

Competition Scenario in Namibia

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Supported by
Consumer Unity & Trust Society
(CUTS International)

August 2006

THE NAMIBIAN MAP

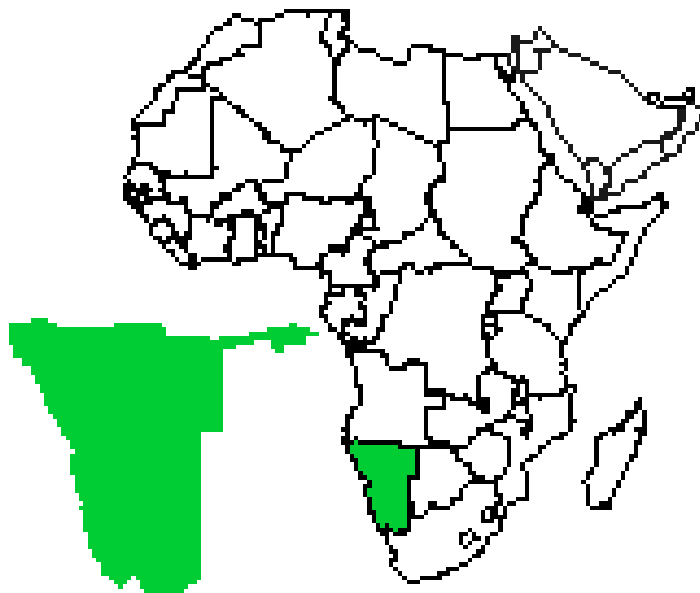


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List of abbreviations

ACPs	Anti-Competitive Practices
BLNS	Botswana, Lesotho, Namibia and Swaziland
CMA	Common Monetary Area
DMCP	Domestic Market Competitiveness programme
ECB	Electricity Control Board
EPZ	Export Processing Zone
ESI	Electricity Supply Industry
EU	European Union
FNB	First National Bank
FTA	Free Trade Area
GDP	Gross Domestic Product
ILO	International Labour Organisation
LDC	Least Developed Country
MFRC	Micro Finance Regulatory Council
mm	millimetres
MME	Ministry of Mines and Energy
MOU	Memorandum of Understanding
MTI	Ministry of trade and Industry
N\$	Namibian Dollar
NABTA	Namibia Buses and Taxi's Association
NAMFISA	Namibia Financial Institutions Supervisory Authority
NamPort	Namibia Ports Authority
NANGOF	Namibia Non-Governmental Organisation Forum
NCC	Namibia Communications Commission
NaCC	Namibia Competition Commission
NCL	Namibia Consumer Lobby
NDP	National Development Plan
NIC	Namibia Investment Centre
NPC	National Planning Commission
NEPRU	Namibia Economic Policy Research Unit
ODC	O FFSHORE Development Company
PWHC	PriceWaterHouseCoopers
RED	Regional Electricity Distributor
RTP	Restricted Trade Practice
SACU	Southern African Customs Union
SADCC	Southern African Development Coordinating Conference

SADC	Southern African Development Community
SME	Small and Medium Enterprise
SWAPO	South West Africa People's Organisation
TNDP	Transitional National Development Plan
UNCTAD	United Nations Conference on Trade and Development
US\$	United States Dollar
VAT	Value Added Tax
WTO	World Trade Organisation

1. Background

Namibia is situated on the south western coast of the African continent, alongside the Atlantic Ocean. The country shares borders with Angola in the north; with Zambia, Zimbabwe and Botswana to the northeast and east and with South Africa in the south. Namibia is one of the most sparsely populated countries in Africa, if not in the world, with a population of around 2.0 million people on the surface area of approximately 824,116 km², deriving a population density of just 2.4 persons per km².

