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Your reference	Our reference	Date
2022APR0051	Mark Garden	23 July 2024

Dear Sirs

RE: COMPETITION COMMISSION'S FRESH PRODUCE MARKET INQUIRY PROVISIONAL REPORT (CASE NUMBER: 2022APR0051)

1. We refer to the FPMI's Provisional Report dated 18 June 2024 (the "**Provisional Report**").

2. Stakeholders were afforded a period of four weeks, until 16 July 2024, to provide comments on the Provisional Report. The Competition Commission agreed to extend this period for RSA Group until 23 July 2024.

3. We have consulted with representatives of RSA Group and obtained their comments on those portions of the Provisional Report relevant to its operations and business activities. Those comments are set out sequentially below. For ease of reference, terms defined in the Provisional Report have been utilised in this letter.

Provisional recommendation (1): Municipalities, in collaboration with SALGA, should change the operating and governance models for NFPMs through (i) the corporatisation of NFPM operations through SOCs owned by municipalities with particular emphasis on the need for accounting separation; and/or (ii) the creation of Public Private Partnerships with municipalities retaining ownership of the NFPM's infrastructure.

Provisional recommendation (2): Municipalities should ringfence profits earned from the market to fund capital expenditure and, where feasible, increase budget allocations for NFPMs from municipal budgets, over and above the revenue generated by the NFPMs.

4. It is unclear why the FPMI has highlighted inefficiencies at only three major NFPMs in its preliminary findings (Johannesburg, Tshwane and Durban). All NFPMs across the country (with the exception of the Cape Town NFPM) are widely acknowledged by South African fresh produce role players to be facing similar issues of collapsing infrastructure and poor management.

5. RSA Group believes that framing maintenance 'inefficiencies' at South Africa's NFPMs as a budgetary/funding issue is a fundamental misreading of the value chain, and cause for significant concern. As explained in its previous submissions to the FPMI, RSA Group believes that the lamentable state of South Africa's NFPMs is attributable to years of maintenance failure and neglect, compounded by an absence of strategic planning and municipal instabilities. RSA Group thus disagrees strongly with the FPMI's provisional finding that "*the inefficiencies of the Johannesburg, Tshwane and Durban NFPMs centre around inadequate funding.*"

6. RSA Group believes that neither additional funding nor structural changes will provide a complete solution to any of the maintenance and/or management issues currently affecting South Africa's NFPMs. RSA Group believes strongly that NFPM 'inefficiencies' have arisen as a result of mismanagement of the system by those tasked with its upkeep. Given the FPMI's extensive information gathering phase, featuring the input of multiple participants across the value chain, RSA Group is surprised that this concern does not feature prominently in the provisional findings.

7. By focussing provisional recommendation (1) on structural, operational and governance reforms aimed at addressing <u>funding inadequacies</u>, the real underlying cause of the so-called maintenance inefficiencies at South Africa's NFPMs – <u>mismanagement</u> – is unlikely to be addressed.

8. Notwithstanding this misgiving, RSA Group endorses the principle in provisional recommendation 1 that NFPMs are best managed independently of municipalities by SOCs and/or PPPs. A case in point is the Cape Town NFPM, which, significantly, has not been managed by the local municipality for more than twenty years, and which delivers manifestly better management and maintenance performance than the rest of the country's NFPMs.

9. As previously submitted by RSA Group, South Africa's NFPMs generate appropriate budget through the 5% commission paid to municipalities by producers (for a service facility not delivered). The failure by municipalities to spend this revenue on market maintenance constitutes the central NFPM issue, which has been compounded by a highly politicised approach to the management of NFPMs, resulting in well-documented management and maintenance failures. A key factor is a lack of legislative ring-fencing obliging municipalities to re-invest the revenue they receive from the markets into the markets themselves, rather than assigning it to other, unassociated, areas of municipal management.

10. Accordingly, RSA Group welcomes provisional recommendation (2) insofar as it is intended to direct the 5% commission paid to municipalities by producers towards its intended purpose.

11. Notably, however, provisional recommendations (1) and (2) go no further than the expression of principles. Conspicuously absent are details around timeframes, explicit responsibility for implementation, and enforcement mechanisms. Without such clarity, RSA Group questions whether such provisional recommendations are capable of meaningful adoption and implementation.

Provisional remedial action (3): All NFPMs to set targets to increase annual sales of smallscale and HDP farmers through NFPMs. These targets should be a minimum of 10% increase annually in sales from SME and HDP farmers combined.

12. The FPMI's approach to small-scale and HDP producer challenges does not acknowledge the dramatic impact <u>inefficiency</u> in free market systems has on barriers to entry for emerging agri-businesses. The target-driven approach recommended by the FPMI fails to recognise or offer any remedies for the fundamental mismanagement of the system itself - which is by far the most significant barrier to entry for HDP businesses.

