NAMC WORKING PAPER (DRAFT)

Competition Policy and Agriculture: Impediment to, or Instrument of Cooperation?

Stephanie van der Walt
Trade Focus Area
Draft: March 2014

Disclaimer

i. Scope and Purpose

This draft sets out a general overview of selected legislative and treaty provisions relevant to competition policy and agriculture as per the jurisdictions identified. This draft is based on information in the public domain and is intended for orientation purposes only. The analysis does not constitute an exhaustive examination of all facts, events, precedents, acts and regulations, opinions or other sources that may be of relevance. This note does not constitute "legal advice" as defined by the South African common law, the Attorney's Act, 53 of 1979 as amended, or any other authoritative code recognised by the South African legal profession. Reference hereto is subject to the understanding that no part hereof is intended for entry into pleadings and/or evidence in any matter before a court of law, whether pending or contemplated, in the Republic of South Africa or elsewhere.

ii. Non-Guarantee, Amendment and Withdrawal

This draft and all subsequent updates thereof has been compiled in good faith with reasonable diligence expended to ensure the quality of information provided, however the NAMC, its representatives and/or its employees make no representations and offer no guarantees regarding the accuracy or comprehensiveness of facts and/or opinions set out herein. The NAMC, its representatives and/or its employees reverse the right to amend this note in whole or in part at any time for any reason, and/or to withdraw it in part or entirely without prior notice to any party.

iii. Exclusion of Liability

This draft does not, either in whole or in part, constitute an official position of the Council of the NAMC. Any reference to its contents is subject to the unequivocal acceptance of the condition that the NAMC,

its representatives and/or its employees are exempt from all liability, whether joint or several, for any and all harm incurred, whether real or projected, that may result from any decisions taken on the basis of aforementioned reference. Any action or omission based on information provided herein is undertaken solely at the decision maker's discretion and entirely at own risk. Any person or entity that may wish to seek further clarification for any purpose other than research as set out in par.(i) above, is advised to consult legal counsel at own expense.

Introduction[1]

The South African Competition Act,89 of 1998, (the Act) affects every business operating in South Africa. In recent years, the food and agricultural sector in particular has been the focus of several high-profile investigations, with large companies incurring significant losses of revenue due to both litigation costs and penalties imposed by the courts. In South Africa, competition authorities consist of three statutory bodies, i.e. the Competition Commission,[2] the Competition Tribunal[3] and the Competition Appeal Court (CAC).[4] All three of these were established under the South African Competition Act 89 of 1998 (the Act). Broadly speaking, the Act defines two categories of anticompetitive conduct, i.e. *per se*[5] and *prima facie*.[6] In the first instance, conduct is deemed unlawful, irrespective of whether any gains are derived there from, or whether any harm was in fact caused. In the second instance, conduct is deemed unlawful subject to evidence that anticompetitive effects are outweighed by technological advancement, economic efficiency or pro-competitive gains resulting from such conduct. Provision is made[7] for granting ad hoc exemption to certain provisions of the Act, however no general exemptions exist.

Competition law is a fairly new addition to the South Africa legal system and builds strongly on the jurisprudence of the European Union (EU), the United Kingdom (UK) and the United States (US). A

[1] The information contained herein uses a point of departure the paper compiled by Irma Gouws and Thandi Lamprecht of Werksmans Attorneys. See http://www.compcom.co.za/assets/Uploads/events/SIxth-Annual-Competition-Law-Economics-and-Policy-Conference-in-South-Africa-2012/NewFolder-8/COMPETITION-LAW-AND-AGRICULTURAL-CO-OPERATIVES-INTERNATIONAL-DEVELOPMENTS-I-Gouws-T-Lamprecht-FIN.pdf
[2] Chapter 4 of the Act.
[3] ibid.
[4] ibid.
[5] Art. 4(1) (b) and 5(2).
[6] Art. 4(1)(a) and 5(1).
[7] Art. 10.

notable deviation,[8] however, is the failure to include a general exception for the agricultural sector, particularly concerning the exchange of information and cooperation by firms.

In 2012, the United Nations (UN) declared the "International Year of Cooperatives," with a particular focus on agriculture in an effort to bolster food productivity across the globe. In response, the South African Department of Trade and Industry (DTI) undertook various campaigns to create awareness about cooperatives and their contribution to social and economic development.[9]

In South Africa, however, as stated above the Competition Act, unlike the competition laws applicable in various international jurisdictions,[10] offer no automatic exemptions for the activities of cooperatives, creating a degree of uncertainty as industries are confronted with "conflicting messages" regarding the use of cooperatives as tool for agricultural development. This paper will attempt to highlight how competition law affects the formation and operations of agricultural cooperatives – typically established to facilitate and administer collective production, processing, joint purchasing or joint marketing and selling of its members' outputs – in the European Union (EU), which informed much of the development of South Africa's own competition policy. This aims to offer a potential roadmap for the development of South Africa's own policies in the future.

