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COMPETITION LAW AND AGRICULTURAL CO-OPERATIVES: CAN INTERNATIONAL DEVELOPMENTS SHOW THE WAY FORWARD FOR SOUTH AFRICA?

IRMA GOUWS AND THANDI LAMPRECHT[1]

INTRODUCTION

The United Nations General Assembly has declared 2012 as the International Year of Co-operatives. This has bolstered the activities of the South African Department of Trade and Industry ("dti"), as the lead department responsible for co-operative promotion and support, to create awareness about co-operatives and their contribution to social and economic development.[2]

In South Africa, the Competition Act 89 of 1998 ("the Competition Act"), unlike the competition laws applicable in various international jurisdictions, currently has no automatic exemptions for the activities of co-operatives.[3]

In this paper, we investigate how competition law concerns surrounding agricultural co-operatives, (which are generally established to conduct the business of collective processing, farming production, joint purchasing or joint marketing and selling of the output of its members'

[1] Werksmans Attorneys.

[2] See the dti 'Integrated Strategy on the Development and Promotion of Co-operatives: 2012 -2020' (at *http://www.dti.gov.za/economic_empowerment/docs/coops/legis_policy/coop-strategy.pdf*). As part of the co-operative development programme, the Co-operatives Amendment Bill [B17-2012] and the Co-operatives Second Amendment Bill [B18- 2012] have been tabled in Parliament and referred to the Trade and Industry Portfolio Committee.

[3] The Maintenance and Promotion of Competition Act of 1979, which was the predecessor of the current Competition Act, initially contained specific exceptions for the activities of co-operatives. The 1979 Act was, however, amended in 1986 to give the Competition Board further powers, including the ability to act against agricultural co-operatives and control boards (also previously exempted).

products), are treated in the United States of America ("US"), the European Union ("EU") and the United Kingdom ("UK"). Thereafter we discuss agricultural co-operatives in the South African context and the principles these co-operatives should bear in mind in conducting their business in the light of the absence of clear competition law guidelines or exemptions for the conduct of co-operatives and its members.

BACKGROUND

Prior to deregulation of the agricultural sector in South Africa, the production and marketing of most agricultural products were extensively regulated by the state, who supported farmers through legislation such as the Co-operative Societies Act 29 of 1939 and the Marketing Act 59 of 1968, through investment in research and development, infrastructure, extension services and the settlement of farmers, and through protection of domestic markets from international competition.[4] Agricultural co-operatives became the products of this highly regulated agricultural sector - organised as local monopolies bolstered by complex marketing schemes, which were designed to protect producers, and those down the production chain, from competition.[5] The Marketing of Agricultural Products Act 1996 repealed the Marketing Act of 1968 and, together with the repeal, state recognition of all single-marketing channels was formally withdrawn and the respective marketing schemes and boards were disbanded – thereby removing the benefits agricultural co-operatives enjoyed as agents for control boards.

The shift to a market economy that sought to allow free participation by all the different stakeholders in the agricultural sector meant that co-operatives had to be competitive if they were to continue prospering. This lead to a noticeable trend in various restructuring actions by co-operatives such as conversions to companies, mergers and acquisitions, joint ventures and

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4 Vink, N. & Van Rooyen, J. 2009. '*The economic performance of agriculture in South Africa since 1994: Implications for food security'*, Development Planning Division Working Paper Series No.17, DBSA: Midrand. March 2010.

5 See the Competition Tribunal discussion in the large merger between Afgri Operations Limited and Natal Agricultural Co-operative Limited 17/LM/Mar04, referring also to The Competition Commission v Patensie Sitrus Beherend, Tribunal Case No 37/CR/Jun01 and SA Fruit Terminals (Pty) Ltd v Portnet and others, Tribunal Case No: 52/IR/Sep01.

strategic changes such as diversification and vertical integration.[6]

There appeared to be a dwindling interest in co-operatives as a business vehicle and by the year 2000, only 11 new co-operatives were registered with the Department of Agriculture.[7] In December 2001, however, Cabinet approved the new mandate for co-operatives development, which was transferred from the Department of Agriculture to the dti. There has certainly been an increase in the registration of co-operatives - the Companies and Intellectual Property Commission ("CIPC") July 2012 statistics report states that there are currently 49 716 active co-operatives in South Africa, of which 12 670 were registered in 2012 alone.[8] A recent study by the dti indicate that about 25% of all registered co-operatives function as agricultural co-operatives and that agricultural co-operatives contribute as much as 80% of the total amount contributed by co-operatives to GDP.[9]

The overall objective of the dti's strategy to promote co-operatives is to adequately and effectively foster entrepreneurship and the promotion of small enterprises.[10] It is envisaged that small rural or subsistence farmers could become competitive by forming agricultural co-operatives where they can pool resources such as trucks and establish joint processing and storage facilities which are not cost effective for individual farmers. In a similar manner, a group of farmers can form a co-operative to pool their products and find larger markets that are more stable and pay better.[11]

According to a recent study commissioned by the National Agricultural Marketing Council

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6 Competition Commission Research Report '*The South African Agricultural Industry In Context'* 2006, available at http://www.southernafricafoodlab.org/wp-content/uploads/2010/09/6-Competition-Commission-report-on-agriculture-2006-2-a-page.pdf.

7 See *http://www.cipc.co.za/Stats_files/July2012.pdf.*

8 See *http://www.cipc.co.za/Stats_files/July2012.pdf*; However, according to the 2009 dti baseline study on co-operatives, it (albeit inconclusively) appears as if only 12% of the registered co-operatives could be confirmed as operating.

9 Op. cit. note 2 at page 36 to 42.

10 Op. cit. note 2 at page 48.

11 '*The Cooperative Link: Food Security and Agrarian Transformation'*, available at *http://www.copac.org.za/files/Food%20Security%20Sem.pdf*

("NAMC"),[12] the South African agricultural sector is characterised by a large number of relatively small producers of perishable products who have to supply to concentrated processor and/or retail markets. There are in fact many examples of regional monopsonies in the form of agribusinesses such as dairy processors, grain traders and millers, sugar factories and cotton ginneries that per definition has market power (or buying power) based on the fact that they are the only buyer of the raw material in a specific geographical region.[13] Due to the high perishability of agricultural products, their farm-level supply is very price inelastic, thereby even further reducing the producers' bargaining power.[14] Collective bargaining through agricultural co-operatives could therefore serve to effectively ameliorate this inequality in bargaining power.

These challenges faced by farmers in the South African agricultural environment are also encountered by farmers in international jurisdictions. It has been recognised that the dominance of retailers and large processors and their ability to one-sidedly determine terms of trade could ultimately be to the detriment of food security. For this reason the US, EU and the UK has allowed agricultural co-operatives and associations of farmers to benefit from varying degrees of exemption from the application of competition laws, as is set out in the discussion below.

INTERNATIONAL BEST PRACTICE

Although there does not appear to be consensus on an "international best practice" in competition policy relating to agricultural co-operatives, many jurisdictions make provision for special exemptions from the application of their competition laws for the particularities of the

[12] Prof Johann Kirsten 'The Impact of Market Power and Dominance of Supermarkets on Agricultural Producers in South Africa A case study of the South African dairy industry', available at *http://www.namc.co.za/assets/newpdf_18_05_09/the%20impact%20of%20market%20power%20and%20dominance%20of%20supermarket%20finalz_09_05_15.pdf*

[13] Op. cit. 12 at page 8.