13. To elaborate, HDP farmers must of their own volition choose to use NFPMs because it makes commercial sense – and are unlikely to do so when there are more compelling business options available, and when the NFPM ecosystem shows so many signs of decay and collapse. For example, there are many HDP tomato farmers operating in the north of South Africa who choose to sell directly to industrial clients rather than to supply NFPMs. It is thus incumbent on the NFPMs themselves to offer a viable trading environment that will attract HDP farmers.

14. RSA Group's view is that the proposed targets should be considered aspirational, and that reaching such targets should be a matter for each individual NFPM to address.

15. The foundational issue in this respect is a general lack of HDP farmers across the country. This will not be resolved by setting targets at NFPMs and needs to be addressed strategically by national government at the level of the broad agriculture sector.

16. In addition, the fresh produce industry effectively forms the backbone of national food security and can ill-afford to add inefficiencies in the form of bureaucracy and strictures that put critical health and safety standards at risk. RSA Group believes that provisional remedial action (3) could inadvertently create such adverse scenarios.

17. A key risk that must be considered in relation to such measures is facilitating the entrance of middlemen (aggregators) at the supply level who meet HDP criteria but are not actually HDP farmers. Not only will this fundamentally disrupt price discovery and the authentic interplay between and supply and demand, it would also introduce inefficiency, higher-costs, and open up multiple areas of operational ambiguity where health and safety standards are jeopardised.

Provisional recommendation (4): Municipalities should, within three years, harmonise the bylaws with respect to the (i) trading hours, (ii) passing of risk from farmer to buyer, (iii) market agent rules, (iv) use of cold storage and ripening facilities, (v) dispute resolution and appeal processes and (vi) rules around conflict of interest in respect of the NFPMs. In addition, SALGA, local municipalities and all NFPMs should, following harmonization, revise bylaws every 5 years to keep up with the developments in the economy.

18. Fresh Produce market agencies are governed by the Agricultural Produce Agents Act, No. 12 of 1992 (and it associated rules) and not NFPM bylaws, which are implemented by each municipality and market management authority individually.

19. That said, RSA Group is of the view that the harmonisation measures referred to in provisional recommendation (4) could be considered valid from an efficiency point of view, provided that, in the case of regional deviations, the need for each market to retain the flexibility to address its own particularities is taken into account. In principle, RSA Group believes that the harmonisation exercise should generate the equivalent of a multi-party service level agreement where deliverables are clearly articulated, and parties are held responsible for delivering in accordance with their respective obligations.

20. It is also worth pointing out that a significant amount of work was carried out by Project Rebirth. These standards were never successfully implemented because there is no legislative framework that obligates market management to adhere to them. Nonetheless, certain aspects of Project Rebirth may prove to be of assistance when implementing provisional recommendation (4).

Provisional recommendation (5): NFPMs (market authorities) must put a programme to: (i) introduce new HDP market agents (where there are none) and (ii) ensure that the HDP market agents have access to highly traded produce, namely potatoes, onions, tomatoes, and bananas at all NFPMs.

Provisional recommendation (6): Large and established fresh produce farmers must put in place a programme for (i) introduction of new HDP market agents (where there are none) and (ii) ensuring that the HDP market agents have access to highly traded produce, namely potatoes, onions, tomatoes, and bananas at all NFPMs.

Provisional recommendation (7): APAC must develop a quantifiable HDP salesperson development programme (to develop skills and contribute to the successful new entry of HDP market agencies). Priority must be given to the existing salespersons from market agencies that are wholly owned by HDPs.

Provisional recommendation (8): Dominant market agents by either product line or overall market share per major NFPM, namely the RSA Group, Subtropico, the Grow Group, Dapper and Prinsloo & Venter Market Agents must enter into management agreements with SME or HDP market agents for skills transfer as well as training on managing the fresh produce market agency business. There is existing precedent that this remedy was previously voluntarily adopted with success by certain market agents.

21. The cumulative effect of provisional recommendations (5) to (8) is indiscriminately to require all participants in the NFPM value-chain (including producers, market authorities, industry bodies, and fresh produce agents) to introduce, develop and support HDP market agents. The simultaneous implementation of these recommendations will result in a proliferation of initiatives, all intended to achieve the same end for the same beneficiaries, without any coherent, consistent, or collective framework.

22. These concerns are exacerbated by the following considerations:

22.1 Fresh produce farmers (provisional recommendation (6)) have neither the expertise nor the ability to initiate and implement programmes for the introduction of new HDP market agents. In addition, forcing producers to partner with market agents not of their own choosing disrupts the effective functioning of a free market system. A further concern is that provisional recommendation (5) gives rise to a clear conflict of interests for the participating HDP market agencies.

