic illustrated the capacity and central role Government can play in assisting the sector and small scale farmers in particular.
- 3.18 According to the Department of Agriculture, Land Reform and Rural Development's 2020/2021 Annual Report, COVID-19 had a devastating impact on the agricultural sector in 2020. As a result the Department increased efforts to provide urgent support to communities who are reliant on agriculture as a source of their livelihoods.
- 3.19 For example, in May 2020 the Department announced the outcome of applications for relief to the COVID-19 Agricultural Disaster Fund with an intervention of R1.2 billion and a total of 55 155 applications. At the time, just over R500 million was approved towards smallholder and communal farmers.
- 3.20 The Department also announced that a further R400 million would be channelled to farmers within the Proactive Land Acquisition Strategy ("PLAS") who were already approved for the

Department's Stimulus Package. Provincial interventions were also achieved by certain provincial governments.

3.21 Other government-led interventions in the agricultural sector, apart from COVID-19 related interventions, include the formulation of the Agricultural and Agro-processing Master Plan.

Objectives of the market inquiry

3.22 The Commission is of the view that the FPMI is essential in order to understand the state of competition within the industry, the market features affecting price outcomes, and the challenges currently faced by farmers (especially small-scale and emerging farmers). More broadly the importance of the sector to both the economy and employment, and the nutrition and welfare of its citizens gives further weight to the need for such an inquiry.

3.23 The Commission is of the view that these objectives are in line with and in support of the objectives of the Act. These are outlined in section 2 thereof, which provides that:

“the purpose of this Act is to promote and maintain competition in the Republic in order-

- (a) to promote the efficiency, adaptability and development of the economy;*
- (b) to provide consumers with competitive prices and product choices;*
- (c) to promote employment and advance the social and economic welfare of South Africans;*
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;*
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy;*
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons; and*
- (g) to detect and address conditions in the market for an particular goods or services, or any behaviour within such a market that tends to impede, restrict or distort competition in connection with the supply or acquisition of those goods or services within the Republic.”*

4. SCOPE OF THE FRESH PRODUCE MARKET INQUIRY

Introduction

- 4.1 Consistent with section 43B of the Act, the FPMI will focus on the fresh produce industry, with the aim of identifying whether any adverse effects on competition are present which result from features that impede, restrict or distort competition and market outcomes.
- 4.2 The FPMI will focus on particular and ancillary issues at each layer of the value chain. Specifically, the scope of the FPMI will cover aspects from the sale of fresh produce by the farmer to the customer (the retailer, processor or export market).
- 4.3 In light of the public comments and further stakeholder engagements, it has become apparent that the interaction of particularly retailers, and to some extent end consumers, cannot be excluded from consideration in the inquiry. In the same vein, the dynamics of the fresh produce processing market(s) cannot be excluded from the inquiry.
- 4.4 However, in order to curtail the duration of the inquiry, some limitation is required. To this end, where concerns and market features are specific to certain fresh produce, the FPMI will only focus on certain fresh produce items. If needed, clarity will be provided in due course on such specific produce.
- 4.5 The Commission has identified three broad themes which cover the features that may impede, restrict, or distort competition and market outcomes. The themes are as follows:
- 4.5.1 ***Efficiency of the value chain, with an emphasis on the dynamics around fresh produce market facilities.*** This theme stems from concerns from stakeholders that the value chain, particularly at the level of NFPMs are inefficient and uncompetitive. A specific focus will be around the competition dynamics prevalent at NFPMs and other contracting means (such as direct contracting) which may affect competitive dynamics;
- 4.5.2 ***Market dynamics of key inputs and its impact on producers.*** Specific aspects relating to key inputs (such as seeds, fertiliser and agrochemicals) that will be considered under this theme are concentration levels and if any, price

discrimination, buyer power and exclusivity. This theme is focused on the upper end of the production value chain; and

4.5.3 **Barriers to entry, expansion and participation.** The inquiry will consider the barriers to entry, expansion and participation in the fresh produce sector. Specific consideration will be given to the barriers faced by small, medium and micro enterprises (“SMMEs”) and firms owned or controlled by historically disadvantaged persons (“HDPs”). In addition, the broader regulatory framework will be considered. Where required, this may include consideration of specific pieces of legislation and the regulation conducted by other regulatory/governmental bodies in relation to such legislation.

4.6 In light of the above, the scope of these terms of reference will centre around specific and ancillary issues relating to each of these themes.

Theme 1: Efficiency of the value chain, with an emphasis on the dynamics around fresh produce market facilities

4.7 The NFPMs form an important part of the price-making, distribution and marketing of fresh produce in South Africa. These markets comprise a single integrated node within a much larger fresh-produce value chain and are often affected by variables that influence the flow of produce, including receiving, selling and dispatching of goods.

