



competition commission south africa

Form CC 7

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Confidentiality Claim

To: The Competition Commission and the Competition Tribunal

Concerning:

(Name and file number:)

Pick n Pay Retailers (Pty) Ltd
Pick n Pay Office Park, 2 Allum Road,
Kensington, Johannesburg
Gauteng, South Africa

On a separate sheet of paper, list the following information, and set out the facts and contentions supporting your claim that the identified information is confidential.

- Column 1 - name of the document that contains the confidential information.
- Column 2 - the page and line number at which the confidential information begins and ends.
- Column 3 - the name of the firm that owns the particular information.
- Column 4 - the nature of the economic value of the information.
- Column 5 - the existing restrictions on access to the information.

Statement of Confidentiality:

I, Avias Ngwenya compiled, or supervised the persons who compiled, the attached list. I believe that the information identified in that list is confidential information as defined in section 1(1) of the Competition Act.

Name and Title of Person authorised to sign:

Avias Ngwenya

Authorised Signature:

Date:

24 July 2024

**For Office
Use Only:**

Commission file number:

Date filed:

CLAIM THAT INFORMATION IS CONFIDENTIAL: FORM CC7
Pick n Pay Retailers(Pty) Ltd ("Pick n Pay")

Name of the document that contains confidential information	Page and line number at which the confidential information begins and ends	Name of firm that owns the particular information	Nature of the economic value of the information	Existing restrictions on access to the information
Nortons letter dated 24 July 2024	Letter dated 24 July 2024	Pick n Pay	The information is commercially sensitive information relating to Pick n Pay. The information contained in the document is not within the public domain and could cause irreparable harm if it were made available to third parties, given that it contains confidential, business-sensitive information which is not publicly available. As such is has economic value to Pick n Pay.	Legal advisors and senior management of Pick n Pay.



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STRICTLY CONFIDENTIAL

Competition Commission

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24 July 2024

Dear Sirs

**THE FRESH PRODUCE MARKET INQUIRY PROVISIONAL REPORT: SUBMISSIONS
IN RESPONSE TO THE PROVISIONAL REPORT**

1. We refer to the Fresh Produce Market Inquiry Provisional Report (“**the Provisional Report**” or the “**Report**”) published by the Fresh Produce Market Inquiry (“**the Inquiry**”) on 18 June 2024 and the Inquiry’s request for Pick n Pay Limited’s (“**Pick n Pay’s**”) submissions in relation to the Report. In addition, we refer to the correspondence between Nortons and the Inquiry’s technical team, in which the technical team granted Pick n Pay an extension of time within which to provide its submissions in response to the Provisional Report.
2. In what follows, we set out Pick n Pay’s submissions in relation to certain of the key findings and recommendations contained in the Provisional Report¹.
3. However, before we do so, we wish to record that it appears that many of the preliminary findings and recommendations in the Report, as they pertain to Pick n Pay, are largely predicated on

¹ It should be noted that the facts reflected in this letter are included on the instructions of our client. Accordingly, we have not prefaced every statement with “*we are advised*” or “*we understand*” to facilitate the reading of the letter.

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statements or contentions with very limited or no evidential basis. In this regard, it does not appear that the Inquiry has adduced any evidence to arrive at a finding that there are market characteristics or conduct by Pick n Pay which would give rise to an adverse effect on competition. Accordingly, before providing Pick n Pay's submissions on the content of the Report, we turn briefly to the relevant provisions of the Competition Act insofar as the Inquiry's powers are concerned, and the circumstances under which these powers can be exercised by the Inquiry.

The relevant provisions of the Competition Act

4. Chapter 43B of the Competition Act empowers the Commission to establish a formal inquiry into the general levels of concentration in, and structure of, a market for particular goods or services. In terms of section 43C(1)(a), *“the Competition Commission must decide whether any feature, including structure and levels of concentration, of each relevant market for any goods or services impedes, restricts or distorts competition within that market”*. Furthermore, section 43C(2) states that in making its decision *“the Competition Commission must have regard to the impact of the adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons”* (emphasis added).
5. What is clear from section 43C is that it is only in circumstances where the Commission determines on the basis of objective factual evidence whether a particular feature, structure or level of concentration in a particular market impedes or restricts competition and that as a result there is an adverse effect on competition, that it is empowered, in terms of section 43D to **remedy** that adverse effect. In this regard, section 43D states that *“[s]ubject to the provisions of any law, the Competition Commission **may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition**”* (emphasis added).
6. In circumstances where the Commission identifies an adverse effect on competition and decides to remedy such an adverse effect in terms of section 43D, there is an obligation on the Commission

to ensure that such remedy is “*reasonable and practicable, taking into account relevant factors*”². Such factors include the following:

“(a) the nature and extent of the adverse effect on competition;

(b) the nature and extent of the remedial action;

(c) the relation between the adverse effect on competition and the remedial action;

(d) the likely effect of the remedial action on competition in the market that is the subject of the market inquiry and any related markets;

(e) the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition; and

(f) any other relevant factor arising from any information obtained by the Competition Commission during the market inquiry.” (emphasis added)

7. In this regard, before coming to the view that a remedy is required, the Inquiry must (i) demonstrate that a feature of the market restricts or impedes competition; (ii) identify an adverse effect on competition in the relevant market; and then (iii) have regard to the “*extent of the adverse effect on competition*”. In other words, the Inquiry must determine whether the identified adverse effect significantly undermines competition or competitive market outcomes, and whether the proposed remedy will have an appreciable impact on improving competition in the market (i.e. will it lead to significant improvements in competition in the market?). In circumstances where there is no reasonable expectation that the proposed remedy will improve competition in the market, then such a remedy would in fact introduce an inefficiency into the market.
8. It appears from the Provisional Report that the Inquiry is seeking to impose remedies in circumstances where it has not (i) provided an evidentiary basis for arriving at the conclusion that

² Section 43D(4)

a feature of the market restricts or impedes competition and there has been an adverse effect on competition; and (ii) properly considered the extent of the so-called adverse effects on competition, if any. Furthermore, it appears that the Inquiry has also not properly considered the likely effect(s) that the remedial action(s) which it seeks to impose on firms such as Pick n Pay will have on market outcomes.