[14] Op. cit. 12 at page 2.

agricultural sector.[15] In the US, the UK and the EU these exemptions are almost as old as the competition legislation in place.[16]

The exemptions granted in all three jurisdictions have come under review in the relatively recent past. In each jurisdiction the authorities have had an opportunity to consider whether these exemptions are still relevant and necessary for the benefit of the particular agricultural sector. Interestingly, although the application of the exemptions has been more narrowly defined over the years, none of the jurisdictions under review are abolishing the agricultural exemptions and it appears that the same factors, such as poor bargaining power of farmers, the pro-competitive reasons for the existence of co-operations and the unique nature of the agricultural sector, which led to the creation of the exemptions, still remain of relevance today.

AGRICULTURAL EXEMPTION IN US ANTITRUST LAW

Background

Agricultural co-operatives appeared in the US as early as 1804, when farmers organised a co-operative to market milk and milk products.[17] These early co-operatives emerged as an effort by farmers to equalise bargaining power in a business environment in which individual farmers

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[15] Arie Reich '*The Agricultural Exemption in Antitrust Law: a Comparative Look at the Political Economy of Market Regulation'* (2007) 42 Texas International Law Journal 843 at 844.

[16] An important factor which must be borne in mind when considering the competition laws applicable in various jurisdictions to their agricultural sectors, is that governments often consider inelastic demand, unpredictable and seasonal supply, the perishable nature of many agricultural products and food security as factors which warrant governmental intervention and market co-ordination. In addition to the special exemptions granted to the agricultural sector in various jurisdictions from the application of competition law, many developed countries also impose intervention mechanisms by means of regulation, such as quota systems, price support mechanisms, protection from imports and subsidies. As such, the markets themselves are often not "free markets" in the true sense, but markets which are already skewed as a result of state interventions – be it through regulation, subsidisation or some other form of protection. The debate on the effects of the largely de-regulated (or self-regulated) nature of the South African agricultural marketing environment and South Africa's ability to effectively compete in the international environment is ongoing and we do not endeavour to incorporate the topic into the ambit of this paper.

[17] C. Varney, The Capper-Volstead Act, Agricultural Co-operatives, and Antitrust Immunity, ABA Antitrust Section's The Antitrust Source (December 2010) (available at *http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_FullSource.authcheckdam.pdf*), citing Jerry Voorhis, American Co-operatives: Where They Come From, What They Do, Where They Are Going 80 (1961).

were forced to negotiate with large, rapidly consolidating businesses. After the passage of the Sherman Antitrust Act in 1890[18] many states enacted provisions in their constitutions or statutes prohibiting monopolies, trusts, and restraint of trade. A number of agricultural co-operatives were investigated and prosecuted for alleged contraventions of antitrust legislation.[19] Often the sentiment was that the co-operation between farmers in fixing common prices for their produce and marketing it jointly was seemingly in violation of the Sherman Act's prohibition of agreements in restraint of trade.[20]

Farmers involved in co-operatives were in a difficult position, as without exemption from the application of antitrust laws, efforts to do business on a co-operative basis were subject to challenge as an illegal conspiracy to restrain trade. The US Senate recognised that the position of agricultural co-operatives was akin to that of labour unions in that the individual workers/farmers were in positions where they had to be placed on a level playing field with the more powerful firms that procured the fruits of their labour.[21] It was partly this recognition that industrial employers and agricultural processors have monopsony power which resulted in broader public policy support for co-operative marketing by agricultural producers and a drive to enact additional legislation granting exemption from antitrust laws.

A specific exemption to the application of the Sherman Act was granted to producers of agricultural products through the Clayton Act of 1914.[22] Section 6 of the Clayton Act stipulates:

> *'That the labour of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labour, agricultural, or horticultural organizations, instituted for the purposes of mutual*

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18 15 U.S.C.

19 See Donald A. Frederick, Antitrust Status of Farmer Co-operatives: The Story of the Capper-Volstead Act, USDA Co-operative Information Report No. 59 (2002) available at *http://www.rurdev.usda.gov/rbs/pub/cir59.pdf.*

20 In *Georgia Fruit Exchange v. Turnipseed*, 62 So. 542 (Ala. 1913) it was held that the openly espoused goal of the co-operative was to enhance prices paid to its members and that an agreement among producers to seek this goal is in and of itself an unreasonable restraint of trade that violates common law.

21 Op. cit. note 15 at 847.

22 15 U.S.C.

help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.'

The wording of section 6 of the Clayton Act was ambiguous and led to much uncertainty as the statute exempts both the 'existence and operation' of farm organizations, but limits that exemption to lawfully carrying out their 'legitimate objects', without explaining what 'legitimate objects' would entail.[23] As such there was a need to extend and clarify the protection granted to agricultural co-operatives from prosecution under the Sherman Act.

Partially in response to the uncertainty around the application of section 6 of the Clayton Act, the Capper-Volstead Act of 1922[24] was passed. It served as the foundation supporting the development of many effective co-operative marketing ventures controlled by their producer-owners in the US.[25] It has given producers assurance that if they organise themselves in compliance with a few easily-understood constraints and conduct their joint marketing activities in a responsible manner as set out in section 1 of the Capper-Volstead Act, they will not be considered as being engaged in an illegal restraint of trade.[26]

Conduct Exempted Under the Capper Volstead Act

The Capper-Volstead Act is widely described as the Magna Carta of the co-operative,[27] as it provides a common structure and business model for co-operatives in the US. The limited exemption in the Capper Volstead Act was enacted to correct the distortion of competition in the agricultural sector and to allow farmers to countervail the monopsonist or oligopsonist market

23 Op. cit. note 19 at 75.

24 7 U.S.C.

25 Op. cit. note 19 at 86.

26 Ibid.

27 Analee Heath Leach '*The Almighty Railroad And The Almighty Wal-Mart: Exploring The Continued Importance Of The Capper-Volstead Act To The American Farmer And The Agricultural Marketplace*' (2010) 32 Hamline J. Pub. L. & Pol'y 261 at 274.

power of middlemen.[28] However, the exemption granted to the agricultural sector does not provide farmers or co-operatives with a blanket exemption from anti-trust law. In order to fall within the exemption a co-operative must remain strictly within the confines of each of the provisions contained in the Capper-Volstead Act.

The exemption is therefore limited in scope and only extends to the formation of co-operatives among farmers and the legitimate activities of such co-operatives, such as joint processing, handling and marketing.[29] Varnay summarises the specific limitations on the scope of immunity granted to co-operatives by the Capper-Volstead Act as follows:[30]

- *'The Capper-Volstead Act, by its terms, authorizes farmers to act together only "in collectively processing, preparing for market, handling, and marketing" their products.*[31]

- *Membership in the cooperative must be limited to producers of agricultural products.*[32]

- *The cooperative must operate "for the mutual benefit of [its] members."*[33]

- *The cooperative either must limit each member to one vote, regardless of the amount of stock or membership capital owned, or must limit dividends to eight percent per year or less.*[34]

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28 Op. cit. note 15 at 849.