4.8 An imperative role of NFPMs is to allow for equal trade opportunities for both large scale, commercialised producers and smallholder farmers producing smaller quantities of produce. The NFPMs serve as a marketing channel for producers as they provide an accessible mechanism through which the growers (like small-scale and emerging farmers) connect with consumers.

4.9 There are at least 21 NFPMs in South Africa, with the four largest markets in Johannesburg, Tshwane, Cape Town and Durban. The medium-sized markets include Mangaung, Springs, East London, Pietermaritzburg and Port Elizabeth. The smaller markets include Kimberley (Sol Plaatjie), Matlosana, George, Mpumalanga, Mthatha (Kei), Nelspruit, Vereeniging, eMalahleni, Mooketsi, Polokwane, Vanderbijlpark and Matjhabeng.

- 4.10 In relation to NFPMs, farmers incur costs related to grading, packaging and transportation of their produce to the markets. In addition, there are commission fees (usually a percentage of goods sold) and other costs (e.g. ripening chambers) levied by agents who sell produce on behalf of farmers.
- 4.11 In respect of retailers, wholesalers and processors, the relationship is usually governed through contractual arrangements, which differ depending on the buyer. There appears to be less transparency on the extent of this practice and the price-setting mechanism in these contracts, but there also appears to be costs associated with participation in these fresh produce platforms. Such costs are relate to grading, packaging, distribution and other logistical costs.
- 4.12 Farmers have raised concerns regarding the widening of the farmgate price to retail price margins which also appears evident in the Commission's analysis of farmgate price to retail price margin data. This data seems to indicate clear and sustained growth in margins seen over the period considered in the Commission's Food Pricing Monitoring Reports. The apparent disparity between farmgate prices and retail prices further raises questions of the distribution of risk (agent commission or wholesale basis), profits, concentration and market power at different levels of the fresh produce value chain beyond farmgate. The Commission has previously also raised questions as to the wide disparity in pricing across NFPMs nationally.
- 4.13 In light of the above, the following specific aspects relating to competition and the efficiency of the value chain will be considered during the inquiry:

NFPM platforms as a route to market:

- 4.13.1 The price setting mechanisms which pertain to the NFPMs and the role of agents;
- 4.13.2 Efficiencies of the NFPMs, specifically pertaining to logistics, storage, the cold chain, grading and selection, packaging and transportation;
- 4.13.3 The liquidity of NFPMs overall and the impact of direct contracting methods on liquidity (if any);
- 4.13.4 The role of information (asymmetry) in trading at NFPMs and its impact on pricing;
- 4.13.5 Price dispersion across NFPMs nationally;
- 4.13.6 Agent fee determination at NFPMs;
- 4.13.7 Challenges faced by HDP market agents in dealing at the NFPMs, particularly

issues on space allocation, costs and the role of historical ties influencing the decision of certain large producers in only dealing with certain market agents; and

4.13.8 Onward logistics, including any price discrimination.

Other market platforms as a route to market (retailers, wholesalers and processors):

4.13.9 Competition for national and local direct sales and contracting, as well as price determination including any buyer power;

4.13.10 Agents, logistics and wholesale/trader fees and associated markups as well as the basis for their determination; and

4.13.11 Retailer margins, markups and their determination.

4.14 As indicated, in order ensure that the duration of the inquiry remains within the statutory time of 18 months, consideration may have to be limited to certain produce where required. Should this be the case, further clarity on the Commission's selection will be provided.

Theme 2: Market dynamics of key Inputs and its impact on producers

4.15 South Africa is a net exporter of primary agricultural products, but it imports a large share of the inputs required to produce the surplus of products. The COVID-19 pandemic has highlighted many challenges related to the reliance on imported inputs. The disruptions of global supply chains has shown the country's vulnerability to rising input costs in an environment which is exposed to exchange rate fluctuations and other global developments.

4.16 As indicated above, key inputs for growers include seeds, fertilisers and agrochemicals (herbicides, fungicides and pesticides). Many of these (manufactured) inputs are imported or priced on international bases and may lead to significant cost effects for growers, particularly smallholder farmers.

4.17 The following specific aspects relating to the market dynamics and impact of key input for growers will be considered during the inquiry:

4.17.1 The costs of key inputs for farmers and its impact on overall producer costs and pricing;

4.17.2 The main driver(s) of cost increases (such as market structures, high

concentration, intellectual property or other external factors);

4.17.3 The existence (if any) of price discrimination in the sale of inputs; and

4.17.4 The role (or lack thereof) of cooperatives (or former cooperatives) and public sector agricultural support in the provision of competing inputs including open seed varieties.