9. The Inquiry needs to consider whether the proposed remedy will enhance competition or conceivably have the contrary effect and conceivably undermine competition as a result of the remedy. Indeed, certain interventions by competition authorities may have unintended consequences and accordingly, the issue of proposed remedies must always be approached with great care and circumspection.
10. Another important factor which the Inquiry appears not to have considered is the *“relation between the adverse effect on competition and the remedial action”*. In this regard, in circumstances where the Inquiry decides to implement a form of remedial action, such remedial action must have a direct relationship with the adverse effect. It would not be appropriate for the Inquiry to impose a remedial action, which does not have a direct relationship with the adverse effect which the Inquiry has identified.
11. A further consideration, which the Inquiry is required to take into account, is *“the likely effect of the remedial action on competition in the market that is the subject of the market inquiry and any related markets”*. In this regard, it may often be the case that competition authorities in seeking to address one specific adverse effect, determine and implement a remedy which inadvertently has significant and important negative consequences for competition in the same or related markets where the adverse effect does not take place. Thus, in order to avoid any unintended consequences, it is incumbent on the Inquiry to consider all of the potential consequences of its action on competition. Indeed, an attempt to cure an adverse effect for a small subset of stakeholders may invariably have significant unintended consequences for the competitive process in other markets with a greater number of stakeholders.

12. Lastly, when seeking to address an identified adverse effect, the Inquiry is required to ensure that it considers “*the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition*”. In this regard, where remedial action is indicated, the Inquiry is required to consider the least restrictive means to remedy, mitigate or prevent the adverse effect on competition without undermining the prevailing levels of competition within the market. That is, the Inquiry must not leave the market worse off than it found it.
13. In what follows we deal with the Commission’s conclusions and findings before addressing the proposed remedial actions which affect Pick n Pay.

Pick n Pay is not a dominant firm and neither does it have market power.

14. In various parts of the Provisional Report, the Inquiry finds that the “*supermarket chains have considerable power*”. This finding is ostensibly made on the basis that collectively Woolworths, Shoprite Checkers, Spar and Pick n Pay account for “*50-60% of the route to market for farmers*”.³ In other words, the Inquiry appears to base its findings on what it contends is effectively a form of collective market power or what is often referred to as “*collective dominance*”.
15. As a consequence of this finding of alleged collective dominance, the Inquiry then suggests that the supermarket chains “*may be able to exploit their relatively strong market positions to extract rents from farmers*” and that they “*may be able to exploit their relatively strong market positions to extract unfair terms and prices from farmers*”⁴ (our emphasis). Such an approach assumes that a firm has a dominant market position, not on the basis of that firm’s individual market position, but on the basis of the collective market positions of two or more firms. Furthermore, it suggests that the firms are engaged in collusive purchasing decisions in contravention of Section 4(1)(b) of the Competition Act.
16. The Inquiry provides no factual basis whatsoever to support such a contention and Pick n Pay is of the view that the Inquiry’s view in this regard is manifestly incorrect. It is also surprising that

³ See for example, the Provisional Report at paragraphs 5.24, 223 and 645.

⁴ See, the Provisional Report at paragraph 5.24 and 224.

the Inquiry would make such a contention for three reasons: (1) the Inquiry will no doubt be aware that such a collective dominance standard cannot be applied in terms of the relevant provisions of the Competition Act; (2) this view is supported by previous Tribunal case precedent; and (3) Pick n Pay has previously indicated in submissions addressed to the Commission in June 2019 (5 years ago) in relation to the Grocery Retail Market Inquiry that the same contention made by that inquiry was unsustainable for the same reasons.

17. In *NAPW v Glaxo Wellcome (Pty) Ltd & Others*,⁵ the Tribunal held that:

*“With respect to this **allegation of ‘joint dominance’**, the respondents counter that “It is not sufficient to assert collective dominance (and we do not concede that the concept is recognised in our legislation) merely because the sum of the sales of the companies that use the same distributor is at least 35%. **There can be no economic justification for aggregating sales in this way.** Where GSK, Pfizer and Pharmicare products have similar therapeutic qualities they are competing products in a particular product market, properly defined, whether or not they use the same distribution agent.”*

We cannot but concur with the respondents. ... Were we to permit this inference to be drawn we would expose every logistic or distribution service provider that had more than one client in the same market (as well as the clients themselves) to prosecution under Section 4 and, assuming that our Act does actually recognise the concept of abuse of collective dominance, Sections 8 and 9. (Our emphasis)

18. In this regard, attempting to impose remedial measures on an entity such as Pick n Pay which, on its own, would **not** meet the 35% minimum threshold for dominance, simply because it allegedly meets an undefined lesser collective standard is not appropriate. Such an approach would clearly be contrary to the previous decisions of the Tribunal where it noted that *“there can be no economic aggregating sales in this way”*, or in this case *“purchases”*.

⁵ *NAPW & 8 others v Glaxo Wellcome (Pty) Ltd & 6 others* : Case No. 68/IR/Jun00, paras 114-115.

19. As the Commission is aware, both dominance and market power are clearly defined in the Competition Act. Section 7 of the Competition Act sets out the criteria for determining whether **a given firm** is dominant in a relevant market. In particular, section 7 notes that:

“A firm is dominant in a market if–

(a) It has at least 45% of that market;

(b) It has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or

(c) It has less than 35% of that market but has market power. (Our emphasis)

20. As can be seen from the above extract, the dominance threshold is assessed on the basis of an **individual firm’s market share**. But, as the Inquiry’s own analysis reveals, Pick n Pay’s market share is as follows:

20.1. Table 24 of the Report suggests that Pick n Pay has a market share of between [REDACTED] in the national retail market.

20.2. Table 25 suggests that Pick n Pay has a market share of between [REDACTED] in the broad market for the sale of fresh produce.

