



Facing the South Atlantic Ocean, between Angola and South Africa, Namibia was the last Southern African country to become independent from foreign occupation in 1990. The colonial system was characterised by racial and ethnic segregation. As such, the Namibian economy is one of contrasts.

Economy

The Namibian economy is characterised by a large, non-tradable sector (government services), Namibia is a small open economy. Primary sectors, mainly fisheries, agriculture and mining still remain the country's largest exporting sectors.

Competition Law and Institutions

Competition policy was introduced in 2003 through enactment of the Competition Act of 2003 (Act No. 2 of 2003). Competition enforcement however only came into operation with the establishment of the Namibian Competition Commission (NaCC), the country's competition authority during late 2009. The Commission is fairly new having been in operation for roughly two years now and as worked on a number of cases in its Mergers and Acquisitions Division as well as the Restrictive Practices Division.

NaCC has recently established a Research and Development Division that will be responsible for Market Studies as well as other functions such as national competition policy, competition impact assessments as well as economic analysis on complex cases.

Objectives of the Competition Act

The rationale behind competition policy is market failure resulting from market power and externalities. However, the emphasis of competition policy is on market failure arising from the abuse of market power. Apart from enhancing efficient allocation of resources and protecting the public interest, the objectives of the Act are to:

PROFILE	
Population:	2.1 million***
GDP (Current US\$):	11.9 billion**
Per Capita Income: (Current US\$)	2,667 (Atlas method)** 6,474 (at PPP)**
Surface Area:	827.3 thousand sq. km
Life Expectancy:	62.5 years***
Literacy (%):	94.9 (of ages 15 and above)**
HDI Rank:	120***
Sources: - World Bank Development Indicators Database, World Bank, 2011 - Human Development Report Statistics, UNDP (**) For the year 2010 (***) For the year 2011	

- promote the efficiency, adaptability and development of the Namibian economy;
- provide consumers with competitive prices and product choices;
- promote employment, and advance the social and economic welfare of Namibians;
- expand opportunities for Namibian participation in world markets whilst recognising the role of foreign competition in Namibia;
- ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and
- promote greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

Anticompetitive Business Practices

The Namibian Competition Act aims to remove or reduce the distorting effects resulting from:

- Collusive practices;
- Abuse of dominant position; and
- Anticompetitive mergers and acquisitions.

❖ Original paper written (2006-07) by John Ashipala. Updated in June 2012.

Restrictive Agreements, Practices and Decisions

Under the Competition Act, agreements and concerted practices between undertakings, that are considered to have the potential to restrict competition or considered detrimental to public interest, are prohibited. The Act prohibits the following conduct:

- Horizontal and vertical collusion;
- Market sharing;
- Collusive tendering;
- Price fixing;
- Minimum resale price maintenance; and
- Bid-rigging.

However, the Act does not prevent a supplier or producer from recommending a resale price, provided that the recommended price is not binding, and the words 'recommended price' appears next to the price. Although the Act covers all economic activities including the States' business engagement in trade and production, or distribution of goods and services, the jurisdiction of the competition policy is boundary restricted and, as such, unable to deal with regional or global strategies adopted by multinational corporations (MNCs).

Exceptions to the Act are collective bargaining activities concluded in terms of the Labour Act, 1992 (Act No. 6 of 1992); concerted conduct designed to achieve non-commercial socio-economic objectives, and goods and services, which the Minister, together with the commission, declare, by notice in the gazette, to be exempted from the provision of the Act.

Abuse of Dominant Position

The Act is meant to curb the behaviour of private enterprises inhibiting the proliferation of competitive market structures, and the efficient allocation of resources, thereby protecting public interest. The Act makes provision for the Minister, either in general or per specific industries, to determine a threshold of annual turnover or value of assets, below which an undertaking is not considered to be in a position of dominance. The Act defines abuse of dominant position to include:

- Direct or indirect imposition of selling prices;
- Restricting production, market access, investments and technical development;
- Applying different conditions to equivalent transactions with other trading parties; and
- Making the conclusion of a contract subject to the acceptance of supplementary conditions, which have no connection with the subject matter of the contract.

Mergers

The Competition Act defines 'a merger to occur when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking'. Thus, a merger entails an acquisition of control through purchase of shares, or assets of other undertakings, and through amalgamation with other undertakings. The Act prohibits all mergers,

which will substantially prevent or lessen competition or which are not justified on the grounds of public interest.

Currently, all mergers irrespective of size and likely impact on competition in the relevant markets are required to be notified to the Commission as there are no thresholds in place. This is accordingly as sub-optimal allocation of resources for the Commission. Not all mergers need to be notified to competition authorities since such a requirement adds a significant and unnecessary compliance burden for the business community, and an equally heavy burden for the Commission, which has to review all the notifications.

Section 43 of the Act provides for the prescription of merger notification thresholds where it indicates that Chapter 4 applies to every proposed merger not falling within a class which the Minister with the concurrence of the Competition Commission, has determined and specified by notice in the Gazette to be excluded from the provisions of the Chapter.