29 Ibid.

30 Op. cit. 17 at 3-4.

31 7 U.S.C. § 291.

32 Ibid see (authorizing "[p]ersons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers" to form co-operatives); National Broiler Marketing Association v. United States, 436 U.S. (1978) 816, 436 U.S. at 822–23.

33 7 U.S.C. § 291.

34 Ibid (stating that co-operatives either must not allow "more than one vote because of the amount of stock or membership capital he may own therein" or must not "pay dividends on stock or membership capital in excess of 8 per centum per annum").

- *The cooperative must not "deal in the products of non members to an amount greater in value than such as are handled by it for members."*[35]

- *The Capper-Volstead Act authorizes the Secretary of Agriculture to bring an administrative action against an association that "monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced."*[36]

In addition, the Supreme Court has held that the Act does not shelter a co-operative when it employs "predatory" practices that violate Section 2 of the Sherman Act or when it colludes with others who do not enjoy immunity.[37]

One of the important features of the exemption is that it allows co-operatives to serve multiple purposes for their members including marketing, supply and packing services. This flexibility increases the value of co-operatives to members and the efficiency of the co-operative system.[38] As the law currently stands in the US, a co-operative facilitating price fixing or voluntary supply restraints amongst its members, will fall within the ambit of the exemption.[39]

The Capper-Volstead Act allows farmers to take advantage of the efficiencies of co-operative association, but only in so far as those efficiencies do not create unfair market conditions.[40] Co-operatives are therefore not immune from administrative or judicial supervision and where they engage in anti-competitive activities such as predatory conduct, anti-competitive third party contracts, or pre-production supply control, they lose the protection of the limited anti-trust exemption.

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35 Ibid.

36 7 U.S.C. § 292. One treatise reports that the Secretary has never used this power. 1B Phillip E. Areeda & Herbert Hovenkamp, Antitrust 249a, at 5 n.3 (3d ed. 2006).

37 Md. & Va. Milk Producers Ass'n v. United States, (1960) 362 U.S. at 463–64.

38 Op. cit. note 27 at 275.

39 Op. cit. note 46 at 11.

40 Op. cit. note 27 at 275.

Recent Developments

Surprisingly, the language of the Capper-Volstead Act has not been amended since its passage in 1922.[41] However, over the years several Supreme Court decisions have provided clarification on the application and parameters of the exemption created by it which provide checks on the membership and potential power of agricultural co-operatives.[42]

Core co-operative conduct between farmer members of a co-operative, such as price fixing through joint marketing (or even naked price fixing in the absence of any marketing activities) remain exempted under the Capper Volstead Act.[43] The US Supreme Court has however made it clear that only co-operatives whose members are all agricultural producers, fall within the exemption. These members must actually produce products and for this reason co-operatives that also have distributors or processors as members, are not covered by the exemption. In addition, the Supreme Court has confirmed over the years that exempted co-operatives may not engage in otherwise illegal predatory trade practices.

During the 1970's the Antitrust Division of the US Department of Justice ("DOJ") examined the agricultural antitrust exemption, among other statutory exemptions, but no changes were effected to the Capper-Volstead exemption. In 2004 the Antitrust Modernization Commission ("AMC") was established by Congress and tasked with examining whether the need exists to modernize the antitrust laws and to identify and study related issues. In its final report in 2007, the AMC found that the laws as enacted and enforced are sufficiently flexible to account for the changing global economy and better understanding of how markets operate. Nevertheless, the AMC made several recommendations to improve US antitrust enforcement, including recommending that statutory immunities should be disfavoured and that they should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject

41 Op. cit. note 27 at 275.

42 Op. cit. note 27 at 275.

43 Kenneth R. O'Rourke & Andrew Frackman, '*The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions*,' 19 J. of the Antitrust and Unfair Competition Law Section of the State Bar of Cal. 69, 83 (No. 2, Fall 2010) at 78.

the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the US economy in general.[44]

The Capper-Volstead Act exemption was identified as one of the statutory exemptions which should be reviewed and in 2010, the Antitrust Division of the DOJ and the US Department of Agriculture ("USDA") hosted a series of workshops exploring competition in the agricultural sector. The goals of the workshops were to promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues as well as to listen to and learn from parties with real-world experience in the agricultural sector.[45] However, rhetoric surrounding the role of co-operatives in the market and public questioning by the (then) US Assistant Attorney General for Antitrust, Christine Varney, of the current-day relevance of the exemption in the Capper Volstead Act, resulted in emphatic participation by co-operatives in defense of the exemption.[46] Strong criticism was directed at the DOJ and USDA for their perceived misdirected focus on co-operatives.[47]

The DOJ published its paper on the workshops entitled "*Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward*" in May 2012 wherein the competitive and anti-competitive forces in the agricultural market in the US is discussed. It steers clear of making any recommendation on the revision of the Capper-Volstead exemption. It did, however, stress that vigorous enforcement of antitrust law in the agricultural sector will remain a priority.

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[44] Antitrust Modernization Committee Report and Recommendation, April 2007, at 350. Report available at *http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf*.

[45] According to the DOJ website: '*The workshops addressed the dynamics of competition in agriculture markets, including buyer power (monopsony) and vertical integration. They examined legal doctrines and jurisprudence, as well as current economic learning, and provided an opportunity for farmers, ranchers, consumer groups, processors, agribusiness, and other interested parties to provide examples of potentially anticompetitive conduct and to discuss any concerns about the application of the antitrust laws to the agricultural sectors. The workshops were transcribed and placed on the public record along with submissions and written comments received*.' Transcripts of all five public workshops and additional information regarding the workshops are available at *http://www.justice.gov/atr/public/workshops/ag2010/index.html.*

[46] Kenneth R. O'Rourke & Andrew Frackman, 'The Capper-Volstead Act Exemption and Supply Restraints in Agricultural Antitrust Actions', 19 J. of the Antitrust and Unfair Competition Law Section of the State Bar of Cal. 69, 83 (No. 2, Fall 2010) at 73; see also submissions made to the DOJ at *http://www.justice.gov/atr/public/workshops/ag2010/index.html.*

[47] Op. cit. note 27 at 11-12.