The country is surrounded by two deserts, Kalahari in the east and Namib in the west, making it one of the most arid countries in the Sub-Saharan Africa, where average annual rainfall ranges between 300 mm to 700 mm. Despite low rainfall figures, many Namibians are still dependent on the agrarian activities (mostly subsistence farming) for their livelihood. Namibia is endowed with a lot of natural resources, making it an important exporter of diamonds, uranium, copper, other minerals, fish and fish products, beef, grapes, and benefits enormously from its tourism industry. The diamond mining sub-sector forms the core of the economy, accounting for about 10% of GDP and it provides raw materials for further processing, enhancing the country's value adding activities. With per capita income of about US\$1,810, Namibia is classified as low middle-income country.

Table 1: Socio-economic indicators: Namibia

Indicator	Value
Current GDP level (NPC 2006)	US\$6.0 billion
Average GDP growth (1995 – 2004)	3.9%
Per capita GDP (US\$ p.a.), 2005	1,810
Inflation (2003-2005, December 2001 = 100)	4.6%
Gini coefficient (preliminary survey 2003/2004)	0.60
Unemployment rate ¹ (Labour Force Survey 2000)	33.8%
Population (2005 estimate)	2.0 million
Population growth rate (1991 – 2001)	2.6%
Literacy rate (2002 estimate)	83.3%
Life expectancy (2002 estimate)	41.5 years

Germany occupied Namibia from the late 19th century (1883), until the end of World War I, following the signing of the Versailles treaty of 1919 in Paris, France. South Africa,

¹ Based on a broad or expanded definition of unemployment, which includes all non-working labour force, irrespective of whether they are looking for work or not. The strict definition yields 20.2%

acting on behalf of the British Empire, then took over the occupation of Namibia and administered it as a C-mandate² until after World War II, when it annexed the territory. In 1966 the South West Africa People's Organisation (SWAPO) launched a guerrilla war for independence of Namibia, setting up its military wing, the People's Liberation Army of Namibia (PLAN). The war was prolonged until in 1988, when South Africa finally agreed to end its administration in accordance with a UN peace plan for the entire country. Independence came in 1990 following multi-party elections and the establishment of a constitution. Since then, the country has experienced political stability, which came about through establishment of an independent judiciary, a representative parliament, a free press and a representative labour system among other ingredients of democracy.

2. National policies affecting competition

2.1. Development policy

After independence in 1990, Namibia devised its development strategy by formulating and implementing three consecutive development plans to date. These plans set out short-term to medium-term objectives and strategies for realising such objectives. The three development plans are the Transitional National Development Plan (TNDP), a three year plan that covered the period of 1991/92 to 1993/94; the First National Development Plan (NDP1), a medium-term plan that covered the period of 1995/96 to 1999/2000; and the Second National Development Plan (NDP2), another medium-term plan that covered the period of 2001/02 to 2005/06. NDP3 has been formulated to cover the period 2006/07 to 2009/10. Recently, a long-term development plan named Vision 2030 has been formulated. This long-term plan captures the aspirations and commitments of Namibians to strive for achieving growth sufficient to reduce maladies of poverty and underdevelopment, and ultimately to attain a developed country status by the year 2030. The first two development plans set four development objectives, which are to stimulate and sustain economic growth, creating employment; reducing inequalities in income distribution; and reducing poverty. Given the increasing importance of gender issues, the need to fight the spread of HIV/AIDS and other diseases, the second national development plan increased these objectives to nine. The country is now pursuing the following development objectives (NPC 2002:50):

- poverty reduction
- employment creation

² C-Mandate means that the Territory is to be administered under the laws of the mandatory power

- promoting economic empowerment
- stimulating and sustaining economic growth
- to reduce inequalities in income distribution
- to reduce regional (within Namibia) development inequalities
- to promote gender equality and equity
- to enhance environmental and ecological sustainability, and
- to combat the further spread of HIV/AIDS

Development policy objectives includes creating a competitive environment for efficient firms to flourish, but also other issues such as the promotion of small business and the welfare of historically disadvantaged persons, which are of social rather than economic nature. In overall, the development policy gives a picture of how various policies would be linked and compromised for a balanced development. For instance, economic empowerment objective distracts from competition due to the fact that the government is encouraging activities that support the poor, employ historically disadvantaged people rather than just considering efficiency alone.