Parties to a proposed merger are required to give notice to the Competition Commission, which carries out an extensive investigation and then determine, within 30 days, by either approving or disapproving the merger. In this instance, the Competition Commission is required to give notice to the parties involved in the proposed merger, in writing and by notice in the Gazette. A merger can be approved with or without conditions or disapproved, based on:

- The extent to which the proposed merger would prevent, lessen or restrict competition;
- The extent to which the proposed merger would lead to any undertaking (either involved in the merger or not) acquiring a dominant position;
- The extent to which the benefits flow from the proposed merger, in the form of enhanced technical efficiency, increased production, efficient distribution of goods, and access to markets outweighing the negative effects of the merger;
- The extent to which the merger would affect a particular industry or region;
- The extent to which the proposed merger would affect employment;
- The extent to which the proposed merger will affect the ability of SMEs to become Competitive; and
- The extent to which the proposed merger will affect the ability of national industries to compete in international markets.

The Act provides the right, for the parties involved, to apply to the Minister to review the Commission's decision. If a merger is implemented in contravention of the provisions of the Act, the Commission may apply for an interdict restraining the parties to the merger from implementing the merger, to declare the agreement void or to impose a penalty. So far, only one case has been referred to the Minister for review, which is the case between Walmart and Massmart.

During the first year of the Commission's operation in 2009, the Mergers Division dealt with 12 applications, increasing to 26 in 2010 and peaking at 68 in 2011. It continues to receive applications for the current year, 2012, adding up to a total of more than 150 applications. Applications come from businesses in sectors ranging from Agriculture, Mining, Financial Services, Manufacturing, Health, Information and Communication Technology, Transport & Logistics, Tourism, Labour and Retail.

Exemption of Certain Restrictive Practices

The Act makes provisions for any undertaking to apply for an exemption from certain restrictive practices. Conditional or unconditional exemptions for agreements or practices may be granted to firms who apply if such an agreement or practice:

- promotes export;
- promotes small undertakings owned by previously disadvantaged persons;
- improves the production or distribution of goods; and
- promotes technical or economic progress in any industry designated by the Minister.

However, the Commission may revoke the exemption if it found out that the exemption was granted on materially incorrect information, that there has been significant change of circumstances since the exemption was granted, or if the condition upon which it was granted has not been complied with. The Competition Commission in December 2010 received one exemption application from the Law Society of Namibia. The Commission is in the process of reviewing this application.

Box 1: New Developments in Namibian Competition Law

The Namibian Government Gazette Nos 5107 of 2012 has given rise to two new developments in Namibian competition law.

- The Namibian competition authorities have finally published monetary merger notification thresholds, a decade after the coming into force of the relevant provisions of competition law. These thresholds should be borne in mind by any IP-owning business which seeks to absorb a competitor, and presumably by any joint venture vehicle to which the commercial operations of two or more enterprises are assigned.
- Secondly, criteria have been set out for determining a dominant position in the market: this is a precondition for establishing whether an abuse of dominant position has taken place. Given the ease with which the exercise of an intellectual property monopoly in a small economy where there are few or no competitors can be characterised as an abuse, IP proprietors and exclusive licensees should take care to check the new criteria out.

Source: <http://afro-ip.blogspot.in>, 13 December 2012

Sectoral Regulation

Prior to the enactment of the competition law, Namibia introduced different sectoral policies to regulate different industries. These sectoral policies are still in existence. At the moment, telecommunication, electricity, ports, railways, airlines, and airports are franchised monopolies.

Many of the regulators have been tasked with the function of competition regulation within their respective sectors. However, with the enforcement of the Competition Commission, which is tasked with competition regulation across all sectors of the country's economy, there has been duplication of this function. To counter this, the Competition Commission has been working on entering into Memoranda of Understanding (MoU) with these institutions to ensure that there is not a duplication of function or inconsistencies in how competition issues are dealt with. The Commission currently has an MoU in place with the regulator of commercial banks; Bank of Namibia (BoN), the Namibia Ports (NamPort) and is in the process of concluding such with other regulators.

Electricity Supply Industry

An independent electricity regulator, the Electricity Control Board (ECB), regulates the Electricity Supply Industry (ESI), in Namibia. The ECB was established under the Electricity Act (Act 2 of 2000), which came into effect in July 2000. The Act requires electricity undertakings to be licensed by the ECB.

The Electricity Act was introduced with the main objective of fostering competition in the generation, distribution and supply of electricity in a vertically integrated industry with monopolies within all segments of the ESI. Thus, the key functions of the electricity board are licensing, electricity pricing, standard setting and enforcing, consumer protection, mediation and dispute resolution, efficiency enforcement and electricity sector development planning.