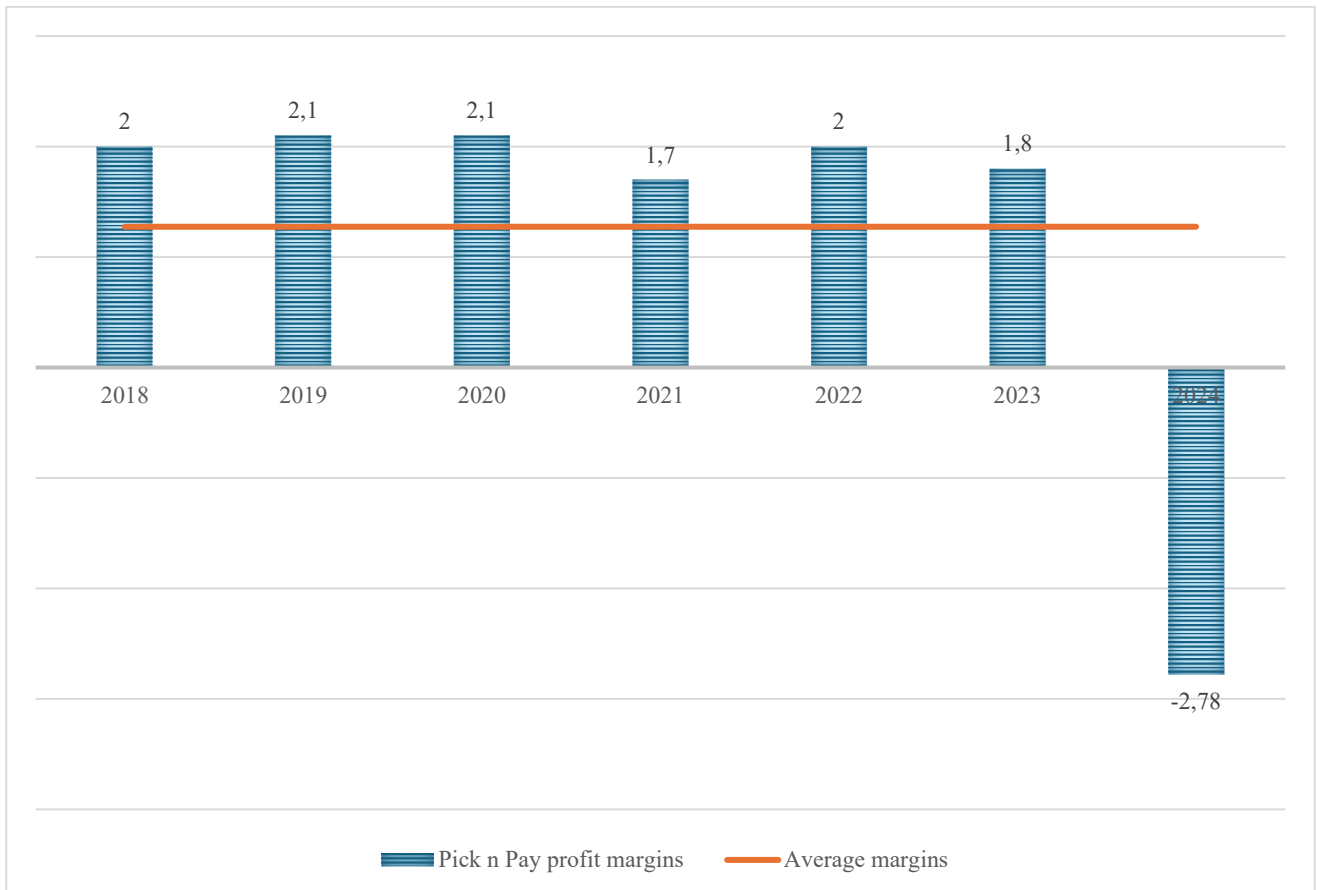
20.3. Table 26 suggests that Pick n Pay has a market share of between [REDACTED] in the national retail market for the sale of fresh produce.

21. Clearly, based on the Inquiry’s own assessment, Pick n Pay is not dominant and its market shares, on the Inquiry’s own version, fall well below the dominance threshold of 45%. In any event, Pick n Pay estimates its shares to be below the lower bound thresholds identified by the Inquiry but nevertheless, even on a worst case scenario, and assuming the Inquiry is correct, these shares do not show Pick n Pay to be dominant.

22. Furthermore, Pick n Pay wishes to place on record that it does not agree with a market definition which has been posited by the Inquiry which excludes non-national retailers. In particular, the Inquiry has considered a national market which only *“consists of the big four national retail groups being Shoprite Checkers, Pick n Pay, Woolworths, and Spar; with Food Lover’s Market a significant challenger firm. The four groups constitute a significant portion of the national supermarket chain retail market in South Africa.”* Based on this market definition, the national market only consists of five players with all other regional and/or local supermarkets being excluded entirely from the relevant market. Pick n Pay is of the view that when considering competition within the retail market then all formal retailers should be considered to be a part of the relevant national market.
23. The Inquiry’s approach to market definition grossly overstates the market position of Pick n Pay, together with the market positions of the other four supermarket chains. Nevertheless, despite this significant overstatement of Pick n Pay’s market shares, even on this worst-case scenario, Pick n Pay’s market shares fall well below the irrebuttable dominance threshold of 45%, as well as the rebuttable threshold of 35%.
24. The final consideration in relation to dominance is whether or not Pick n Pay, despite not having a significant market share which meets the threshold for dominance in any of the candidate markets posited by the Inquiry, nevertheless has market power. Market power is defined in the Competition Act as *“the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers”*.
25. As the Inquiry is aware, the grocery retail sector in South Africa is an extremely competitive environment, characterised by low prices and good quality consumer offerings. Customers are extremely price sensitive and even loyal customers will quickly defect to a competitor if prices are increased. As a result, the retail grocery industry in South Africa is a low margin industry, which is characterised by intense competition to attract consumers to retail outlets, and high levels of price competition across numerous categories of groceries, in particular between the larger

supermarket chains. In such an environment, Pick n Pay is manifestly unable to act independently of its competitors, customers or suppliers.