2.2. Industry and Investment policies

At independence in 1990, the new Namibian Government started with an economy whose manufacturing sector's contribution to GDP was mere 4.3% (average annual contribution for 1980 –1988). This obviously needed to be changed. The first move towards enhancing manufacturing or value adding activity came in the form of an industrial strategy as set out in the white paper on Industrial Development of August 1992. The industrial policy as enshrined in the white paper embraces the following concepts (GRN 1992):

- The private sector as the leading economic actor;
- Government creating an enabling environment for the private sector, an environment in which the private sector should prosper but an internationally competitive environment;
- Government to create environment geared towards attracting foreign direct investment and to develop local capacity through education and training and fostering of entrepreneurial skills;
- Consistency in policy-making and implementation;
- Proper communication within Government as well as between Government and the private sector;
- Prevention of further creation of monopolies in Namibia, through exposing industry to import competition;
- Limited Government intervention in the market to situations where it is meant to control monopolies, based on non-economic factors and unfair competition, such as dumping;

- Increase value addition by stimulating exports and, where efficient, import substitution.

The Namibia Government has made the development of the manufacturing industry a cornerstone of its economic policy. One of the major tools for encouraging export of manufactured products is the setting up of the Export Processing Zone (EPZ) through the EPZ Act (Act no. 6 of 1995). The aim of the Government is to attract companies to EPZ regime for them to produce manufactured exports, as well as to encourage skills and technology transfers.

Enterprises that qualify for an EPZ status are those that undertake manufacturing, assembly, re-packaging and break-bulk operation and gear all or almost all of their production for export, earn foreign exchange and employ Namibians.

EPZ enterprises get tax benefits, whereby for an unlimited duration, they do not pay corporate tax, import tax, sales tax, stamp and transfer duties on goods and services required for EPZ activities.

Further incentives include being allowed to hold foreign currency accounts with local banks, enjoy industrial calm as no strikes or lock-out are allowed in the EPZ-regime, freedom to locate their operations anywhere in Namibia and having access to Government grants for training purposes.

The Namibian EPZ regime has attracted significant local and international interest, but the practical picture on the ground has been disappointing in terms of a number of companies, which have set up operations of economic significance. The positive aspect of this is that many firms to whom the EPZ status has been granted did not withdraw their investment out of the economy, but rather moved out of the EPZ to the main stream of the economy. This can be attributed to regional restrictions on importation (into regional countries) of products produced under the EPZ regime. It is often argued that Namibia provides too generous investment incentives, while the resulting quantity and quality of investment was far below expectations, or too low to justify incentives given. The Foreign Investment Act (Act no. 27 of 1990, amended in 1993) forms the foundation of Namibia's policy on foreign investment. This Act established the Namibian Investment Centre (NIC), which together with the Offshore Development Company are the official promoters and facilitators of investment in Namibia. The two are also key promoters of the EPZ regime and the general export-based industrialisation strategy of Namibia. They provide investor information, evaluate investment projects administer numerous investment incentives.

Manufacturing incentives are applicable to both existing and new manufacturers, in all sectors. Manufacturing activities include local value-addition in the form of processing of

Namibia's minerals, fish and agricultural products. Some of the incentives given to entrepreneurs who invest in manufacturing activities are listed below (NCCI 2005):

- Exemption from VAT on purchase and import of machinery and equipment;
- Factory buildings written off at 20% in the first year and the balance at 8% for 10 years;
- Export promotion allowance of 25% is deducted from taxable income;
- Additional deduction of incentives for training and production wages of between 25% and 75%;
- Deduction of 50% of cash grants for direct cost of approved export promotion activities;
- Corporate tax abatement of 50% for 5 years and phasing out of abatement over the following 10 years.