US Courts also continue to scrutinise the conduct of co-operatives claiming exemption under the Capper-Volstead Act, as is evidenced by the important issues on limitations of the exemption decided by two federal courts in the latter part of 2011. The outcomes in both these cases were generally unfavourable towards the co-operatives involved in the prosecution.[48]

Although the world has changed remarkably since the passage of the Capper-Volstead Act in 1922 a strong case can still be made for the protection of agricultural co-operatives to ensure the efficient functioning of agricultural markets.[49] Today the large retailers, such as Wal-Mart, have taken the place of the railroad barons of old, as Leach remarks:

> "*The Capper-Volstead Act remains as vital today as it was in 1922. Although the market actors have changed, agricultural producers remain at a significant bargaining disadvantage. This disadvantage arises from the inherent limitations of farming and is unlikely to be resolved by producers acting independently. Agricultural co-operatives are therefore essential to stabilizing and increasing the bargaining power of farmers and ensuring a fair and competitive marketplace for agricultural commodities."*[50]

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[48] *In re Mushroom Direct Purchaser Antitrust Litigation*, 514 F. Supp. 2d 683 (E.D. Pa. 2007). *In re Mushroom Direct Purchaser Antitrust Litigation,* 621 F. Supp. 2d 274 (E.D. Pa. 2009*); In re Mushroom Direct Purchaser Antitrust Litigation,* 655 F.3d 158 (3d Cir. 2011) resolved in the negative the issues of whether Capper-Volstead provides immunity from a civil suit and whether pre-judgment denial of protection is immediately appealable, and acknowledged the issue of whether inadvertent inclusion of an ineligible member strips an agricultural co-operative of Capper-Volstead protection; *In re Fresh and Process Potatoes Antitrust Litigation,* No. 4:10-MD-186-BLW (D.Idaho Dec. 2, 2011) which determined that the Capper-Volstead exemption does not reach pre-production farming activity, such as planting and harvesting, adopted to reduce the supply of potatoes – and hence, to increase the price at which the product is sold.

[49] See also Shannon L Ferrell *"New Generation Co-operatives and the Capper Volstead Act: Playing a New Game by the Old Rules*" 27 Okla. City U. L. Rev. 737.

[50] Op. cit. note 27 at 300.

AGRICULTURAL EXEMPTION IN EU COMPETITION LAW

Background

In the EU, the point of departure is that the Treaty of the Functioning of the European Union ("the Treaty") applies to all sectors of the economy, but exemptions are granted to undertakings from the normal application of these rules in certain limited circumstances. Importantly it should be noted that the application of the Treaty to an agricultural co-operative only becomes relevant when the conduct or agreement may actually or potentially affect trade between Member States and therefore fall within the scope of application of Article 101(1) of the Treaty. Many Member States have their own policies and regulations affecting agricultural co-operatives or associations and we do not endeavour to set out all the variations of those provisions in this paper.

The agricultural sector is granted an exemption in terms of the Treaty. The EU exemption aims to allow the proper functioning of central governmental policies in the agricultural sector, mainly the Common Agricultural Policy ("CAP"), (which has recently been reviewed) and occasionally Member State's national policies.[51]

Article 42(1) of the Treaty grants the Council and the European Parliament the power to determine the extent to which EU rules on competition apply to the production and trade of agricultural products under the following terms:

> *"The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.'*

On the basis of this enabling provision in the Treaty, two Regulations were adopted by the Council and these currently govern the application of competition rules to the agriculture sector:

[51] Op. cit. note 15 at 849.

- Council Regulation (EC) No 1234/2007[52], known as the 'Single Common Market Organisation Regulation' ("Single CMO Regulation"), which establishes a common organisation of the markets for certain agricultural products included in Annex I to the Treaty[53]; and

- Council Regulation (EC) No 1184/2006, which applies to products listed in Annex I to the Treaty not covered by the Single CMO Regulation. [54]

Application of the EC Agricultural Exemption

The limited general exemptions contained in the Regulations are the following:

- *'Agreements, decisions and practices which form an integral part of national market organisations;*

- *Agreements, decisions and practices which are necessary for the attainment of the objectives of the CAP (as set out by Article 39 of the Treaty); and*

- *Agreements between farmers or associations of farmers belonging to a single Member State not involving an obligation to charge identical prices.'*[55]

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[52] The Commission has proposed a new Regulation on the common organisation of agricultural markets, COM (2011) 626 of 12.10.2011, to replace Council Regulation (EC) No 1234/2007 per Catherine Del Cont, Luc Bodiguel, Antonio Jannarelli "*EU Competition Framework: Specific Rules for the Food Chain in the New CAP*", May 2012, at 24.

[53] The sectors concerned are cereals, rice, sugar, dried fodder, seeds, hops, olive oil and table olives, flax and hemp, fruit and vegetables, processed fruit and vegetables, bananas, wine, live plants and products of floriculture, raw tobacco, beef and veal, milk and milk products, pig meat, sheep meat and goat meat, eggs, poultry meat and other products. The Regulation also establishes specific measures for ethyl alcohol of agricultural origin, apiculture products and silkworms.

[54] European Competition Network Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector, May 2012, available at *http://ec.europa.eu/competition/ecn/food_report_en.pdf.*

[55] Regulation 184/2006; Alison Jones and Brenda Sufrin *EU Competition Law, Text, Cases, and Materials* 4th Edition (2010) at 107.

For purpose of this discussion, we only deal with the third exemption, which applies specifically to associations of farmers. Note that certain common market organizations such as those dealing with 'fruit and vegetables' or 'wine', containing specific provisions on interbranch organisations also fall outside the scope of Article 101, under certain conditions.[56]

In order to apply this third exception, three cumulative conditions must be met: [57]

- *"The agreements must be concluded between farmers, farmers' associations or associations of farmers' associations belonging to a single Member State.*

- *The agreements must concern the production or sale of agricultural products (the terms used by the Preamble (§ 85) of the Single CMO Regulation in this regard are "joint production or marketing of agricultural products") or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices.*

- *Thirdly, the agreements may not exclude competition or jeopardize the objectives of the CAP. This 3rd exception seems to have been so far of very minor relevance in light of the limited case law and Commission practice in which its potential application has been analysed. No particular decision or case has been found in this regard in which it has been fully accepted. Some of the underlying reasons taken into account in this regard have been the following:*

  - *The agreement at issue involves not only farmers, farmers' associations or associations of farmers' associations but also third parties or trade associations. If third operators (other than farmers, farmers' associations or associations of farmers'*

[56] Alison Jones and Brenda Sufrin *EU Competition Law, Text, Cases, and Materials* 4th Edition (2010) at 107.

[57] Working Paper "*The interface between EU competition policy and the Common Agriculture Policy (CAP): Competition rules applicable to co-operation agreements between farmers in the dairy sector*" Brussels, 16.02.2010 available at *http://ec.europa.eu/competition/sectors/agriculture/working_paper_dairy.pdf* .

associations) participate to the agreement at issue, the latter would not qualify for being exempted.

- The restriction of competition at issue (even though stemming from a decision of a farmers' association) is afterwards included in a contract with a third party which becomes subject to such restriction.

- The agreement at issue refers to prices. That was the conclusion of the Court of Justice in the Case C-399/93, Oude Luttikhuis, 15 in which it stated that: "The third derogation is subject to three cumulative conditions. For the derogation to be applied, it must be confirmed, firstly, that the agreements in question concern cooperative associations belonging to a single Member State, secondly that they do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products, and thirdly that they do not exclude competition or jeopardize the objectives of the common agricultural policy."

Recent Developments

Dairy industry

After fluctuations in supply and price of milk in 2009/2010 resulted in what was termed a "milk crisis" in the EU, the Directorate-General for Competition published an explanatory Brochure on '*How EU competition policy helps dairy farmers in Europe*'[58] and a working paper on '*The interface between EU competition policy and the CAP: competition rules applicable to cooperation agreements between farmers in the dairy sector*'[59]. In particular, the papers clarify the various forms of co-operation that milk farmers could develop in order to adopt more market-oriented business models and strengthen their bargaining position vis-à-vis their buyers without infringing EU competition law. Such forms, which must be assessed under the rules applicable

[58] See *http://ec.europa.eu/competition/sectors/agriculture/summary_dairy.pdf*.