26. One other potential means, although not definitive, through which competition authorities may infer, or could conceivably assess, whether or not a firm is able to exercise market power to the detriment of competition, is to conduct a profitability analysis. Typically, when a firm has market power it is able to earn profits, which are above what it would be expected to earn in a competitive environment. By conducting a profitability analysis, competition authorities are typically able to gather indicative evidence, which can point to a firm having market power. This is because the less competitive a market is, the greater the ability of the firms in that market to earn significant profits (i.e., the stronger the likelihood that the firm(s) has market power).
27. Where firms are able to earn consistent and unreasonably high returns over an extended period of time, then a competition authority might potentially seek to infer that the firm(s) is/are able to exercise some degree of market power, which cannot be constrained by existing competition. In the current context, we note that this is not the case. Unfortunately, the Inquiry does not appear to have conducted a meaningful assessment of whether or not Pick n Pay has market power. In what follows, we demonstrate that Pick n Pay does not have market power.
28. A review of Pick n Pay's profit before tax (PBT) margins demonstrate that over the last five years Pick n Pay has earned an average PBT margin of approximately 1.27%. This is not indicative of a firm which is able to exercise significant market power or earn above average returns.

Figure 1: Pick n Pay net profit margins (2018 to 2024)

Source: Pick n Pay Annual Financial Results

29. As can be seen from the above graph, prior to the 2024 financial year Pick n Pay's PBT margin oscillated between 1.7% and 2.1%. However, most recently in its 2024 financial year Pick n Pay suffered a significant loss for the first time in its history of approximately R3.1 billion (a negative profit margin of -2.78%). Overall, the average net profit margin over the period 2018 and 2024 is 1.27%. Clearly, such low average net profit margins are not indicative of a firm which has significant market power, or more specifically, the ability to act independently of its suppliers and customers.

30. Pick n Pay has recently incurred significant losses and as a result has been forced to raise capital through a R4 billion rights issue in order to ensure the ongoing commercial viability of the broader business. Furthermore, Pick n Pay has been forced to close several non-performing stores throughout South Africa. None of these facts are consistent with a firm that is earning above average profits or is able to engage in any form of market power. To the contrary, it is in keeping with a scenario where Pick n Pay is operating in an extremely competitive environment, where it is very difficult for retail grocery firms such as Pick n Pay to make significant profits.
31. Accordingly, given that Pick n Pay is neither a dominant firm, nor a firm which has the ability to exercise market power, it is not apparent on what basis the Commission would suggest that Pick n Pay is able “*to exploit their relatively strong market positions to extract rents from farmers*” or “*to exploit their relatively strong market positions to extract unfair terms and prices from farmers*”. Pick n Pay clearly does not have such an ability and no evidence has been provided by the Inquiry to support these contentions.

The Inquiry’s pricing analysis is not appropriate for assessing whether a firm is engaged in exploitative pricing.

32. In its Provisional Report the Inquiry presents the findings of its preliminary analysis as it pertains to the Inquiry’s assessment of supermarket prices, margins and mark-ups analysis⁶. While the Inquiry notes that it does not “*at this stage, make findings on retail prices, mark-ups and margins pending further engagements with the affected retailers*”, the Inquiry has nevertheless presented several analyses and made several statements in relation to its “*observations*”.
33. The Inquiry made the following observations in relation to Pick n Pay:

“Total revenue earned for 2kg onion sales (accounting for [REDACTED] of all onions sales value) by Pick n Pay against the total amount paid to suppliers (‘Product price’ - what Pick n Pay pays Suppliers) is shown in the Figure 26 below. No data was provided for October 2022 to

⁶ See Section 5.2.3 of the Provisional Report.

February 2023 for what was paid to suppliers under the ‘Product price’ data from Pick n Pay. **On average, the markup of revenue over total amount paid to suppliers for the period (Mar 2020- Sep 2022) was [REDACTED]. The markup also remained similar for each financial year that data was provided. This gives an indication of how much higher the retail revenue earned by Pick n Pay was relative to the total amount paid to its suppliers”**⁷ (Emphasis added)

“The 1kg (V) category (accounting for [REDACTED] of all sales) has seen what could be considered high and increasing mark-ups of revenue earned on sales over total amounts paid to suppliers/farmers. On average for the period, these mark-ups were [REDACTED], and have increased from [REDACTED] in FY21 (year ending Feb 2021) to [REDACTED] in FY22 and [REDACTED] in FY23. Similar mark-ups result from calculations using per unit selling prices and per unit pricing data to suppliers/farmers provided by Pick n Pay. These increases in mark-ups may be suggestive of increasing rents being extracted by Pick n Pay for this product category (Figure 28).”⁸ (Emphasis added)

“The largest category of tomatoes sold by Pick n Pay is the 1kg English tomatoes unit or category, which accounts for [REDACTED] of the value of all tomatoes sold and [REDACTED] of total units sold. The markup of revenue over amount paid to suppliers for the sales of 1kg English tomatoes on average for the full period (Mar 2020- Feb 2023) was [REDACTED] (see Figure 33 below). The markup was [REDACTED] on average in FY21, [REDACTED] in FY22 and [REDACTED] in FY23.”⁹ (Emphasis added)

“The data on potatoes did not reveal any significant anomalies. The magnitude of mark-ups of retail selling revenues and prices over the total amount and prices farmers/suppliers get paid were generally lower for potatoes than for onions and tomatoes for all four supermarkets. These mark-ups were on average [REDACTED] or less for all potato categories

⁷ See Provisional Report at paragraph 656

⁸ See Provisional Report at paragraph 659

⁹ See Provisional Report at paragraph 665

considered for the 4 supermarket chains. The margin data provided particularly for Pick n Pay fluctuates widely from month to month, and it was not possible to get a clear picture of trends. Unlike onions and tomatoes, there appears to be cross subsidisation with potatoes, with many loss-making months."¹⁰ (Emphasis added)