4.18 The impact of climate change on supply chains and its adverse effect on producers of fresh produce will also be considered. This is mainly due to the knock-on effect of climate change on producer costs (prices of inputs such as seeds, fertilisers, fungicides, pesticides and herbicides), volumes of produce and the ultimate prices that consumers pay.

Theme 3: Barriers to entry, expansion or participation

4.19 As indicated before, the food and agro-processing sector has been of particular importance to the Commission as part of its prioritisation framework. The previous studies conducted by the Commission found that high and increasing staple food prices may have a negative impact on the majority of South Africans. The sector has a long history of regulation and is characterised as highly concentrated with few significant firms active at the processing and retail levels of the value chain.

4.20 More broadly, the Commission's Concentration Study have shown that high levels of market concentration in the country's agricultural sector persist, and that market power in the South African context may create barriers to entry. This may have a negative impact towards the development of competitive fresh produce markets as new and small players may not be able to challenge incumbents, efficient firms are not able to grow and expand, and firm investments and innovations initiatives are disincentivised.

4.21 Farmers play a crucial part of the country's fresh produce value chain as they are involved in the primary agricultural activities of producing fruits and vegetables. Therefore, they have a critical role in achieving the country's food security.

4.22 The agricultural value chain in South Africa seems to be highly industrialised and characterised by a high degree of vertical coordination of production through large-scale commercial farming as well as concentration at various levels of the value chain. The existing 'large-scale or nothing' dynamic in the value chain limit the scope for smaller scale

participation in the markets.

- 4.23 South Africa's agricultural value chain seemingly shows trends of declining participation by commercial growers and increasing levels of concentration for inputs and outputs. The sharp decline observed in the Commission's Concentration Study in the number of commercial farms may highlight the difficulties smaller farmers face in reaching the necessary economies of scale to decrease costs and maintain profitability.
- 4.24 In respect of the role of cooperatives (and former cooperatives in the public sector), they may hold numerous benefits for citizens and the Government, especially in circumstances where a government has limited resources and is battling high poverty and unemployment levels.
- 4.25 It has been recognised before that the cooperative structure can help alleviate these problems as they may offer a way for farmers to achieve economies of scale and scope, to increase bargaining power, to develop communities, as well as contribute towards innovation, stability and legal protections.
- 4.26 There are some concerns from stakeholders that since the deregulation of agriculture markets, which included the support of (former) cooperatives, the outcomes may have mostly benefitted larger players. This is because it is the nature of cooperatives to favour the members of that cooperative rather than working to include new and smaller players. There may also be evidence that the centralised nature of cooperatives may have resulted in competition concerns, particularly in the context of price discrimination or buyer power. To the extent that cooperatives can again function in support of smaller players and farmers, there may be an opportunity for a greater level of inclusion and participation in the value chain.
- 4.27 SMME and/or HDP farmers may face barriers to entry and expansion in the markets which inhibit their transition from small to commercial farmers. Such barriers to entry and expansion may be related to access to (routes to) markets, discriminatory practices in relation to inputs and/or outputs, access to financial support and/or equitable access to water resources. In addition, access to land (as a resource and separate from considerations of expropriation) may also pose barriers to entry. These barriers may inhibit such farmers from achieving the necessary scale to become more efficient, expand output and reduce prices.

4.28 The FPMI will inquire into the following specific aspects relating to the participation of SMME and/or HDP farmers, where not already covered in the other sections:

4.28.1 Market access;

4.28.2 Discriminatory practices, if any, for inputs and outputs; inclusive of the role of cooperatives and/or former cooperatives;

4.28.3 Access to financial support; and

4.28.4 Challenges relating to access to water.

4.29 Where applicable the market inquiry will draw on specific case studies relating to SMME and/or HDP farmers, specifically relating to growing of the most common fresh produce.

5. MARKET INQUIRY TIMELINES

5.1 The FPMI will commence after the publication of the final Terms of Reference and on a date to be communicated. The final report will be completed within 18 months after such commencement as per the statutory requirements of section 43B(2) and 43B(4)(a) of the Act respectively, unless such period is extended by the Minister in terms of section 43B(4)(b).

5.2 Details on the administrative phases of the inquiry along with Guidelines for Participation will be made available on the Commission's website.

5.3 Members of the public, businesses (formal or informal), associations, government departments, government agencies and members of civil society may be invited to provide written representations and information to the Inquiry.