[59] See *http://ec.europa.eu/agriculture/markets/milk/hlg/com6_eucomp_policy_cap_en.pdf*.

to horizontal agreements between competitors, can range from joint commercialisation (e.g. use of a common agent or broker, or in some cases, collective bargaining groups) to joint production agreements (e.g. use of common facilities for milk collection or the development of co-operatives active at the processing stage).[60]

In December 2011, the European Commissioner announced that an informal agreement by Council and Parliament was reached on *"a legislative package to strengthen the European milk sector. Producers' organisations will have all the necessary tools to better promote their work in the food chain. This new regulation will open the way towards a modern management of agricultural markets, less bureaucratic, better organised between the public authorities and private actors with tools tailored to the new economic challenges. These tools will replace instruments that have lost their effectiveness and did not prevent the 2009 dairy crisis*".[61]

In essence the Regulation[62] grants Member States the possibility (until mid 2020) to make "*written contracts between farmers and processors compulsory and to oblige purchasers of milk to offer farmers a minimum contract duration. These contracts should be made in advance of delivery and contain specific elements such as the price, volume, duration, details concerning payment, collection and rules for force majeure. All these elements should be freely negotiated between the parties and farmers may refuse an offer of a minimum duration in a contract. Deliveries by a farmer-member to its cooperative are exempted from this contract obligation if the statutes or rules of the coop contain provisions that have similar effects as the prescribed contract. In order to reinforce the bargaining power of milk producers, farmers can join together in producer organisations (PO) that can negotiate collectively the contracts terms including the price of the raw milk. The volume of milk that a PO can negotiate is limited to 3.5% of the EU production and to 33% of the national production of the Member States involved. For Member States with production of less than 500,000 tonnes (Malta, Cyprus and*

[60] See *http://ec.europa.eu/competition/ecn/brief/02_2010/ec_milk.pdf.*

[61] *http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/877&format=HTML&aged=0&language=EN&guiLanguage=en*

[62] Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector.http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32012R0261:en:NOT

Luxembourg) the limit for national production is set at 45% instead of 33%.These limits allow negotiations between POs of approximately the same size as a major dairy processor while effective competition on the dairy market is maintained."

Agricultural industry in general

The European Commission has stated that agriculture is changing rapidly due to globalisation and technological innovation and that the reform of the CAP will take place by 2013.[63] In view of the imminent reform of the CAP in 2013, which should come into force on the 1st of January 2014, the European Commission has developed a set of legislative proposals,[64] which aims to prepare European farmers for the challenges of increasingly open markets and international competition, so that they can continue to feed Europe and the world.

Among these proposals, the Commission has presented a new Regulation on the Common Organisation of agricultural markets (*Single CMO Regulation* COM (2011) 626 of 12.10.2011), to replace the current Single CMO Regulation[65] aimed to strengthen the offer and the role of farmers' associations and interbranch organisations and to clarify the competition rules.[66] The exemption for farmer associations will remain largely unchanged, except that the exemption (currently contained in Article 176 of the Single CMO Regulation) will no longer apply to producer organisations that are in a dominant position.[67]

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63 *http://ec.europa.eu/competition/sectors/agriculture/overview_en.html*

64 See *http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/index en.htm* This legal proposal follows a series of discussions and debates led by the Community institutions (Commission, Parliament and Council) since 2010: See Resolution T7-0286/2010 of 8 July 2010. *http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0286*; Communication from the Commission: Europe 2020 (COM (2010) 2020), 03.03.2010*; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF;* Communication of the Commission: the CAP towards 2020, COM (2010) 672, 18.11.2010; Resolution T7-0297/2011 of 23 June 2011. *http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0297.*

65 OJ L 299, 16.11.2007.

66 See "EU Competition Framework: Specific Rules for the Food Chain in the New CAP", May 2012 which analyses the legal framework in force concerning agricultural competition, and the conditions of application of antitrust law to agreements and practices of farmers and farmers' associations and interbranch organisations.

67 Ibid at 31.

The market monitoring investigations carried out by the competition authorities have identified factors which may have a negative impact on the overall functioning and competitiveness of the food sector in the EU, such as the fragmented and atomistic structure of farmers in some Member States, the existence of unnecessary intermediary stages in the supply chain or the existence of regulatory entry barriers to retail markets.[68]

However, competition rules surrounding price fixing agreements or output restrictions will still not be exempted in future as the competition authorities consider that the problems faced by small-scale farmers in some Member States should rather be addressed by encouraging a pro-competitive restructuring and consolidation of the agriculture sector through the forms of co-operation allowed under competition and CAP rules, for instance by pooling some activities (e.g. production, storage or marketing of products) in a proportionate way and integrating part of the value in the chain (e.g. processing or retail sales)."[69] The retention of the prohibition on price-fixing in the context of co-operatives has been questioned - especially in the light of the fact the legislators in the US has allowed their co-operatives the benefit of this exemption and that it serves as a counterbalancing power in the face of other economic partners such as industrials and distributors. [70] The omission to extend the exemptions granted to the dairy sector to other "live products" is also being questioned.[71] Joint selling through co-operatives will therefore remain subject to the requirements set out for commercialisation agreements in the guidelines applicable to parties in a horizontal relationship[72] or, for example, where the commercialisation agreement involve a common agent, then the guidelines on vertical restraints will apply. [73]

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[68] 'Antitrust: European Competition Network reports shows competition enforcement across the EU benefits all parts of the food sector - frequently asked questions' available at *http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/373&format=HTML&aged=0&language=EN&guiLanguage=en*

[69] Ibid.

[70] Op. cit. note 66 at 36.

[71] Louis-Pascal Mahe, 'Do the proposals for the CAP after 2013 herald a 'major' reform?' March 2012 at *http://www.notre-europe.eu/uploads/tx_publication/CAPReform_LP-Mahe_NE_March2012_01.pdf.*

[72] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [OJ C 11 of 14.1.2011].

[73] Commission Regulation (EU) No. 330/210 of 20 April 2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices, [OJ L 102, 23.4.2010], see specifically paragraph 20.

AGRICULTURAL EXEMPTION IN THE UK

Competition Law in the UK

In the UK, competition law is affected by both British and European elements. Relevant legislation which must be considered when analysing the competition law framework in the UK is the Competition Act of 1998 ("the UK Competition Act") and the Enterprise Act of 2002.

The Office of Fair Trading ("OFT") and the Competition Commission are the two primary regulatory bodies for competition law enforcement. Currently the competition law enforcement structures in the UK are being reconsidered and the amalgamation of certain functions of the OFT and Competition Commission is envisaged by 2014 – the new watchdog will be called the Competition and Markets Authority.

Agricultural Exemptions

The legal position in respect of agricultural co-operatives in the UK is substantially the same and in line with the EU approach. We set out the relevant principles in the section below.