22.2 Market authorities have no practical means at their disposal to compel producers to "*ensure that the HDP market agents have access to highly traded produce, namely potatoes, onions, tomatoes, and bananas at all NFPMs*" (provisional recommendation (5).

22.3 Obligating market agents to adopt management agreements with competitors (provisional recommendation (8)) exposes the firms involved to the possibility of horizontal contraventions under the Competition Act, particularly in light of the automatic/*per sé* nature of section 4(1)(b). Accordingly, the practical implementation of provisional recommendation (8) raises insurmountable hurdles. Although the Provisional Report makes reference to "*existing precedent that this remedy was previously voluntarily adopted with success by certain market agents*", RSA Group is not aware of such 'precedent' nor has it been shared with RSA Group by the FPMI.

23. RSA Group notes further that provisional recommendation (8) applies only to "*dominant market agents"*. RSA Group has had no opportunity independently to verify the FPMI's approach to market share calculations or the methodology employed. As such, RSA Group does not accept its categorisation by the FPMI as a dominant firm. However, even it was to be classified as such, that alone does not constitute a defensible basis for the imposition of a binding, onerous and costly obligation. Differently put, the Provisional Report makes no case (corroborated by evidence) that RSA Group has in any way abused its so-called dominant position so as to warrant the recommended course of action. In this regard, the impact of recommendation (8) is both arbitrary and its application asymmetric.

24. The same criticism may be levelled against recommendation (6) insofar as it targets only dominant producers.

25. RSA Group submits that APAC is the appropriate vehicle through which to formulate, adopt and implement a "*quantifiable HDP salesperson development programme (to develop skills and contribute to the successful new entry of HDP market agencies)*", supported where necessary and appropriate by contributions from fresh produce agents and market authorities. RSA Group understands that APAC is already actioning this deliverable and has communicated this directly to the FPMI.

26. RSA Group has a long track record of running internal programmes to develop the skill sets and careers of individual HDP market agents, as well as of participation and involvement in related industry-level programmes and initiatives. It is committed to continuing these efforts and willing to contribute towards an APAC-led programme as suggested in paragraph 25 above.

Provisional recommendation (9): The DALRRD must, within three years, amend the APA Act to confer powers to APAC to regulate market agencies' HDP ownership and participation. This should be in line with the AgriBEE Broad-Based Black Economic Empowerment Framework for Agriculture.

27. The Provisional Report provides no clear motivation for provisional recommendation (9), and its formulation is too vague for RSA Group to provide meaningful commentary. Suffice it to state that a bland reference to the AgriBEE Broad-Based Black Economic Empowerment Framework for Agriculture is unhelpful. In particular, the operational model followed by fresh produce market agents is neither understood nor recognised within the framework.

28. The potential for unintended and adverse consequences arising from provisional recommendation (9) is significant. RSA Group believes that the FPMI should provide clear motivation for arriving at its finding that recommendation (9) is warranted and necessary, and if so, a clear explanation as to how this should be achieved (which extends further than a reference to an existing but unrelated framework).

Provisional recommendation (10): The DALRRD should amend the APA Act within three years to allow for regulating the maximum commission fee which may be charged by market agents (i.e. place an effective cap on commission fees), such that the revised cap should not lead into increases in the current commission fees and should provide for discounts. In addition, the costs associated with transport, palletising and packaging, should be negotiated or set outside of the commission fee structure.

29. RSA Group does not share the FPMI's finding that HDP and emerging producers are discriminated against with respect to commission fees and has seen no compelling evidence to support this assertion. The evidentiary basis for this finding is certainly not apparent from the Provisional Report, beyond anecdotes and speculation.

30. RSA Group is concerned that setting an artificial commission cap will have detrimental – and unintended – consequences on pricing across the sector, creating a real risk that, over time, commission rates will trend towards the higher levels set by the cap. The FPMI's attempt to address this concern in provisional recommendation (10) by suggesting that "*the revised cap should not lead into increases in the current commission fees*" is impractical and incapable of meaningful enforcement outside of absolute price regulation. The FPMI's imperative that discounts should be provided for is equally unhelpful. In the ordinary course, the matter of a discount is discretionary and subject to negotiation. The only way to enforce the application of discounts is to remove that discretion through price regulation.

31. A draconian intervention of this sort (direct or indirect price regulation) is not supported by the surrounding facts and circumstances and amounts a reversion to the historical position under the Commission for Fresh Produce Markets Act, which regulated the remuneration of market agents and included references to tariffs that the Minister of Agriculture might set, or that administrators might be allowed by law to set.

32. RSA Group believes commission fees should be determined by market forces and the quality of service being delivered by competing sales agencies, and that interventions that set fixed commission rates will disrupt the integrity of the value chain, further raising barriers to entry for HDP producers.