34. A fundamental concern which Pick n Pay has with the approach which has been adopted by the Inquiry, is that it calculates mark-ups while completely ignoring all of the costs which Pick n Pay incurs from receiving deliveries at its distribution centres (storing and maintaining its fresh produce at the highest global standards prior to distributing it to its various retail stores throughout South Africa), as well as the costs which Pick n Pay incurs in running its retail stores and its head office.
35. By ignoring all of the costs which Pick n Pay incurs, the Inquiry is effectively grossly inflating its mark-up calculations and then making potentially damaging "*observations*" to the effect that "*This gives an indication of how much higher the retail revenue earned by Pick n Pay was relative to the total amount paid to its suppliers*", or that "*[t]hese increases in mark-ups may be suggestive of increasing rents being extracted by Pick n Pay for this product category*".
36. The analysis which the Inquiry has presented in its Provisional Report appears to be largely similar to the analysis which was contained in the letter from the Inquiry to Pick n Pay of 19 April 2024. In this regard, the Inquiry will recall that Pick n Pay had raised numerous concerns with the approach, which the Inquiry had followed in conducting this analysis. For example, in Pick n Pay's response of 8 May 2024, Pick n Pay explained to the Inquiry that it had provided data to the Inquiry in the manner which it had been requested. However, Pick n Pay also explained in great detail the manner in which fresh produce (in particular onions and tomatoes) was sold within Pick n Pay (which is primarily through its combo offering), and explained how this affected the manner in which the Inquiry sought to analyse the profitability of these products. We attach marked **Annexure A**, a copy of the letter of 8 May 2024 and

¹⁰ See Provisional Report at paragraph 674

request that the Inquiry take account of the submissions made in the letter as part of these submissions.

37. In the abovementioned letter, Pick n Pay also went to great lengths to explain to the Inquiry the appropriate way of calculating its gross margins, which take into account the revenue which Pick n Pay earned and deducting from this the costs which Pick n Pay incurred in running its operations. In addition, Pick n Pay also explained how it had approached the calculation of its net margins in relation to the products which the Inquiry expressed interested in. In this regard, Pick n Pay demonstrated that in many instances it was incurring significant [REDACTED] from the sale of tomatoes and onions and that in the one instance [REDACTED]
[REDACTED]
38. Furthermore, the Inquiry will recall that in a follow up call with the Inquiry and its experts on 22 May 2024, Pick n Pay had raised the fact that the approach which was adopted by the Inquiry did not take into account any of the costs which Pick n Pay incurs in running its operations. The Inquiry acknowledged this point and indicated that it recognised that the calculations had not taken Pick n Pay's costs into account. Furthermore, the Inquiry also requested that Pick n Pay provide its data in an updated format reflecting the products which formed part of a Pick n Pay combo offering. This data was duly submitted to the Inquiry on 28 May 2024.
39. The Inquiry appears to have ignored the majority of the submissions made by Pick n Pay (in written submissions and during the meeting of 22 May 2024), when formulating its Provisional Report. Pick n Pay notes that it is extremely troubling that the Inquiry would reflect such statements in its Provisional Report, in circumstances where it is well aware that its calculations do not take into account any of the costs Pick n Pay incurs in running its operations at both the distribution and at the retail levels.
40. It is thus not apparent to Pick n Pay, on what basis the Inquiry would still choose to reflect such "observations" in an analysis which it has acknowledged does not take into consideration any of Pick n Pay's own costs, and which is clearly fundamentally deficient. It is respectfully submitted that such a mark-up analysis is meaningless if it does not take into account the very

significant costs of Pick n Pay's operations. Furthermore, the "observations" which are contained in the public version of the Inquiry's Provisional Report are patently misleading and are significantly damaging to Pick n Pay, as they seek to portray Pick n Pay as a firm which is characterized as having "extracted" rents from farmers in an "exploitative" manner. In this regard, the Inquiry has not presented the results in a truly independent and impartial manner.

41. As the Inquiry is well aware, competition authorities are not price regulators and the aim of competition law and economics is not to dictate to firms how to price to customers, but rather to ensure that a conducive environment is created which allows for efficient competitive market outcomes. As the Competition Appeal Court ("CAC") has previously noted in Mittal:

"The powers and duties of the competition authorities, and their limitations, are contained in the Act. The authorities are not called upon to set a price for a good or service. It is incumbent on the Tribunal, if necessary to determine whether a specific price is 'excessive' in contravention of s 8(a). There is no suggestion in the Act that the competition authorities should regulate and set prices. To the extent that the enquiry requires the examination of a possible excess of the charged price over economic value, as defined, that enquiry is required by virtue of the express formulation employed by the Act." (emphasis added)

42. Thus, it is incumbent upon the Inquiry, when it seeks to opine on matters related to how firms price and whether or not such pricing is exploitative, that it does so having conducted a thorough and rigorous pricing analysis which takes into consideration the costs of the firms under consideration. That is, it is necessary for the Inquiry to take into consideration the costs which are incurred by Pick n Pay in arriving at a given profit margin. In this regard, it is not appropriate to undertake and draw "observations" on the basis of an analysis which ignores critical relevant considerations such as the costs which Pick n Pay incurs.
43. Pick n Pay notes that this is also in keeping with the approach which has been confirmed by the CAC in the *Sasol* judgment.

44. In the *Sasol* case, the CAC said the following in the context of assessing a price-cost test:

“[99] The analysis with which this judgment has been concerned has turned on the question of an excessive price, as that term has been interpreted. The interpretation seized upon by the Tribunal in much of its determination was informed by a reading of but a few paragraphs of the Mittal, judgment. In dealing with this question at para 43 this Court said:

‘Thus economic value is a notional objective competitive market standard, not one derived from circumstances peculiar to the particular firm. If the firm’s prices are no higher than economic value, no contravention of s 8 (a) can arise. If however, the firm’s price is in fact higher than economic value so determined, the test of reasonableness in respect of the difference remains to be applied... the test of reasonableness applies to the excess of price over economic value and thus only to the element of ‘pure profit’ (over and above normal profit) implicit in that price.’