Recent Developments

UK competition law authorities allow many forms of co-operation between farmers as "*they recognise that - except for price-fixing agreements and/or agreements aimed at limiting output or sharing markets or customers which are generally regarded as per se restrictive of competition - many forms of horizontal co-operation are generally beneficial, as they may foster innovation, allow the commercialisation of new products, facilitate efficient sales or reduce distribution costs*".[74] Further, by co-operating and pooling capital and other resources it is

[74] Written Evidence Submitted By The Office Of Fair Trading Dairy Sector And Competition Law: OFT Response To EFRA Committee; at *http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvfru/952/952vw12.htm*

recognised that co-operation among farmers will lead to the modernisation of and rationalisation in the agricultural sector and improving efficiency, to the ultimate benefit of consumers.[75]

In November 2011, the OFT updated its guidelines to UK farmers on collaborations with competitors as it recognised that competition law has developed since its first publication in 2004 and it became necessary to reflect those developments in updated guidelines ('the Guidelines').[76] Prior to the publication of the Guidelines, consultations were held with interested parties in the farming sector in order to establish which issues farmers and their representatives would most benefit from guidance. The 2011 guidelines included additional provisions on:

- How the OFT defines markets and estimates market power;
- How the OFT determines whether there are competition problems in a market; and
- Where collaborative activities are most and least likely to breach the law.[77]

The Guidelines make clear that co-operation among agricultural producers is permitted as long as they create efficiencies and do not limit competition to the detriment of consumers. Examples of forms of co-operation which, absent market power, could be considered as 'efficiency-enhancing' without contravening the provisions of the Chapter I prohibition of the UK Competition Act and/or of Article 101(1) of the Treaty, and whilst ensuring CAP objectives are achieved, include:

- *'The sharing of facilities of any kind – such as packaging facilities, storage facilities, transport, processing facilities and other common equipment;*

- *The sharing of skills and knowledge including staff (for instance product research and development and technical staff);*

- *Putting in place, common marketing or branding of a product to add value which is of some benefit to consumers (but not simply increasing the sale price of a product*

[75] Op. cit. note 74

[76] *http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/guidance-farmers/#named2*

[77] Ibid.

without such justification);

- *Common marketing or branding of a product to ensure availability of that product in a particular market (ensure market access and help maintaining presence in the market if their "genuine" product is specifically desired by consumers); and*

- *Reducing waste of any kind through better management and potential use of all by-products to their highest value rather than for disposal or for commodities*.'[78] [79]

Agreements between farmers which seek to fix prices or share markets and/or customers are considered likely to breach competition law, hence they are generally prohibited. The Guidelines state that only in very exceptional circumstances would price fixing be allowed under current competition law. Such arrangements would have to meet the criteria for exemption in accordance with Article 101(3) of the Treaty or section 9(1) of the UK Competition Act, which provides that an agreement will not be prohibited under Article 101(1) and/or Chapter I of the UK Competition Act '*if it (a) contributes to (i) improving production or distribution, or (ii) promoting technical or economic progress; while allowing consumers a fair share of the resulting benefit; and it (b) does not (iii) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or (iv) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.'*[80]

In the UK, the OFT does not consider joint marketing by farmers through a co-operative structure to amount to price fixing *per se*.[81] They recognise that joint marketing may be necessary to achieve the scale and professional management to meet the specifications of large customers, but it is crucial that the parties to a joint selling agreement are free to set their own

[78] Op. cit. note 74

[79] Office of Fair Trading "*How Competition Law Applies to co-operation between farming businesses: Frequently asked questions"* November 2011 OFT740er at 20.

[80] Op. cit. note 74 at footnote 4.

[81] Op. cit. note 79 at 21-22.

prices.[82] The OFT clarifies that where farmers sell jointly through a co-operative or through a commercial agent, taking whatever price the agent can get for their produce, then competition concerns are unlikely to arise (unless the business involved has market power[83] or where the co-operative or agent restricts output or limits quantities sold by its members).[84]

A further warning in the Guidelines directed at farmers operating in collaborative arrangements (particularly joint commercialisation) is the prohibition on the exchange of sensitive commercial information on future or current marketing strategy, volumes and prices.[85] The Guidelines state that such information may reveal a business's or competitor's future commercial behaviour: '*Exchanging information which reduces uncertainty about a business's behaviour is likely to be problematic. Through these actions the businesses in question would knowingly substitute co-operation between them for the risks of competition, thus reducing the normal commercial uncertainty that should exist between competitors. On the contrary, businesses should determine their commercial conduct, including pricing, completely independently of one another'*.[86]

CO-OPERATIVES IN SOUTH AFRICA: COMPETITION LAW CONCERNS

Prohibited Horizontal Practices

An agricultural co-operative produces, processes or markets agricultural products and/or supplies agricultural inputs and services to its members.[87] The objectives of a primary agricultural co-operative are one or more of the following: to undertake the marketing of any agricultural product or anything that is derived from an agricultural product; to acquire, or to acquire control over, any agricultural product or anything derived from an agricultural product, for the purpose

82 Ibid.

83 Parties with a combined market share of 15% are unlikely to be considered to have market power.

84 Op. cit. note 79 at 22.

85 Office of Fair Trading "*How Competition Law Applies to co-operation between farming businesses: Frequently asked questions"* November 2011 OFT740er at 22.

86 Ibid.

87 Section 1 of the Co-operatives Act 14 of 2005.

of marketing thereof; to process an agricultural product or anything derived from it, manufacture it and dispose of the end product or of the agricultural product and anything derived from it; to hire, buy, produce, manufacture, let, sell or supply services or things required for purposes of farming; to hire, buy, acquire, produce, manufacture, let, sell or supply any article for consumption; to hire, establish, erect, use or make facilities available for use in connection with farming; to render services which are necessary and useful in farming; to render any other services, including services which relate to buying, selling and hiring of fixed agricultural property; to farm and dispose of farming products, process products or manufacture articles and dispose of them; and to undertake insurance business which relates to farming risks for farmers.[88]

The competition law risks inherent to the structure of agricultural co-operatives as a vehicle for co-operation by parties in a horizontal relationship is as relevant in South Africa as it is in the rest of the world. Individual farmers cannot consistently and reliably control the prices that they receive for their agricultural products or the prices they pay for the inputs required to produce these goods. The enhancement of their economic market power is therefore often the driving factor for farmers to form agricultural co-operatives.[89] In essence, the activities of the co-operative therefore may often involve joint selling and purchasing by the farmers through their co-operative.

In an OECD Peer review report titled '*Competition Law and Policy in South Africa*',[90] joint selling through agricultural co-operatives was specifically discussed as follows:[91]

> *'Farmer "joint-activity" organizations on the selling side take a variety of forms, some of which would not be expected to create any anti-competitive harm, while others could create market power and limit supply or raise prices. Joint activity does not require that farmers sell their product through a central selling organization, such as a co-operative,*

88 Part 4 of Schedule 1 of the Co-operatives Act 14 of 2005.

89 Guidelines for establishing Agricultural Co-operatives, published at *http://www.daff.gov.za/doaDev/AgricDevFinance/GuidelinesForEstablishingAgricCo-operatives.pdf*

90 May 2003 at *http://www.oecd.org/dataoecd/52/13/2958714.pdf*

91 See *http://www.oecd.org/dataoecd/7/56/35910977.pdf*

but can involve other sorts of joint activity, such as limitations on supply, ingredients, or quality. Small farmer co-operatives that affect a limited percentage of the production of a given product within an appropriately-defined geographic area likely do not have any ability to influence prices or terms of competition and are unlikely to generate price increases. In contrast, large co-operatives, or mandatory membership organizations, whether run by the state or other entities, may have the ability to affect the terms of competition and could ultimately raise prices for consumers. "Joint-activity" organizations often benefit from antitrust law exemptions that prevent cartel charges, as long as the organisations act appropriately. Joint-activity organisations are often independent of the government but at other times are endorsed by government and include mandatory membership for all producers of the relevant product in the relevant area.'