6. MARKET INQUIRY PROCESSES

6.1 In terms of section 43B of the Act, the Commission may conduct a market inquiry in any manner but for greater certainty the following processes may apply as required by the circumstances.

In relation to the issuing of requests for information and powers of summons

- 6.2 At any time during the Inquiry, the Commission may issue a request for information to a person or firm who it believes has information which may be relevant to the issues identified in the terms of reference.
- 6.3 In addition to the issuing of requests for information, the Commissioner may also summon, in terms of section 43B(3)(c) read with section 49A of the Act, any person who is believed to be able to furnish any information on the subject of the Inquiry, or to have possession or control of any book, document or other object that has a bearing on that subject, to appear before the Commission, to be interrogated at a time and place specified in the summons; or at a time and place specified in the summons, to deliver or produce to the Commission any book, document or other object specified in the summons.

In relation to (public) hearings

- 6.4 The Commission must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and may conduct its hearings informally or in an inquisitorial manner.
- 6.5 Despite the above, the Commission may order that a matter be heard in chambers (i.e. *in camera*) and that oral submissions be made at the hearing (whether in person, by telephone or video conference), if it is in the interests of justice and expediency to do so. Despite this, the Commission must seek to limit the extent to which hearings take place *in camera*.
- 6.6 Furthermore, the Commission may condone any technical irregularities arising in any of the Inquiry proceedings.
- 6.7 The Commission may accept as evidence any relevant oral testimony, document or other thing, whether or not it is given or proven under oath or affirmation; or would be admissible as evidence in court; but may refuse to accept any oral testimony, document or other thing that is unduly repetitious.
- 6.8 The format of public hearings may take different forms according to the needs of the Inquiry and relevant stakeholders, provided the above principles are adhered to in all formats.

Accordingly, the Inquiry may choose to hold the following types of public hearings:

- 6.8.1 Full panel public hearings, facilitated by evidence leaders, where the entire Inquiry Panel must be present and the Chairperson of the Inquiry will chair proceedings;
 - 6.8.2 Single panel member seminars, where a single panel member may be present to chair the seminar; and
 - 6.8.3 Technical team workshops, where the presence of any panel member will be optional and the workshop will be lead by the technical team.
- 6.9 Details on the conduct of proceedings at each format of public hearing will be made available on the Commission's website in due course.
- 6.10 The purpose of the public hearings, in whichever format they occur, will remain the same, namely to engage directly with stakeholders in respect of their submissions around the issues identified by the Inquiry and any remedial actions stakeholders consider are necessary to address any issues identified. There will also be scope for stakeholders to highlight other issues that the Inquiry is not aware of at the time so long as these fall with the Terms of Reference.

7. OUTCOMES OF THE INQUIRY

- 7.1 In terms of section 43C of the Act, if the Commission establishes that there is an adverse effect on competition, it must determine the action that must be taken. In addition it must determine:
- 7.1.1 whether it must make recommendations to any Minister, regulatory authority or affected firm to take action to remedy, mitigate or prevent the adverse effect on competition; and
 - 7.1.2 if any such action must be taken, the action that must be taken in respect of what must be remedied, mitigated or prevented.
- 7.2 In terms of section 43C(4) of the Act, in determining the above matters, the Commission must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable.

- 7.3 Furthermore, and in terms of section 43D of the Act, the Commission has a duty to remedy adverse effects on competition. In particular the Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.
- 7.4 Any action taken in terms of remedying an adverse effect on competition must be reasonable and practicable, taking into account relevant factors, including:
- 7.4.1 the nature and extent of the adverse effect on competition;
 - 7.4.2 the nature and extent of the remedial action;
 - 7.4.3 the relation between the adverse effect on competition and the remedial action;
 - 7.4.4 the likely effect of the remedial action on competition in the market that is the subject of the market inquiry and any related markets;
 - 7.4.5 the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition; and
 - 7.4.6 any other relevant factor arising from any information obtained by the Commission during the market inquiry.
- 7.5 Further, on the basis of information obtained during the Inquiry, the Commission may:
- 7.5.1 initiate a complaint and enter into a consent order with any respondent, with or without conducting any further investigation;
 - 7.5.2 initiate a complaint against any firm for further investigation;
 - 7.5.3 initiate and refer a complaint directly to the Competition Tribunal without further investigation;
 - 7.5.4 take any other action within its powers in terms of the Act recommended in the report of the Inquiry; or
 - 7.5.5 take no further action.
- 7.6 Any interested person who is materially and adversely affected by a determination of the Commission in terms of the above outcomes, may, within the prescribed period, appeal against that determination to the Competition Tribunal.

[END]