The court went on to say: ‘The criterion of economic value ... recognises only the costs that would be recovered in long run competitive equilibrium.’ It also said in para 42 that at the stage of reasonableness, account could be taken of benefits flowing to the firm ‘from the subsidised loan, long term low rental or other special advantage which may serve to reduce its own long run average cost below the notional norm.’” (Emphasis added)

45. In support of this position the CAC also noted the views of the European Commission in *Scandlines Sverige* when it noted that:

“‘The economic value of the product/service cannot simple be determined by adding to the approximate costs incurred in the provision of this product/service ... a profit margin which would be a pre-determined percentage of the product costs. [Rather, the] economic value must be determined with regards to the particular

circumstances of the case and take into account also non-costs factors such as the demand for the product/service.’ (Emphasis added)

46. In this regard, the CAC considered several costs when assessing whether or not Sasol was engaged in excessive pricing. This included an evaluation of (i) capital assets; (ii) capital reward (i.e. the weighted average costs of capital inclusive of a hurdle rate); (iii) group costs (allocated appropriately); (iv) common costs (allocated appropriately); and (v) the inclusion of a tax effect.

47. In its findings, the CAC found that Sasol enjoyed positive profit margins:

“[159] On the basis of all of these assumptions, it would mean that the price-costs mark up on average would be in the region of 16% for FY 2001 to FY 2008 insofar as propylene is concerned and from FY 2002 to FY 2008 to slightly less than 19%. Commensurate increases would also have to be made insofar as the separate Tier 1 and Tier 2 calculations are concerned. Manifestly, on these calculations the changes to the PP price-cost mark up should not vex any court with respect to an excessive pricing dispute.” (Emphasis added)

48. Having undertaken a price-cost analysis which takes into account a reasonable return for investors, the CAC then turned to the question of how **reasonable** the pricing was. In particular the CAC noted that *“a price is excessive only if it is higher than economic value and bears no reasonable relation thereto. Section 8 (a) does not apply to prohibit any price in excess of economic value. This conclusion must follow from the wording that is employed: the price is excessive if it is both higher than economic value and bears no reasonable relation thereto. This formulation, as has been noted on a number of occasions in this judgment, was derived from the decision of the European Court of Justice in United Brands Company v EC Commission, supra at para 248-250. The relevant article of the EU Treaty, with which excessive pricing is concerned is Article 102. In the German version this article contains the following wording ‘Unangenessene Preisen’; that is prices that are out of line or disproportionate. Accordingly, a*

proportionality enquiry appears to be indicated to determine the reasonableness component of the test for excessive pricing.” (Emphasis added)

49. Overall, in the *Sasol* judgment, the CAC found that even if the price-cost ratio were above economic value by as much as 16% “returns above economic value are not per se unreasonable”. In conclusion, the CAC noted that “[a] price which is significantly less than 20% of the figure employed to determine economic value falls short of justifying judicial interference in this complex area.” (Emphasis added). Put differently, a profit level which is up to 20% in excess of a reasonable competitive economic return would not warrant it to be deemed to be excessively anti-competitive such that it would require intervention by competition authorities.
50. Indeed, that such stringent price-cost tests are required to be applied by competition authorities in the context of assessments of actual contraventions of the Competition Act by dominant firms, would suggest that at the very least the same standard, if not a higher standard, would need to be applied when considering findings against firms which have not actually been found to be dominant. While Pick n Pay has sought to provide the Inquiry with an indicative price-cost analysis, the Inquiry has not presented a proper price-cost test which would support the conclusions which it wishes to make.
51. Furthermore, if one has regard to the recent amendments to the Competition Act in relation to determining whether a price is excessive, it is clear that one of the key tests to be performed by the Competition Commission is a price-cost test. Pick n Pay has not been presented with the outcome and workings of any such price-cost test in relation to the products in question.

The Inquiry’s remedial actions are not supported by factual evidence and neither are they required.

52. In its Provisional Report, the Inquiry suggests two provisional remedial actions which are applicable to Pick n Pay. These are provisional remedial actions 15 and 27. We deal with each of these in turn below.

(i) *Provisional remedial action 15*

53. In respect of remedial action 15, the Inquiry indicates that it has made a provisional finding that a lack “*of transparency in unit pricing (per kg/g) distorts competition in that consumers are (less) able to compare pricing between retailers. It is important that this concern be remedied as this will allow consumers to compare pricing of differentiated products instore and across the retailers.*” (Emphasis added)
54. In arriving at this finding, the Inquiry appears to have only placed reliance on the 2015 findings of the Competition and Markets Authority (“**the CMA**”) in the United Kingdom¹¹ and the 2010 findings of the Australian Competition and Consumer Commission (“**the ACCC**”). In other words, it appears that the Inquiry’s observations are based solely on the findings of other market inquiries in other jurisdictions, and which are between 10 and 15 years old. It is respectfully submitted that findings from other jurisdictions which are over a decade old, do not provide an evidential basis for the Inquiry to impose remedial actions which will impose significant additional costs on retailers such as Pick n Pay. The Inquiry does not appear to have conducted any independent research or analysis of its own which is specific to South Africa, and to date Pick n Pay has not been presented with any evidence demonstrating that South African consumers find it difficult to compare prices between competing retail grocery supermarkets in South Africa. It is respectfully submitted that it is incumbent on the Inquiry to have conducted its own economic analysis and research to demonstrate that this is an issue which fundamentally affects South African consumers and that, as a result, this gives rise to a restriction of competition and an adverse effect on competition. No such evidence or analysis has been provided by the Inquiry.
55. As noted above, remedial actions need to be “*reasonable and practicable*” and there must be a direct relationship between the remedial action and the identified adverse effect on competition. Put plainly, the Inquiry cannot seek to impose remedial actions on South African retailers, such as Pick n Pay, solely on the basis of findings which are over 10 years old from market inquiries which took place in the United Kingdom and in Australia. There is simply no linkage between

¹¹ See Provisional Report at paragraphs 527 to 528

the harm which was identified in decade old market inquiries and the remedial measures which are currently being proposed by the Inquiry.

56. Finally, it is also concerning that, despite not appearing to have obtained its own independent evidence of South African consumers struggling to compare pricing of differentiated products, the Inquiry then proceeds to dismiss, without any tangible reasons, the concerns that such a system would raise costs for retailers. It is not apparent at all on what basis the Inquiry would have dismissed the very real concerns raised by many of the retailers through their separate submissions and suggest that:

*“Despite some retailers raising prohibitive costs of implementing this system, **none of them attempted to quantify the costs associated with implementation. Furthermore, none of the retailers sought to understand how this can be implemented.**”* (Emphasis added)

57. It is respectfully not for the Commission to determine what actions are commercially feasible for retailers to implement or to suggest that retailers have not sought to understand how such measures may be implemented. It is ultimately for the Commission to demonstrate that this would give rise to a restriction on competition and an adverse effect on competition and, crucially, that the remedy is capable of practical implementation, and is the least restrictive remedy in the circumstances. The Commission has failed to comply with any of these requirements and, accordingly, there is no basis whatsoever for the proposed remedy.