As South African trade regulatory measures are regarded as a blueprint of sorts for similar efforts elsewhere on the continent, and particularly within the context of the Comprehensive African Agriculture Development Programme (CAADP), the interaction between European Competition Policy and Common Agricultural Policy (CAP) is of singular significance.

2. The Agricultural Exemption

A United Nations (UN) survey of selected competition regimes has indicated that most competition laws either exempt specific industry clusters, or types of economic activity, and also often make

[8] Arie Reich "The agricultural exemption in antitrust law: a comparative look at the political economy of market regulation" (2006) Bar-Ilan University Public Law and Legal Theory Working Paper No. 06-7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944389> accessed 12 January 2013.

[9] Ref the DTI's '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] were tabled in Parliament and referred to the Trade and Industry Portfolio Committee.

[10] 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).

allowance for such exemptions to be granted under specified circumstances.[11] It is worth noting that, in general, there tends to be fewer exemptions in countries which have recently adopted competition laws – such as in South Africa – in comparison with nations that have a long history of competition jurisprudence.[12]

This is thought be reflective of the fact that in new competition regimes, the true effect of competition regulations have yet to be exhaustively tested in a given market setting.[13] Indeed, observation suggests that in advanced industrial countries, exemptions granted from competition law have generally tended to evolve and expand over time because of specific issues and cases encountered in the application of the law, and the resulting adjustment of regulation in accordance with real-world conditions.[14] In addition to legal and economic concerns, various historical, cultural and political factors have also contributed to the way in which competition regulation is enforced.[15]

The UN review of different competition laws suggests that a wide range of exemptions and exceptions have been granted by various jurisdictions.[16] Among the sectors commonly exempted are agriculture – particularly dairy – forestry and fisheries. Exemptions for these sectors have typically been introduced for the purpose of helping to ensure that farmers, fishermen and forestry workers receive "fair" and "stable" prices for their products and labour.[17] The seasonal nature of their activities, the cycles of production and harvesting, and the social objectives of ensuring viable farming, fishing and forestry communities are also among the reasons cited for allowing these exemptions.[18] In addition, with the advent of large processing and even retails firms in these sectors,[19] the relative weak bargaining position of individuals engaged in these activities could be exploited. The formation and exemption of cooperatives and marketing boards were seen as possible corrective measures.[20] The cooperatives can enable their members to bargain more effectively for higher prices for their products, and cooperate in such areas as processing, transportation, efficiencies not likely to be attained on an individual basis.[21]

[11] R. Shyam Khemani, "Application of competition law: exceptions and exemptions" (2002) United Nations Conference on Trade and Development UNCTAD/DITC/CLP/Misc. 25, <http://unctad.org/en/Docs/ditcclpmisc25_en.pdf> accessed 22 February 2013.
[12] ibid.
[13] ibid.
[14] ibid.
[15] ibid.
[16] ibid.
[17] ibid.
[18] ibid.
[19] ibid.
[20] ibid.
[21] ibid.

3. Competition and Cooperatives: European Union Approach

3.1 Example of the European Dairy Sector

Dairy is of special importance within the EU, as milk is produced in every one of the Union's 27 member states. The CAP reform process, completed at the end of 2013, has taken a market-oriented approach in an effort to help farmers respond better to market signals. Farm subsidies have been largely decoupled from production and farmers have been given incentives to develop more innovative and business-oriented market models.

In the dairy sector, along with the phasing out of the milk quota system by the end of 2015, this policy development poses a significant challenge. Milk farmers are, generally speaking, less able than other farmers to adjust their production to changes in the market. This is attributable to the fact that production is constant and cannot be reduced or re-orientated over the short term, while high-stranded investment costs in infrastructure and milk-producing livestock make it difficult to change the nature of production. As milk is a highly standardised product, aside from switching to organic production, milk farmers have limited opportunities to improve their competitive position by diversifying their outputs.

Structural measures within the EU Rural Development Policy have helped dairy producers to modernise production structures and increase profitability by lowering unit costs. The result is that productivity of dairy farms has increased over the last several years, with the number of dairy farms decreasing and production becoming more concentrated in fewer farms with more animals per farm. Despite these developments, production in several EU member states remains atomised and dispersed with a low degree of supply concentration. These farmers are more exposed to the fluctuations of market conditions than farmers who have both bolstered and buttressed efficiencies by engaging in various forms of cooperation. The market pressure on small producers with a low degree of cooperation can be expected to intensify with the abolition of quotas, as the most effective and best organised producers can now place their production on the market without being restricted by maximum quantities.