The Competition Commission ("the Commission") has stated in a research report titled "*The South African Agricultural Industry In Context*"[92] ("the Commission Report") that:

'Since existing co-operatives involve acting in unison by people that are naturally supposed to be competing, policies aimed at their promotion may be seen by some as being opposed to the spirit of competition. At first glance, the promotion of co-operation might seem at odds with the Competition Act (promotion of competition). However, collaboration among potential competitors is also possible through other arrangements such as joint ventures, business contracts and mergers and acquisitions, as it is through co-operatives and corporatized co-operatives, without necessarily falling foul of the Act. Such collaboration may inter alia increase market access or even result in efficiencies that are beneficial without necessarily falling foul of the Act. Where they affect competition, they may be justified on efficiency or other gains outweighing the anti-competition effects. Where it results in conduct that is a prohibition under the Act, an exemption may be granted if it meets the criteria set out in the Competition Act. Thus, from a competition policy perspective, co-operatives and converted Co-operatives, like any other business entity, can be assessed from three dimensions: collusion; abuse of dominance; and mergers

[92] See *http://www.southernafricafoodlab.org/wp-content/uploads/2010/09/6-Competition-Commission-report-on-agriculture-2006-2-a-page.pdf*

and acquisitions.'

With regards to collusion within co-operative structures, the Commission Report stated the following:

> *"Whilst the structure of co-operatives may not necessarily be anticompetitive, it is the conduct of such co-operatives that needs to be regulated. Thus, the focus of the competition authorities would be more on the conduct and the Commission will always scrutinize such structures to ensure that they do not become breeding ground for cartels and collusive behaviour. For instance, co-operative arrangements should not involve an obligation to charge identical prices. In other words, conventional price fixing cartels cannot hide under the guise of co-operatives. Such activity should be prohibited even under co-operative structures."*

The above statement however, does not appear to consider the fact that in terms of section 14(dd) of the Co-operatives Act 2005, a co-operative's constitution must provide that it may only appoint directors who are members. Therefore, the executive body of a co-operative will all be parties in a horizontal relationship.[93] If it is the sole business of the co-operative to engage in joint marketing and selling on behalf of its members, the co-operative may find it difficult to justify any discussions at board level surrounding prices, markets and customers without falling foul of the provisions of section 4(1)(b) of the Competition Act, as such conduct is *per se* prohibited.[94]

In *American Soda Ash Corp v Competition Commission*[95], the Competition Appeal Court ("the CAC") held that selling by competitors through a joint sales agency had to be condemned as a

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93 Note that in terms of section12 of the Co-operatives Amendment Bill [B17-2012] the constitution may in future allow for the appointment of non-executive independent directors.

94 The prohibition on price fixing, contained in section 4(1)(b)(i) of the Competition Act, is one of the major competition concerns arising from competitors who embark on a joint selling and marketing arrangement. Arrangements with the view on joint selling generally have the object of co-ordinating the pricing policy of competing producers or suppliers, since it goes to the core of the competitive process: prices and customers.

95 Case Number 12/CAC/Dec01.

per se price fix.[96] The court ultimately accepted that its conclusion "*does not mean the end of joint ventures: they will only be prohibited if the partners are competitors 'directly or indirectly fixing a purchase or selling price or any other trading condition; dividing markets by allocating customers, suppliers, territories, or specific types of goods or services'. Joint ventures do not necessarily involve any of these practices. Those that do may be exempted under the provisions of s 10 or chapter 3".* In an appeal of this matter to the Supreme Court of Appeal ("SCA"), reported as *American Natural Soda Ash Corporation and another v Competition Commission of SA and others*[97] the SCA stated that: '*If that separate entity is no more than the alter ego of the individual competitors in association, who are in truth consensually fixing their prices through the medium of that alter ego, then no doubt the façade behind which they are acting can be stripped away to reveal the reality of the arrangement (collusion by two or more competitors designed to ensure that their respective goods reach the market at non-competing prices).*'[98]

Most agricultural co-operatives who market crops utilise pooling mechanisms.[99] The competition authorities did not in past cases before the Competition Tribunal appear to view this type of joint marketing and selling by co-operatives as problematic from a price-fixing point of view.[100] Yet when maize farmers applied for exemption towards pooling/joint selling of agricultural commodities in the export market, the Competition Commission refused it.[101] In the Competition Commission v USA Citrus Alliance case number 67/CR/Jul05, the Competition Commission held that co-ordination amongst farmers in the export of their fruit to the USA resulted in a contravention of section 4 of the Competition Act, even though the conduct did not have any anti-competitive effect in any market in South Africa. Subsequent to the conclusion of a settlement agreement, the USA Citrus Alliance, in the form of a new entity styled Western

96 Paragraph 31 *supra*.

97 Case number [2005] 3 All SA 1 (SCA).

98 Paragraphs 52 to 55 *supra*.

99 USDA Co-operative Pooling Operations at *http://www.rurdev.usda.gov/rbs/pub/rr168.pdf*

100 Neither the Competition Commission, nor the Competition Tribunal expressed the view in the SAD or the Patensie cases (infra at notes 105 and 106) that joint marketing through a co-operative could be regarded as being in contravention of section 4(1)(b) of the Act merely as a result of the structure of the co-operative business. See also the reasons in the Large Merger between Tiger Brands & others and Langeberg Foods & another 46/LM/May05 at paragraph 58-59, where the Competition Tribunal raised no objection to the practice of collective price bargaining by farmers through their association.

101 See Government Notice 1259, 31 December 2010.

Cape Citrus Producers Forum, applied and obtained exemption in terms of section 10 of the Competition Act (which exemption was recently renewed for another 5 years, albeit under a more limited scope).

Agricultural co-operatives should therefore take heed of the uncertainties surrounding the manner in which the South African competition authorities will view joint selling and pooling of products by farmers. It will perhaps be easier to justify a joint selling arrangement if the business of the co-operative involves additional efficiency-enhancing services, such as storage and packaging. Co-operatives which exist purely to fulfil a selling function on behalf of its members should re-consider whether a co-operative is an appropriate vehicle for joint selling initiatives by its members, absent applying for an exemption under section 10 of the Competition Act.

South African co-operatives could also find guidance in the approach adopted internationally, as our competition authorities may consider foreign and international law when interpreting the Act.[102] The OFT guidelines state that, as long as the members of the co-operative are free to set their own prices and the co-operative does not otherwise restrict competition, they can sell through the co-operative or commercial agent taking whatever price the agent can get for their produce.