(ii) Provisional remedial action 27

58. In terms of remedial action 27, the Inquiry has not identified a specific adverse effect on competition which is required to be remedied. On the contrary, the Inquiry appears to accept that retailers such as Pick n Pay have made significant efforts to facilitate the entry of SME- and HDP-owned farmers into the value chain.

59. For example, the Inquiry points to the Spar Group’s supplier development programme (i.e., the Spar Rural Hub programme) and how this programme has assisted in empowering and growing

small scale farmers. In addition, the Inquiry indicated that it “*found that most of the supermarket retailers are assisting farmers, including through offering loans and other forms of financial support. However, the scale of the assistance is an important indicator of the true impact this assistance has on farmers. Whilst every farmer who received support is commendable, real impact will only be achieved if the assistance is of a sufficient scale.*” (Empasis added)

60. It is worth noting in this regard that while the Inquiry suggests that a level of “*sufficient scale*” is required there does not appear to be any meaningful analysis of what such a sufficient scale of support would need to look like for a given farmer, or why only certain retailers should be shouldered with a regulatory obligation to provide even more support while no such obligations are placed on other retailers.
61. Nevertheless, in respect of Pick n Pay, the Inquiry notes that Pick n Pay runs a supplier development programme in which approximately 149 local producers have benefited over the last three years.
 - 61.1. This is an average of approximately 50 new SME suppliers per year over a three-year period.
 - 61.2. Of these 149 farmers, approximately 34 have HDP-ownership involvement.
 - 61.3. The Inquiry also highlighted how the spend which Pick n Pay had with its SME suppliers had increased significantly at a compounded annual growth rate of 25% per year.
 - 61.4. It noted that Pick n Pay has spent almost █████ million in 2023 with SME farmers which equates to approximately █████ of its fresh produce expenditure.
 - 61.5. The Inquiry also noted that Pick n Pay has partnered with the SME Investment Organisation to provide small grants and loans to SME suppliers.
 - 61.6. Furthermore, it noted that Pick n Pay has negotiated preferential food safety audit rates for these SME suppliers with its partner, Intertek.

- 61.7. In addition, Pick n Pay has also established a dedicated team of buyers who focus specifically on sourcing from SME suppliers.
62. All of these initiatives are clearly geared towards ensuring the sustainable growth and development of SME and HDP suppliers in the fresh produce value chain. However, despite these numerous initiatives which have already been implemented, the Inquiry appears to believe that it would be appropriate to impose further additional onerous obligations on retailers, such as Pick n Pay, which are already under significant financial pressure.
63. The Inquiry proposes the following remedial action, which it states is aligned with the Agricultural and Agro-processing Master Plan (“AAMP”):

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

64. Pick n Pay wishes to make a number of submissions in response to the Inquiry’s proposal in this regard:
- 64.1. First, the proposed remedial action does not appear to actually be aligned with the AAMP, as suggested by the Inquiry. When having regard to the AAMP¹², it states that:

“The Agriculture and Agro-Processing Master Plan (AAMP) is the product of a social compact between labour, government, civil society, and industry. It aims to promote inclusive growth, competitiveness, transformation, employment, and food security. COVID-19 induced economic strain and a decline in broader economic activity have

¹² See chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://static.pmg.org.za/220607Agriculture_and_Agro-processing_Master_Plan_Signed.pdf

*made the AAMP even more urgent and compelling. Since the pandemic outbreak, agriculture has shown greater resilience, as the only sector to record impressive growth rates of 13.4% in 2020 and 8.3% in 2021. This sector has considerable potential to pull the economy through times of crisis. We must position it as a pillar of the country's economic strategy, particularly to achieve the Economic Reconstruction and Recovery Programme (ERRP). **With a social compact, the sector can achieve even more gains for rural economies, generate economic growth across the value chain, and sustain employment when unemployment rates are incredibly high, as they were in the fourth quarter of 2021, at 35.3%.***” (Emphasis added)

- 64.2. Second, Pick n Pay notes that the AAMP was not designed to be a regulated objective, but rather a compact between government and business which is aimed at achieving growth and transformation through a public private partnership. In this regard, the targets of the AAMP are meant to be reviewed and assessed on an annual basis.

*“This Master plan represents an essential step in repositioning the sector as a critical player in the South African, regional and global markets. It also aims to find the best possible ways to enhance the security of farmers and the well-being of farmworkers. It is not a definitive plan but the beginning of our shared journey to improve the sector. In light of this, it will be subjected to annual periodic reviews to set mid-term goals and evaluate progress in achieving the goals and aspirations of the social partners. The second track of the Master plan process will need to address a range of unfinished business related to infrastructure, transformation interventions, financing arrangements, and human capital and enhanced conditions of labour. **Many of these will be 'Implementation Issues', that is, those areas that were agreed during the negotiations and that should be implemented in the medium-term. Further, the AAMP envisages a range of implementation instruments: value-chains roundtable, PPP-Transformation Schemes, and institutional structures within DALRRD to ensure that the plans of the department are aligned with the AAMP as well as to coordinate the activities of other implementing structures.**”* (Emphasis added)

64.3. It is also worth noting that the AAMP is an aspirational agenda between government and industry stakeholders, which seeks to achieve its goals by 2030. It is noteworthy that any goals which are considered as part of the AAMP are forward looking and it is not the case that these goals should be imposed on participants who are engaged with government to grow the agro-processing sector.