Structural and other support measures targeting single farms are no longer sufficient to equip small-scale dairy producers for the challenges of the increasingly liberalised and competitive market, both within the EU and beyond. Fostering cooperation between milk farmers can help rationalise the supply chain, making it more efficient. By creating better efficiencies, more intensive cooperation will improve the farmers' position in relation to the other market players and, depending on the degree of cooperation achieved, add value to their products.

3.2 EU Competition Policy and the CAP

Although there does not appear to be consensus on an "international best practice" in competition policy relating to agricultural cooperation, many jurisdictions make provision for special exemptions from the application of their competition laws for the particularities of the agricultural sector.[22] Interestingly, although the application of agricultural exemptions has been continuously reviewed and defined more narrowly as time went on, none of the major competition law jurisdictions – i.e. the United States (US), United Kingdom (UK) or the EU – have ever completely abolished agricultural exemptions. The reason for this, is that the same factors, such as poor bargaining power of farmers, the pro-competitive reasons for the existence of agricultural cooperation and the unique nature of the agricultural sector, which led to the creation of the exemptions, still remain of relevance today.

In the context of the EU, competition policy is regarded as having a major role to play in promoting cooperation between farmers themselves as well as between farmers and other actors in the dairy value chain. Competition rules are intended to foster intensive cooperation, both at producers' level and between farmers and market players at marketing and processing levels, as long as this cooperation creates efficiencies and does not jeopardise the competitive process in the sector to the detriment of consumers. Cartels, therefore, are not the solution to the problems faced by Europe's dairy sector. In fact, agreements restrictive of competition and void of any efficiencies are prohibited by article 101 of the Treaty on the Functioning of the European Union (TFEU). However, competition policy should not function as an obstacle to cooperation between farmers but as a tool to help improve production and marketing structures and strengthen their position in the supply chain, all the while ensuring a level-playing field where operators have equitable access to the benefits of a liberalised market.

This supports the objectives of the CAP and EU Rural Development Policy to encourage structural development in dairy farming and to enable farmers to actively respond to market fluctuations. The legislation applicable to agricultural products[23] provides for a limited number of derogations form the applicability of competition rules to certain agreements and decisions of farmers and farmers' associations. However, in light of the interpretation that European Courts have given to such derogations, the vast majority of the agreements and decisions of farmers do not fulfil the conditions

[22] 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.
[23] Council Regulation 1234/2007 ("Single CMO Regulation") and Council Regulation 1184/2006.

for such derogations to apply. Therefore, these agreements must be analysed under the regime of the general competition rules applicable to undertakings.

The EU exemption aims to allow the proper functioning of central governmental policies in the agricultural sector, mainly CAP, and occasionally member state's national policies.[24] Article 42(1) of the TFEU 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:

Council Regulation (EC) No 1234/2007, 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 TFEU; 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.

3.3 Competition Rules under the Single CMO Regulation

A "producer organisation" (PO) is defined in article 122 of Council Regulation (EC) No 1234/2007, of 22 October 2007, establishing a common organisation of agricultural sectors and on specific provisions for certain agricultural products (the Single CMO Regulation)[25] as being "constituted by" and "formed on the initiative of" producers. A PO pursues specific aims which may include: ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity; concentration of supply and the placing on the market of the products produced by its members; and optimising production costs and stabilising producer prices.

[24] n 3, at 849.
[25] OJ L 299, 16.11.2007, p.1.

Article 175 of the Single CMO Regulation provides for the general application of competition rules to the agricultural sector:

> *Save as otherwise provided for in this Regulation, articles 81 to 86 of the Treaty and implementation provisions thereof shall, subject to articles 176 to 177 of this Regulation, apply to all agreements, decisions and practices referred to in articles 81(1) and 82 of the Treaty which relate to the production of, or trade in, the products covered by this Regulation.*

This general application of competition rules to the agricultural sector is subject to three exceptions which are further specified in article 176(1) of the Single CMO Regulation. These three exceptions only concern article 101 of the TFEU. Article 102 of the TFEU therefore remains fully applicable to the agricultural sector.