The ESI restructuring study, carried out by the Government in 2000, found that there is a need to restructure the industry from a non-competitive, vertically integrated system to a more competitive structure. Thus, the ECB embarked upon the restructuring of the ESI, aimed at the creation of a Single Buyer market structure; the creation of Regional Electricity Distributors (REDs); and the introduction of a licensing system, which was approved by the cabinet in 2000.

The Act provides for the establishment of four REDs for the North, West, Central and Southern parts of Namibia, which will be opened up to private sector participation. However, the generation and transmission of electricity is still a monopoly of Nampower, the national electricity provider, whilst various players, including a number of regional and local authorities, carry out distribution.

Transport and Communication Industries

The Telecommunication industry has seen new changes mainly in the form of a new regulatory agency. The Namibian Communication Commission was dissolved in 2011 and a new regulator, the Communications Regulatory Authority of Namibia (CRAN), was established. CRAN was established through the Communications Act, Act No. 8 of 2009.

Telecom Namibia Limited is the national telecommunications operator, established in 1992, and wholly owned by the Government. Telecom Namibia was granted a monopoly licence for five years, with the objective of extending telecommunication services in Namibia to facilitate economic development. The purposes of the period of exclusivity are to allow Telecom Namibia to put up the network and prepare for competition.

Historically, telecommunication has been viewed as a natural monopoly, due to having a network of fixed lines. This means that, in a competitive environment, the service provider would engage in serving only the lucrative market and the areas that do not offer much profit may not receive telecommunication services, even though the community, as a whole, will benefit.

However, due to technological advancements, it has now been realised that not all telecom products are subject to the same cost conditions. This has created a number of close substitutes, which weaken natural monopolistic tendencies. The continued improvements in technology increase consumers' choice of the mode of communication, which further reduces the remaining monopoly power of telecom service providers. This has led to the restructuring of the sector and the introduction of sectoral regulations.

The White Paper on Transport Policy led to the commercialisation of a number of government activities. This led to the creation of the Namibia Airport Company in 1999, Road Contractor and Road Authority, and the Namibia Ports Authority (Namport, 1995). The rail network is owned by the Government and operated by TransNamib Limited.

Financial Sector

The banking sector in Namibia consists of four commercial banks namely; First national Bank, Standard Bank, NedBank and Bank Windhoek. As it is common with other SACU countries, the banking industry in Namibia is dominated by South African Banks. With the exception of Bank Windhoek which is the only Namibian owned bank, the other three Banks are all Namibians. Questions loom as to whether Bank Windhoek will remain the only Namibian Bank as it has filed an application with the Competition Commission for a merger between them and Barclays Bank UK.

The Banking Sector remains characterised with very little price and product competition with all banks offering more or less the same rates and products. The Central Reserve Bank of Namibia, the Bank of Namibia (BoN) remains the regulator of commercial banks prescribing. However, the size of the Namibian market limits the number of players in the banking sector. Therefore, effective competition is very difficult.

The regulation of non-banking financial institutions is done by Namibia Financial Institution Supervisory Authority (NAMFISA), which was established in 2000. Non-bank Financial institutions include Contractual Savings Institution (pension funds, long and short-term Insurance), Unit trusts, Cooperatives and Microfinance. Other government initiatives include the Namibian Development Cooperation, the National Housing Enterprise Development Fund of Namibia, Namibian Development Bank, etc.

Consumer Protection

Namibia still does not have a law on consumer Protection and hence consumers are still faced with unfair business practices from business in all retail sectors ranging from unfair stipulations in long term contract purchases to the purchase of defective foods and products. The cost of litigation is too high and hence consumers do not have much recourse

The Ministry of Trade and Industry together with the Law Reform and Development Commission have set in motion the process of drafting the consumer protection legislation. The policy will likely be guided by the United Nations' Consumer Guidelines on Consumer Protection and will cover the 8 basic consumer rights, namely:

- The right to satisfaction of basic needs
- The right to safety
- The right to be informed
- The right to choose
- The right to be heard
- The right to redress
- The right to consumer education
- The right to a healthy and sustainable environment

With increased competition and the consumer protection legislation to be enacted, consumers in Namibia will be able to enjoy protection from unfair business practices by many businesses in the country. In the mean while, institutions such as the Bank of Namibia the Competition Commission and Consumer Lobby groups in the country. The NaCC has regard for consumer issues when it comes to competitive pricing and product choice. Institutions such as NamFISA and others take the prerogative to educate consumers on issues in their respective industries.

Concluding Observations and Future Scenario

The Competition Act is a good starting point, however much work still needs to be done in order to achieve an effective competition regime in Namibia, which would enhance the growth and efficiency of national economy and consumer welfare. In particular, many legal provisions will have to be included or amended to address all competition issues and challenges according to specific needs emerging from implementation of the Competition Act, and to ensure that the Competition Act is easily enforceable.

Development of the legislation on Consumer Protection seems underway with the efforts by the Ministry of Trade and Industry to draft the policy and the Law Reform and Development Commission which is responsible for the legal framework.

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