Where agricultural co-operatives are established with the goal of embarking on joint production, packaging or processing, it is easier to analyse and justify the conduct from a joint venture perspective as per the basic principles set out in the May 2010 decision by the United States Supreme Court in the case of *American Needle Inc. v. National Football League*[103]:

- ensure that the primary purpose of the joint venture is not to limit or restrict competition and that it has a legitimate objective;

[102] Section 1(3) of the Competition Act.

[103] Case number 130 S.Ct. 2201 (2010); see also the US DOJ and FTC's 'Antitrust Guidelines for Collaboration Amongst Competitors', available at *http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf*

- if possible, ensure that the joint venture introduces a new product or service which would not otherwise have been available (or would not otherwise have been available at a low cost) other than through the "co-operation" of the joint venture parties;

- ensure that the joint venture achieves measurable technological, efficiency or other pro-competitive benefits, and that these benefits are passed on to end consumers;

- ensure that the joint venture or area of co-operation is "tightly integrated" around the core objective, i.e. do not allow activities where the parties compete (or should compete) to fall within the scope of the joint venture activities. This applies to the activities of the joint venture but the joint venture should also not become a platform for collusion or information sharing beyond the activities of the joint venture;

- to the extent that any restrictions or restraints are imposed on the joint venture parties, ensure that these are (i) strictly ancillary to the principal (legitimate) objective and in furtherance of its achievement and (ii) proportional or reasonable.

Agricultural co-operatives should therefore always ensure that they heed the above principles when conducting their business as these principles are of universal application and it is likely that the South African Competition Commission will follow the same approach.

Dominant Firms

The Commission Report also cautions against anti-competitive exclusionary practices adopted by co-operatives and similarly structured firms with dominant market shares, since such conduct may amount to an abuse of dominance in terms of the Act. It stressed that, "*if not properly regulated or assessed, the conduct of co-operatives may result in market foreclosure. The risk of market foreclosure exists in markets where there is vertical integration, increased barriers to*

entry, and where access to co-operatives has grown to become an essential prerequisite for operating in those markets."[104]

Our competition authorities have in the past had to consider the provisions contained in the articles of association of two co-operatives which were converted into companies, namely in the Patensie case[105] and the SAD case.[106]

In the Patensie case the co-operative was, *inter alia*, accused of contravening the abuse of dominance provisions of the Act in that its articles of association effectively required its farmer members not to deal with competitors (i.e. any other packinghouse), since each of the members had to deliver their entire citrus crop to Patensie for the purposes of packing and marketing. In addition, certain restrictions were imposed on the sale of shares in that its board of directors had to have the identity of the potential purchaser of the shares approved. It was argued that the board would be unlikely to approve a sale of shares to anyone other than an existing shareholder. The articles of association of Patensie also stipulated that a member selling his shares would only be allowed to effect transfer when he made good his share of the outstanding capital liability (which was substantial) or if the purchaser of the shares agreed to assume that liability. It was therefore very onerous, if not almost impossible, for a member to exit the arrangement. The Competition Tribunal and the CAC found that the arrangement created by the articles of association, was a contravention of section 8(d)(i) of the Act. The CAC found that Patensie's articles of association constituted an exclusivity agreement which distorted competition by depriving customers of the dominant entity the opportunity to choose their own packing facility or export agent.

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104 Commission Report page 68.

105 Interim relief case reference was *JJ Bezuidenhout v Patensie Sitrus Beherend Ltd* (66/IR/May00); hearing before the Tribunal reported as *Competition Commission v Patensie Sitrus Beherend* (37/CR/Jun01); appeal to the CAC cited as *Patensie Sitrus Beherend Bpk v The Competition Commission, JJ Bezuidenhout, JD du Preez* (16/CAC/Apr02).

106 *South African Raisins (Pty) Ltd, JP Slabber v SAD Holdings Ltd, SAD Vine Fruit (Pty) Ltd* (04/IR/Oct99); *SAR (Pty) Ltd, JP Slabber v SAD Holdings Ltd, SAD Vine Fruit (Pty) Ltd* (16/IR/Dec99*); SAD Holdings Ltd & Another v SAR (Pty) Ltd & Others* 2000 (3) SA 766 (T); *SAR (Pty) Ltd & Another v SAD Holdings Ltd & Another* 2001 (2) SA 877 (SCA*); SAD Holdings Ltd, SAD Vine Fruit (Pty) Ltd v The Competition Commission* (41/CR/Jul01).

In the SAD case, the abuse of dominance of which the claimants were complaining related to certain restrictive provisions in SAD's articles of association alleged to require or induce grapes-for-raisins producers not to deal with the first claimant, SAD's competitor. The Tribunal held that the real effect of the articles of association was to exclude or severely discourage producers from delivering to SAD's competitors.

What is clear from the above cases is that certain restrictions by a dominant co-operative on dealings with competitors may result in a contravention of the abuse of dominance provisions set out in the Competition Act. However, there are various ways in which producers can be required to supply to co-operatives, even where the co-operative has a dominant market share, which do not contravene the Competition Act – for example, the constitution of the co-operative or the supply agreements should not require producers to surrender all their produce to a dominant co-operative in perpetuity or enforce severe and unjustifiable penalties for non-delivery.[107]

CONCLUSION

Agricultural co-operatives and its members require certainty regarding the competition law landscape within which they conduct their business. Neither the US, the EU nor the UK are abolishing their limited agricultural exemptions and it appears that the same factors, such as poor bargaining power of farmers, the pro-competitive reasons for the existence of co-operations and the unique nature of the agricultural sector, which led to the creation of the exemptions, still remain of relevance today. Given that the small farmers in South Africa must negotiate individually with very large purchasers and suppliers, the South African agricultural industry will arguably benefit from legislation exempting the conduct of agricultural co-operatives from the ambit of the Competition Act.

[107] A full discussion of appropriate conduct by co-operatives with a dominant market share does not fall within the scope of this paper.

It is submitted that a limited competition law exemption to the conduct of co-operatives will not contradict the purpose of the Act,[108] being to promote and maintain competition in South Africa in order to ensure, *inter alia*, that small and medium sized enterprises have an equitable opportunity to participate in the economy and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons (these being two of the very same principles underlying the current promotion of co-operatives by the dti).

The Competition Commission has, in its suggestions on information exchange in the agricultural sector reported to the NAMC,[109] embarked on a process of engagement with the agricultural sector. In the absence of legislative competition law exemptions for agricultural co-operatives, the International Year of Co-operatives is perhaps the perfect time for the Competition Commission to give serious impetus to its engagement with the agricultural industry in formulating a clear policy and guidelines on the manner in which it will apply our competition legislation to co-operatives' business objectives.

[108] Section 2 of the Competition Act.

[109] The Competition Commission's report is dated January 2012 and is available at *http://www.agbiz.co.za/LinkClick.aspx?fileticket=Xj73WT5jja0%3D&tabid=362*. The NAMC Report titled '*Information Exchange and the South African Agricultural Sector'* is dated October 2011 and is available at *http://www.agbiz.co.za/LinkClick.aspx?fileticket=Mq6t4WTIU50%3D&tabid=362*.