In particular, article 176(1) of the Single CMO Regulation sets forth that:

> *Article 81(1) of the Treaty shall not apply to the agreements, decisions and practices referred to in article 175 of this Regulation which are an integral part of a national market organisation or are necessary for the attainment of the objectives set out in article 33 of the Treaty.*
>
> *In particular, article 81(1) of the Treaty shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single member state which concern the production or sale 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, unless the Commission finds that competition is thereby excluded or that the objectives of article 33 of the Treaty are jeopardised.*

In accordance with article 176(2) of the Single CMO Regulation the Commission has sole power to determine which agreements, decisions and practices fulfil the conditions required by the above exceptions. The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a member state or of an interested undertaking or association of undertakings. Before entering into the analysis of these three exceptions, it should be noted from the outset that their potential application to a PO or farmers' cooperation agreement only becomes relevant when the agreement at issue may fall under the scope of application of article 101(1) (that is, when it

may actually or potentially affect trade between member states). If such is not the case (because, for instance, the PO or farmers' association has a limited geographical scope in the territory of a member state), a derogation from article 101(1) would not ultimately make sense since the agreement would not be capable in any event of triggering the potential application of this provision.

3.4 Application

The limited general exemptions contained in the Regulations apply to the following agreements:

- 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.

With regards to the first category of agreements contemplated in article 176(1) – i.e. those forming part of national market organisations – it is currently of limited relevance given that the majority of products (including milk) are now covered by a single CMO, which has superseded market organisations operating at national level.[26] The second derogation applies to agreements necessary for the attainment of the objectives of the CAP as set out by article 39 of the TFEU. These are:

> *a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;*
>
> *(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;*
>
> *(c) to stabilise markets;*
>
> *(d) to assure the availability of supplies; and*
>
> *(e) to ensure that supplies reach consumers at reasonable prices.*

[26] This exception was applied, for instance, in relation to the French market organization of potatoes by Commission Decision of 18 December 1987, Case IV/31.735, *New potatoes*, OJ L 59, 4.03.1988, p. 25.

When analysing the potential application of this second exception, the relevant case law has followed a restrictive interpretation. According to this approach, the objectives of the CAP are already generally ensured by the means provided for by the rules applicable to a common market organization. If a particular private action or agreement is not expressly included among these means, it is generally not deemed to be "*necessary*" for the attainment of the objectives of article 39. Such was the reasoning followed by the General Court, for instance, in the Joined Cases T-70/92 and T-71/92, *Florimex*, in which it endorsed the prior practice of the Commission in this regard:[27]

> *[147] Until now, the Commission has never found that an agreement between the members of a cooperative which affects free access by non-members to agricultural producers' channels of distribution is necessary for attainment of the objectives set out in article 39 of the Treaty.*
>
> *[148] Furthermore, the Commission's practice in earlier decisions has generally been to conclude that agreements not included amongst the means indicated by the regulation providing for a common organization in order to attain the objectives set out in article 39 are not 'necessary' within the meaning of the first sentence of article 2(1) of Regulation No 26, as observed by Advocate General Tesauro in his Opinion in Oude Luttikhuis.*

An additional condition required by the case law to apply this exception is that the agreement or action at issue must be necessary for the attainment of all the objectives of article 39. If such is not the case, the second exception provided for by article 176 would not be applicable. Thus, in the Joined Cases T-70/92 and T-71/92, *Florimex*, the General Court established that:

> *Finally, as the applicants have submitted, it is settled case-law that the first sentence of article 2(1) of Regulation No 26 applies only if the agreement in question is conducive to attainment of all the objectives of article 39... It follows that the Commission's statement of reasons must show how the agreement at issue satisfies each of the objectives of article 39. In the event of a conflict between those sometimes divergent objectives, the*

[27] Judgment of 14 May 1997, Joined Cases T-70/92 and T-71/92, *Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten v. Commission*, [1997] ECR II-00693. See also Commission Decision of 14 December 1998, Case IV/35.280, *Sicasov,* OJ L 4, 8.01.1999, p. 27: "*68. Lastly, it must be concluded that agreements which are not included among the means provided by the Regulation on the common organization for the attainment of the objectives set out in article 39 of the Treaty are not necessary within the meaning of article 2(1) of Regulation No 26/62. The common organization of markets in seeds does not provide for the conclusion of licensing agreements. 69. Accordingly, an exception under article 2 of Regulation Nº 26 must be ruled out in this case and, by the same token, article 85(1) of the Treaty is applicable."*

> *Commission's statement of reasons must, at the very least, show how it was able to reconcile them so as to enable the first sentence of article 2(1) of Regulation No 26 to be applied.*