33. Related to the subject of commission is the "*5% ad valorem fee or commission on the gross sale price of produce*" charged by market authorities to producers. RSA Group is surprised that while the Provisional Report focuses considerable attention on the commission fees charged by fresh produce agents, it provides no analysis on the quantum of the fee/commission charged by market authorities ("*which has not changed in the past 15 to 20 years*"), or the fact that, in most cases, the service facility ostensibly paid for by the producers is not delivered. RSA Group regards this as a material omission that warrants closer attention before the Provisional Report is finalised.

Provisional recommendation (11): APAC and the NFPMs management must use advocacy measures to educate farmers that they can negotiate lower commissions with market agents and either that a maximum fee applies or that they cannot be forced to accept an ostensible standard commission rate.

34. Since the Commission for Fresh Produce Markets Act was repealed by the Agricultural Produce Agents Act on 1 October 1993, commission rates have been unregulated and subject to market forces. RSA Group believes that producers are well-aware of this and have been for a number of years.

35. Nevertheless, RSA Group believes in a transparent, free-market trading environment, and is therefore supportive of any initiative designed to further this agenda – including the advocacy measures contemplated in provisional recommendation (11). RSA Group also believes that APAC and the NFPMs are best suited to do so.

36. For completeness, RSA Goup's in principle support for provisional recommendation (11) should not be construed as support for regulating the maximum commission fee. RSA Group's position is this regard is made clear in paragraphs 29 to 32 above.

Provisional recommendation (12): APAC must develop and enforce a Code of Good Practice governing these practices, in accordance with the relevant provisions of APA Act, for market agents and market authorities to comply with.

37. RSA Group is supportive of any initiative designed to assist APAC in enforcing the APA Act and regulating the behaviour of its constituents (including fresh produce agents).

38. It is worth pointing out that a significant amount of work was carried out by Project Rebirth (including the development of Codes of Best Practices). These efforts may be of assistance in implementing provisional recommendation (12).

Provisional recommendation (13): DALRRD should, as part of the current legislative amendments, review the composition of the APAC Council to minimise conflicts of interest on market agents. In addition, amendments should also include rotating the membership of APAC Council to include at least one small or 100% HDP-owned market agent to represent SMEs and/or HDPs on the Council.

39. RSA Group appreciates that the composition of APAC is within the exclusive purview of the Minister of Agriculture, Land Reform and Rural Development. Within that framework, however, RSA Group supports the FPMI's recommendation to ensure that APAC features adequate and relevant SME and/or HDP representation and adheres to the highest standards of corporate governance.

40. RSA Group understands that APAC has already responded to this aspect of the Provisional report in some detail.

Provisional recommendation (14): African Rainbow Capital should divest its shareholding in either Subtropico or RSA Group. The buyer of divested shares must be a firm wholly owned and/or controlled by HDP

41. The FPMI's provisional finding upon which provisional recommendation 14 is founded is that "*African Rainbow Capital's cross shareholding in Subtropico and RSA distorts competition in that it erodes the incentive for either to compete with the other. This is prevalent more for RSA (due to African Rainbow Capital's majority stake) wherein it does not have any incentive to take away market share from Subtropico as the ultimate shareholder's return on investment will not increase as a result.*"

42. Given that the remedial action arising from provisional recommendation 14 is aimed primarily at ARC, RSA Group has worked with ARC, its competition law advisors and external economists to prepare a formal submission (the "**ARC Submission**") in response. This will be filed by ARC in due course. RSA wishes to place on record, at this stage, that it is firmly aligned with the contents of the ARC Submission.

43. Since the Provisional Report does not recommend any direct remedial action against RSA Group arising from the FPMI's provisional finding set out above, RSA Group does not intend to use the opportunity afforded by this letter for the submission of its independent comments on that finding. RSA Group does, however, reserve its right to do so, at the appropriate time and in the appropriate forum, should the need arise.

44. For purposes of this submission, RSA Group states categorically that provisional recommendation 14 is entirely misguided and devoid of any factual or evidentiary basis. Competition between RSA Group and all other market agents, including Subtropico, is robust, transparent, and consistent with all applicable legislation (including the provisions of the Competition Act). Had the FPMI sought to engage with RSA Group on this matter prior to releasing the Provisional Report, RSA Group is confident that any misgivings arising from ARC's cross-shareholding in RSA Group and Subtropico would have been dispelled.

45. This is regrettable, particularly in light of RSA Group's willing co-operation with the FPMI throughout its processes. Indeed, the possibility of provisional recommendation 14 – which self-evidently has a material impact on RSA Group - was not even raised with RSA Group when it was invited to provide initial comments on preliminary issues identified by the FPMI on 18 April 2024.

Closing

46. RSA Group remains available to the FPMI to engage further on any aspects of this letter.

Yours faithfully

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