

REGULATORY

The Memorandum of Understanding between the Competition Commission of South Africa and the National Agricultural Marketing Council

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The Competition Commission and the NAMC concluded an MOU

On 13 August 2021 the Competition Commission (“**the Commission**”) and the National Agricultural Marketing Council (“**the NAMC**”) concluded a memorandum of understanding (“**MOU**”). Published in *Government Gazette No. 44981*, the purpose of the MOU is to ensure that markets in South Africa’s agriculture, food and agro-processing sectors operate “*efficiently and competitively for the benefit of industry, consumers and society in general*”. Considering both the NAMC as well as the Commission, it is clear that both institutions are mandated to ensure a competitive agriculture, food and agro-processing sectors.

Who is the NAMC?

National Agricultural Marketing Council (“**the NAMC**”). Section 3 of the Marketing of Agricultural Products Act No. 47 of 1996 (“**the MAP Act**”) establishes the NAMC whose function is to investigate the establishment, continuation, amendment or revocation of statutory measures affecting the marketing of agricultural products. The NAMC is also tasked with promoting research in the South African agricultural sector. Furthermore, the NAMC acts in an advisory role to the Minister of Agriculture, Forestry and Fisheries in implementing policies to ensure the competitive nature of various industries within the agriculture, food and agro-processing sectors in South Africa is guaranteed. An example of which is the Establishment of Statutory Measure and Determination of Guideline Prices: Levy relating to Cotton Lint, published on 20 July 2018 in *Government Gazette No. 41782* in which a guideline price for cotton lint was set to ensure the “*furtherance of the primary cotton industry’s competitive position*”. The guideline price, however, did not amount to price setting. It does, however, provided for a framework within which to consider the pricing of cotton.

The objectives of the MOU

In cases where the Competition Act No. 89 of 1998 (“**Competition Act**”) applies to a sector or an industry that is subject to the authority of another regulatory body, such as the NAMC, the Competition Act establishes concurrent jurisdiction over competition matters. As such, the Commission entered into an MOU with the NAMC to clarify the concurrent jurisdiction of the two bodies where competition concerns overlap with regulatory responsibilities in order to refine the roles of the NAMC and the Commission and to create certainty for market participants.

The MOU identifies four key areas of mutual interest and cooperation between the Commission and the NAMC, namely:

1. research;
2. policy making;
3. advocacy efforts; and
4. investigations in agricultural, food and agro-processing sectors in South Africa.

The MOU provides that the Commission and the NAMC **must** consult and coordinate activities on policy matters and regulatory aspects to ensure the consistent interpretation and application of both competition and agricultural marketing policy principles. This entails, amongst

others, the following:

1. sharing of information between both institutions to inform their policy work and for the purposes of the review of merger transactions; and
2. co-operating during investigations in order to provide each other with the “*necessary advice and inputs*”.

The cooperation between the Commission and the NAMC is significant as the food and agricultural industry in South Africa has been the subject of several high-profile investigations by the Commission in the past.^[1] Furthermore, the agricultural, food and agro-processing sector is recognised as a priority sector by the Commission and specifically, a designated sector in terms of the Buyer Power Regulations, 2020 published in *Government Gazette No. 43018*. This is due to the anticompetitive market structures that linger from the state sanctioned ‘control boards’ established under the apartheid regime in the Marketing Act No. 59 of 1968. The ‘control boards’ were designed to support farmers through price protection, subsidised finance and export subsidies. The Commission has expressed the view that these market structures have far reaching consequences on the pricing of food, vertical integration and the maintenance of high barriers to entry into the agricultural, food and agro-processing sector.

Conclusion

The Commission has signed numerous MOU’s with other regulatory authorities to date. These include, *inter alia*, the Council for Medical Schemes, the Independent Authority of South Africa and the National Consumer Commission. Notably and on a surface level, the MOU’s all provide similar and straightforward guidance on the relationship between the Commission and the regulatory authority. The MOU provides a foundation upon which cooperation between the NAMC and the Commission is to be facilitated. This is of significance to market participants as the Commission will now have access to sector specific knowledge which will allow the Commission to bolster their efforts within the agricultural, food and agro-processing sector. This further provides a clear indication that entities participating within the sector will not be able to forum shop but will be confronted by a strong team addressing any potential market failure from a competition law perspective.

[1] For example, in *Department of Agriculture, Forestry and Fisheries v Botha Roodt Market Agents (Pty) Ltd and Others*, the Commission referred for prosecution to the Competition Tribunal 14 fresh produce market agents and their association, the Institute for Market Agents of South Africa, in relation to charges of price fixing and/or fixing trading conditions in contravention of the Competition Act. Furthermore, in *Commission v South African Feedlot Association; Karan Beef (Pty) Ltd; Sparta Beef (Pty) Ltd; Chalmar Beef (Pty) Ltd; Beefmaster Kimberley; Morgan Beef (Pty) Ltd; Beefcor (Pty) Ltd; Fabvleis (Edms) Bpk t/a Midland Meat; Austin Evans Feedlot and 23 Others* the Commission investigated collusive agreements entered into by the Respondents to fix prices when purchasing weaner calves at various auctions and the fixing of trading conditions by agreeing on the process to determine the breakeven prices when selling beef carcasses to wholesalers, hoteliers, restaurants, and retailers.

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