This attempt to reconcile all the objectives of article 39 of the TFEU is found for instance in the *French beef* case, where the Commission considered that a price fixing cartel between French farmers and slaughterhouse federations could only fulfil one of these objectives (ensuring a fair standard of living for farmers) but not the rest of the goals set down under the above provision. The reasoning of the Commission was endorsed by the General Court in the Joined Cases T-217/03 and T-245/03, *FNCBV*,[28] in which it stated that:

> *In the light of the foregoing, it must be found that the disputed agreement can be regarded as necessary only in relation to the objective of ensuring a fair standard of living for the agricultural community. On the other hand, the agreement is likely at least to jeopardise the setting of reasonable prices for supplies to consumers. Lastly, the agreement had no connection with, and was therefore all the more unnecessary for, the stabilisation of markets, ensuring the availability of supplies and increasing agricultural productivity. Therefore, in view of the case-law referred to in paragraph 199 above, the Court considers that the Commission did not err in finding that bringing those different objectives into balance did not justify the conclusion that the derogation provided for by the first sentence of article 2(1) of Regulation No 26 was applicable in the present case.*

From an economic point of view, in a static sense, it is not possible to achieve the five objectives set out in article 39 simultaneously, as "fair standards of living for the agricultural community" may conflict with "reasonable prices to consumers." However, in a dynamic sense, the five objectives can be met if there are sufficient efficiencies or productivity gains that are passed onto consumers in the form of reasonable prices, while entailing higher farming incomes.

In light of the interpretation of this second exception under article 176(1), it would seem difficult to apply it to arrangements concluded between farmers in the form of POs or other form of associations, in which price mechanisms regarding the purchase or sale of raw milk were to be agreed. Such

[28]Judgment of 13 December 2006, Joined Cases T-217/03 and T-245/03, *FNCBV and others v. Commission*, [2006] ECR II-04987.

agreements may indeed respond to the need of ensuring a fair standard of living for farmers, but the rest of the objectives foreseen under article 39 of the TFEU would also have to be met.

Even though it may be considered that the second sentence of article 176(1) of the Single CMO Regulation is a particular example of the two prior exceptions contained in the first sentence – by reason of the word "*in particular*" – the Court of Justice has finally considered that it has an independent meaning with respect to the prior exceptions and, therefore, amounts to an independent, third exception.[29]

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

- 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 jeopardise the objectives of the CAP.

To date, this third exemption appears to have been of little significance 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 which it has been fully accepted. Some of the underlying reasons taken into account in this regard have been as follows:

[29] Judgment of 12 December 1995, Joined Cases C-319/93, C-40/94 and C-224/94, Dijkstra, [1995] ECR I-04471:
[17] It should be noted in that regard that, for the purposes of interpreting the second sentence of article 2(1), it is necessary to take into account its genesis and the reasons on which Regulation No 26 is based.
[18] It is apparent, first of all, from the genesis of that regulation that, by adding that second sentence, which did not appear in the Commission' s original proposal for a regulation, at the behest of the European Parliament, the legislature sought to introduce an exception applying in favour of agreements, decisions and practices of farmers where they fulfil the criteria laid down in it, unless the Commission finds that competition is thereby excluded or that the objectives of article 39 of the Treaty are jeopardised.
[19] Next, that desire to protect agricultural cooperatives is apparent from the reasons given for the regulation, and in particular from the fourth recital in the preamble to Regulation No 26, which states that special attention is warranted in the case of farmers' organizations.
[20] To interpret the second sentence as having no independent meaning would run squarely counter to the wishes of the legislature, inasmuch as it would result in more stringent conditions being applied to agreements which are to be made more flexible, since they would have to fulfil the conditions laid down in both the first and second sentences. Moreover, the Commission could scarcely find that an agreement jeopardized the objectives of article 39 of the Treaty if, by virtue of the derogation set out in the first sentence, it had already been established that that agreement or decision was necessary for the attainment of those objectives.

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' associations) participate to the agreement at issue, the latter would not qualify for being exempted. Such was the approach taken by the Commission in its Decision of 26 November 1986 in the Meldoc case11: when analysing a horizontal agreement between four dairy cooperatives and one private company introducing a quota system, consultations on prices and mechanisms to restrict imports from other member states in the Netherlands, the Commission concluded that this 3rd exception was not applicable to the agreement at issue to the extent that a private company (which was not an association of farmers) was also involved:

> *[55] …Since ML is a private company and not an association of farmers, it cannot be maintained that the Meldoc agreement is covered by the exception provided for in the second sentence of article 2 (1).*

Similarly, in its Decision of 7 December 1984 in the *Milchförderungsfonds* case,[30] the Commission refused to recognise the exception to the extent that the arrangements at issue – i.e. management of a private fund aimed at promoting the quality and sales of milk and dairy products – had been implemented by several associations of farmers' trade associations which could not qualify as farmers' associations as such:

> *[22]... The association formed by the German Farmers' Union and German Raiffeisen Association and their respective Land associations and the Central Association of Private Dairies to administer the MFF is an association of trade associations serving the common economic interests of its members. It is not, however, an association of farmers' associations within the meaning of the second sentence of article 2 (1) which, like farmers' cooperatives, carry on behalf of their members common commercial activities in the field of the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural Products.[31]*

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. Such was the reasoning followed by the Commission to reject the application of this

[30] Commission Decision of 7 December 1984, Case IV/28.930, *Milchförderungsfonds*, OJ. L 35, 7.2.1985, p. 35.
[31] Commission Decision of 2.12.1977, Case IV/28.948, *Cauliflowers*, OJ L 21, 26.01.1978, p. 23.

exception in its Decision of 26 July 1988 in the *Bloemenveilingen Aalsmeer* case[32] in which, when analysing the compatibility of certain auction rules and charges adopted by a cooperative society of plant and flower growers, it stated that:

> *[152] The exception provided for in the second sentence of article 2(1) applies only to agreements between farmers and/or their associations. Although the Auction Rules and the Scale of Charges are decisions of a farmers' association, the restriction of competition stems from the fact that wholesalers subject themselves to these provisions by contract and thus individual agreements come into being between a farmers' association and wholesalers.*

The agreement at issue refers to prices. That was the conclusion of the Court of Justice in the Case C-399/93, *Oude Luttikhuis*,[33] in which it stated that:

> *[28]... 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.*

Similarly, in its Decision of 2 April 2003 in the *French-beef* case the Commission refused the application of the exception to an agreement between several federations of farmers and slaughterers including a minimum purchase price for identical reasons:

> *[137]…The exception at (c) is excluded twice over: the agreement involves parties other than farmers, namely the slaughterers' federations; and it does indeed impose an obligation to charge identical prices.[34]*

[32] Commission Decision of 26 July 1988, Case IV/31.379, *Bloemenveilingen Aalsmeer*, OJ. L 262, 22.9.1988, p. 27.
[33] Judgment of 12 December 1996, Case C-399/93, H.G. Oude Luttikhuis, [1995] ECR I-04515.
[34] Commission Decision of 2 April 2003, Case COMP/C.38.279/F3, *French beef*, OJ L 209, 19.08.2003, p. 0012. This Decision was confirmed in essence by the General Court judgment of 13 December 2006, Joined Cases T- 217/03 and T-245/03, *FNCBV and others / Commission*, already cited. The General Court judgment was also upheld by the Court of Justice judgment of 18 December 2008, Joined Cases C-101/07 P and C-110/07 P, *FNCBV and others / Commission*.

In light of the above precedents, the relevance of the second sentence of article 176(1) of the Single CMO Regulation to assess POs or other forms of associations between farmers would seem to be quite limited. Indeed, in many cases the agreements may involve in practice farmers' trade associations, e.g. *Milchförderungsfonds*, or third parties other than farmers, i.e. collectors, processors, etc, which would automatically exclude the application of the second sentence of article 176(1), e.g. Cases *Meldoc* and also *French beef*. In addition, if the agreement involves price arrangements (which would be the case, for instance, when the PO or association buys the raw milk from its members to sell it to processors at an identical price), the application of this derogation is excluded, e.g. Cases *Oude Luttikhuis* and *French beef*). The fact that the potential restriction of competition between farmers (in the form of an identical sale price agreed in the framework of a PO, be included in subsequent individual contracts concluded with third parties (i.e. collectors, processors, etc, would also seem to be an additional reason to justify the non-application of this exception, e.g. *Bloemenveilingen Aalsmeer*.

Cooperation agreements between farmers not meeting the requirements laid down by article 176(1) of the Single CMO Regulation would still be required to be analysed under article 101(1) of the TFEU in order to determine whether they are deemed to be restrictive of competition and capable of affecting trade between member states. If such is the case, it would thus be necessary to analyse whether these agreements could still benefit from a block or individual exemption under article 101(3) of the TFEU. Such has been the approach taken by the Commission practice which, when it has come to the conclusion that article 176(1) of the Single CMO Regulation was not applicable, has also analysed whether the agreement at issue may fall under the scope of application of article 101(1) of the TFEU and, if so, whether it could benefit from the exception provided for by article 101(3) (for instance, in Cases Milchförderungsfonds and Meldoc). Similarly, when the Court of Justice has concluded that Regulation 26/62 did not apply in a particular case, it has ruled that article 101 remained fully applicable (Case C-250/92, DLG).[35]