“The AAMP, specifically, promotes a meaningful public-private partnership designed to produce a world-class, competitive, dynamic, growing, ecologically sustainable, safe, fair and Inclusive sector in 2030. With the assistance of governments, development banks, and other organisations, various Interventions and programmes will be undertaken with workers, employers, and communities on small, medium, and large farms and agribusinesses. The intention is to leverage and channel various forms of resources, support, and clearly defined roles and responsibilities of social partners in implementing the programmes of action towards achieving the strategic objectives of AAMP.” (Emphasis added)

64.4. The AAMP has six main goals which it targets for completion by 2030. These are set out below:

“In the sector, the AAMP seeks to achieve the following through the six (6) pillars:

a) To reaffirm NDP's chapter six goals of enhanced food security, inclusive growth in agriculture and agro-processing, high job creation, and export growth;

b) To accelerate the review of key legislation that governs land, water, agricultural inputs, chemicals, food safety, biosecurity, and traceability to boost business confidence;

c) To enhance state capacity and efficiency and strengthen partnerships with the private sector to boost comprehensive farmer support programmes,

biosecurity control measures and protocols, agricultural research and development, technology adoption, and access to markets;

d) To raise an estimated R9.4 billion for fast-tracking targeted infrastructure maintenance and expansion of irrigation schemes, dams, dipping tanks, roads, rail and port facilities, fresh produce markets, and processing infrastructure;

e) To appoint 10 000 new extension, animal health, and other industry officers and technicians and second some officers to commodity associations and seed companies. Furthermore, it is necessary for both the government and the private sector to collaborate to develop a better capitalisation model to strengthen state support for the sector;

f) To unlock R7 billion in agricultural financing for farmers and SMMEs through the Blended Finance Scheme, Agro-processing Fund, Statutory Levies, State Grants, Industry Trust and Supplier Development Programme;

g) To allocate a minimum of 3% of retailers and supermarkets' net profit aligned to BBBEE to Supplier Development Programme.” (Emphasis added)

65. Of particular relevance is the last of the listed targets (i.e., the 3% spend of net profits). This is the social compact aspiration for a future (2030) target spend which the Inquiry now seeks to impose by means of remedial actions in 2024, not on all of the stakeholders who are party to the AAMP, but on the four retailers which have participated in the market inquiry.

66. Furthermore, the Inquiry has not explained why, what is effectively a social compact between government and stakeholders across the entire agro-processing industry, should now be mandatory for Pick n Pay, while it is not so for other stakeholders who subscribed to this social compact. Indeed, in circumstances where social partners are attempting to build “*trust and collaboration and [to] commit to shared objectives for the future growth and success of the*

sector”, the attempt by the Inquiry to seek to impose such an immediate and onerous remedy on retailers such as Pick n Pay erodes trust and may conceivably result in a reluctance on the part of social partners to participate in such nation building initiatives in future.

67. Pick n Pay also notes, when having regard to Annexure B7 to the AAMP, that the commitment by 2030 of “[a]t least 3% of NPAT to be spent on Supplier and Enterprise Development Programme” appears to be targeted specifically at the agro-processing cluster which covers “**dairy, wine, food, feed and niche products such as essential oils.**” (Emphasis added)

68. On the other hand, when having regard to Annexure B5 of the AAMP, which deals with the Horticulture Value-Chain Cluster Outcomes for commodities such as fruits, nuts, vegetables (i.e., the products which form part of the current market inquiry) and wine, it appears that there is no requirement for an increase of at least 3% of NPAT to be spent on supplier and enterprise development. Instead, the AAMP discusses the need to “*Increase domestic market access opportunities for all famers*” through a number of initiatives including the following:

68.1. “*Promote local demand and supermarket access for new growers.*”

68.1.1. “***Supermarkets should endeavor to purchase from smaller, black producers - explore market opportunities.***” (Emphasis added)

68.1.2. “***Assist growers in complying with and obtaining SA-GAP and Global-GAP certification - partnership with PPECB.***” (Emphasis added)

68.2. “*Implement Project Rebirth to revitalise National Fresh Produce Markets (NFPMs)*”

68.2.1. “*Improve infrastructure, maintenance and management of Fresh Produce Markets - including operating systems.*”

69. These are the very AAMP objectives which Pick n Pay is attempting to achieve through its social development initiatives.

70. In terms of the alternative proposed remedy that retailers “*increase in supplier development baseline by 10% annually for a period 5 years*”, Pick n Pay notes that this requirement is also not contained in the AAMP. Furthermore, it is worth noting that the expected increase which the Commission is proposing would effectively result in a compounded increase in spend of approximately 61% over five years. Such a proposal has the potential to be commercially unviable and would place a substantial obligation on retailers to develop new suppliers at an exponential rate and at great expense to the retailers. From Pick n Pay’s perspective, it is under immense financial pressure and such a proposal is simply not commercially viable.
71. As explained above, Pick n Pay has suffered significant losses in excess of R3 billion in its most recent financial year. In addition, it has been forced to raise capital through a R4 billion rights issue in order to ensure the ongoing commercial viability of the broader business. Furthermore, Pick n Pay has been forced to close several non-performing stores throughout South Africa. In these circumstances it would not be sustainable or feasible for Pick n Pay to now commit to contribute 3% of its net profit after tax in this manner.
72. Lastly, and most importantly, it is not for the Inquiry to seek to implement a social contract by means of seeking to introduce remedial actions emanating from a market inquiry. It is not within the powers of the Commission to do so, and the Commission would be acting *ultra vires* the Competition Act if this remedial action were to find its way into the Inquiry’s final report.
73. In summary, the Inquiry has not identified a restriction on competition and an adverse effect on competition in relation to the relevant product market, which would warrant a remedy of this nature. Furthermore, the remedy is not capable of practical implementation and is not the least restrictive remedy in relation to Pick n Pay. There is simply no factual or legal basis whatsoever for the imposition of a remedy of this kind, and this would amount to a significant overreach of the Inquiry’s powers. It is strongly suggested that the Inquiry should fundamentally reconsider its approach to the proposed remedies, failing which Pick n Pay will have no option but to take appropriate legal steps to address the proposed remedies suggested by the Inquiry. .
74. All of Pick n Pay’s rights are expressly reserved in relation to the issues dealt with in this letter.

Yours sincerely

[Unsigned due to electronic transmission]

**Anthony Norton / Michelle Rawlinson / Avias Ngwenya
NORTONS INC.**