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

[35] Judgment of 15 December 1994, Case C-250/92, *Dansk Landbrugs Grovvareselskab AmbA*, [1994] ECR I- 05641. However, it should also be noted that in other cases the Court of Justice has firstly considered whether an agreement may fall under article 101(1) and benefit secondly from the "exemptions" of articles 176/1) of the Single CMO Regulation or 101(3) of the TFEU. See, for instance, Court of Justice Joined Cases C-319/93, C-40/94 and C-224/94, *Dijkstra*: "*[22] …where it is found that an agreement or a decision falls within the scope of article 85(1), that the criteria for exemption referred to in the second sentence of article 2(1) of Regulation No 26 are not fulfilled and that it does not qualify for exemption under article 85(3) of the Treaty, it is void in accordance with article 85(2). Such nullity has retroactive effects."* See also, for instance, Commission Decisions of 26 July 1988, Case IV/31.379, *Bloemenveilingen Aalsmeer*, or of 14 December 1998, Case IV/35.280, *Sicasov*.

policy helps dairy farmers in Europe".[36] This publication seeks to 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 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.[37]

In essence the Regulation[38] 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 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 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.*

4. The Competition Act and Agricultural Cooperatives in South Africa

4.1 Prohibited Horizontal Practices

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

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

[38] 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.

An agricultural co-operative produces, processes or markets agricultural products and/or supplies agricultural inputs and services to its members.[39] 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 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.[40]

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.[41] 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,"[42] joint selling through agricultural co-operatives was specifically discussed as follows:[43]

> *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 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*

[39] Section 1 of the Co-operatives Act 14 of 2005.
[40] Part 4 of Schedule 1 of the Co-operatives Act 14 of 2005.
[41] Guidelines for establishing Agricultural Co-operatives, published at: http://www.daff.gov.za/doaDev/AgricDevFinance/GuidelinesForEstablishingAgricCo-operatives.pdf
[42] May 2003 at *http://www.oecd.org/dataoecd/52/13/2958714.pdf*
[43] See *http://www.oecd.org/dataoecd/7/56/35910977.pdf*

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"[44] 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 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

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

> *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.[45] 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.[46]

In *American Soda Ash Corp v Competition Commission,*[47] the Competition Appeal Court (the CAC) held that selling by competitors through a joint sales agency had to be condemned as a *per se* price fix. 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 section 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*[48] 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*

[45] 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.
[46] 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.
[47] Case Number 12/CAC/Dec01.
[48] Case Number [2005] 3 All SA 1 (SCA).

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).

Most agricultural co-operatives who market crops utilise pooling mechanisms.[49] 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.[50] Yet when maize farmers applied for exemption towards pooling/joint selling of agricultural commodities in the export market, the Competition Commission refused it.[51] In the *Competition Commission v USA Citrus Alliance,*[52] the Competition Commission held that coordination 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 Cape Citrus Producers Forum, applied and obtained exemption in terms of section 10 of the Competition Act (which exemption was recently renewed for another five 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.[53] The OFT guidelines state that, as long as the members of the co-operative are free to set their own prices and the

[49] USDA Co-operative Pooling Operations at *http://www.rurdev.usda.gov/rbs/pub/rr168.pdf*
[50] 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.
[51] See Government Notice 1259, 31 December 2010.
[52] Case Number 67/CR/Jul05.
[53] Section 1(3) of the Competition Act.

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:*[54]

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

4.2 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:

[54] 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 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.*[55]

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[56] and the SAD case.[57]

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.

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.

---

[55] Commission Report page 68.

[56] 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).

[57] *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).

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.[58]

5. Conclusion

As highlighted above, the exemptions provisions of any competition regime lie at the intersection of competition legislation and broader economic and social policy objectives.[59] Article 10 of the South African Competition Act deals with so-called "public policy" exemptions, and requires the Competition Commission to exempt conduct otherwise prohibited if such conduct is required to achieve identified socio-economic aims.

Speaking at the 2011 Agri SA conference in Somerset West, Prof. Nic Vink[60] made the statement that "too-stringent competition laws may be hampering the growth of [South Africa's] agricultural sector."[61] As stated above, no explicit agricultural exemption exists in domestic competition law, which, according to reports,[62] has resulted in substantial losses within the sector. Prof. Vink further highlighted the aberrance of the South African competition regime in failing to exempt primary agriculture from certain competition law provisions.[63]

As highlighted above,[64] the need for exemption in the case of primary agriculture stems from the very nature of farming as a business. [65] In all branches of economic law,[66] whether domestic or

[58] A full discussion of appropriate conduct by co-operatives with a dominant market share does not fall within the scope of this paper.
[59] Neil Mackenzie and Stephen Langbridge "Understanding public policy exemptions" (2010) Bell Dewar Attorneys Discussion Paper <http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/Exemptions-Final-10257675.pdf> accessed 3 March 2013.
[60] Senior agricultural economist and professor at Stellenbosch University.
[61] Denene Erasmus, "Is competition law hurting SA agriculture?" (*Farmers Weekly*, 4 March 2011) <http://www.farmersweekly.co.za/article.aspx?id=6046&h=Is-competition-law-hurting-SA-agriculture> accessed 13 November 2012.
[62] Robyn Joubert, "No hope for grain export pool" (*Farmers Weekly*, 18 January 2011) <http://www.farmersweekly.co.za/article.aspx?id=5716&h=No-hope-for-grain-export-pool> accessed 13 November 2012.
[63] n 17.
[64] n 8.
[65] ibid.
[66] Including trade regulation, commercial law and competition regulation.

international, agriculture represents a "special and problematic case."[67] In South Africa, as elsewhere in the world, much of the sector is characterised by a large number of small, geographically scattered firms who often find it difficult to secure market access individually. These firms produce perishable products in order to supply an inelastic demand, and are subjected to unpredictable and seasonal supply cycles.[68] For these reasons, cooperation and pooling of resources not only makes sense, but may in some industries constitute a prerequisite for sustainable production – "hence the prevalence of co-ops,"[69] as Prof. Vink explained.

Prof. Vink further questioned the appropriateness of strict competition laws in light of the fact that South African agriculture is still in a developmental phase.[70] "If you look at South Africa's competition policy and implementation, it clearly follows that of the US, the UK and some EU countries. We sit in a very underdeveloped continent competing with countries such as China and many in South America that didn't have strong competition laws when they were going through developmental stages,"[71] he said.

The lack of an explicit exemption in South African competition law, means that farmers and their representative organisations must navigate a regulatory minefield, often fraught with uncertainty and bureaucratic delay to determine whether practices commonly pursued in the rest of the world are deemed permissible in the domestic context.

Proponents[72] of the current regime argue that no general exemption is necessary, due to the fact that professional bodies are allowed to apply for exemption on an ad hoc basis.[73] Such an exemption may then be granted subject to evidence that the practice for which exemption is sought will "contribute to export promotion, the promotion of small-, medium- and micro-enterprises of historically disadvantaged persons, or arrest the decline of an industry or promote the stability of an industry."[74] However, industry representatives[75] have argued that while the provision may exist *de jure*, the *de facto* position is that costs associated with such an application are prohibitive, easily running into hundreds of thousands of Rands.[76] This is in part due to the stringent burden of proof, which requires a high degree of expert

[67] n 7.
[68] n 17.
[69] ibid.
[70] n 17.
[71] ibid.
[72] David Lewis, *Thieves at the dinner table: enforcing the Competition Act* (Jacana Media 2012) 27—74, 224—243.
[73] n 6.
[74] Art. 10(3).
[75] n 17.
[76] ibid.

analysis to satisfy. In addition, the need for the exemption is often time sensitive. Delays created by compiling the application and then waiting for the appropriate authorities to reach a decision, [77] means that the aims of the application are defeated even if a favourable decision is reached.

In addition to the business-related difficulties posed, the wording of article 10 is remarkably narrow, while the drafting thereof is peculiar in that the potential for ambiguity is strong, offering little insight into how judicial certainty is to be achieved.[78] No clear guidelines exist as to how the Commission goes about its assessment of applications received, and the reasons published for its decisions on previous exemption applications provide little direction.[79] Industry requests for clarity via the publication of official guidelines, have been met with refusal or simply ignored by the Commission.

From a legal analytical perspective, it is therefore clear that this critical aspect of our competition law leaves much to be desired.[80] In addition to substantial costs and long delays, firms seeking to behave in a manner which promotes essential economic, social and political ideals face not only a stringent onus, but an unpredictable one, which of course contravenes the rule of law as enshrined in the South African Constitution 108 of 1996.

Agricultural co-operatives and its members require certainty regarding the competition law landscape within which they conduct their business. None of the major competition law jurisdiction, including the EU have abolished their limited agricultural exemptions as 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.

[77] Ann Crotty, "No reply to Clover's appeal for exemption" (*IOL Business Report*, 8 December 2010) <http://www.iol.co.za/business/business-news/no-reply-to-clover-s-appeal-for-exemption-1.998869> accessed 14 November 2012.
[78] n 15.
[79] ibid.
[80] Ibid.