EPZ and investment policies have objectives to promote investment in the country, with some preference given to investments in manufacturing and export-oriented activities. This is to reduce economic dependency on other countries that have developed manufacturing capacities by attracting manufacturing firms, both from outside and within the country. The protection (in form of incentives) given is for specified periods, after which those firms are then expected to be ready to compete internationally. This process does compromise on competition during the period when new firms are protected, and in the medium to long-run, competition will be increased because you have more companies.

The white paper of 1992 has an objective to avoid the creation of further monopolies. The maintenance of existing State-Owned monopolies can however be viewed as the way to promote national champions. Most of these companies continue to depend on state bail-outs, while those that are self-sufficient in funding their operations have generally failed to improve efficiency e.g. the service charges by Telecom Namibia were recently rated to be second highest in a sample of Sub-Saharan African countries.

2.3. Trade policy

Namibia does not have a written trade policy or Act. Unwritten trade policy is anchored on four key elements:

- WTO requirements/obligations
- SACU Agreement
- Diversification of exports away from primary to manufactured products, and
- Diversification of export destinations, reaching preferential trading arrangements both at bilateral and multilateral levels to increase market access, and to boost its participation in regional trading blocks as a way to promote greater economic development.

As a member of the WTO, Namibia is committed to facilitate global trade through progressive reductions in all kinds of trade-restricting practices. In this context, the Government has undertaken to minimise domestic support by privatising support services such as tractor and seed provisions.

The Southern African Customs Union (SACU) members Botswana, Lesotho, Namibia, Swaziland and South Africa have a system of a common external tariff. SACU Agreement has recently been renegotiated, with key elements being revised and given new focus in light of the need to allow BLNS countries greater say in the determination and administration of SACU tariffs. It is through SACU that Namibia has secured bigger markets i.e. mostly South African market, which allows Namibian industrial planners and business to plan for the wider regional market.

The SADC Trade Protocol calls for the removal of all intra-regional tariffs, but does not cover the liberalisation of trade with non-SADC countries. The protocol significantly allows for special treatment for "sensitive products" (in agriculture and manufacturing), by allowing tariff reductions in these sectors to move at a slower pace than the rest. Under the accord, SADC countries would phase out tariffs on all "non-sensitive" products by 2008, and by 2012 the grouping expects fully liberalised trade. The implementation of the SADC agreement has been delayed since the year 2000 while negotiators continued to discuss the thorny issue of market access to South African markets, the regional economic powerhouse.

A couple of Namibian products benefit from preferential access under the Cotonou Agreement. As a result of the preferences under this trade pact, a select of Namibian exports enter the EU market duty free. These include an annual duty free quota for beef to the tune of 13,000 tonnes under the Cotonou agreement. Exceeding the quota means that you should be paying escalating tariffs depending on the excess tonnage. According to the Meat Board of Namibia, the country's annual production of beef amounts to some 100,000 tonnes of which approximately 80% is exported (Meat Board of Namibia 2005). Namibia also faces an export quota for seeded grapes, whereby the country is allowed to export seeded grapes to the EU market up to 900 tonnes per annum, which is also below the country's annual grape exports capacity. This is not a completely quantitative restriction because Namibia can export more than 900 tonnes per year to the EU market, but at escalating tariff rates. Namibia is said to be currently exporting grapes to EU in the range of 12,000 tonnes per annum. South Africa, Namibia's main trading partner, faces lower duties because of its Trade and Development Cooperation Agreement (TDCA) that it has signed with the EU, and this has some negative impacts on Namibia's competitiveness.

Namibia itself employs various barriers to trade. Trade barriers refer to measures undertaken by Governments to impact positively on local production capacity, especially manufacturing, increase Government Revenue and improve the balance of payments. One can say that in most cases, trade restrictive measures are introduced to restrict competing imports, thereby increasing local manufacturing capacity. The other two effects (on

Government Revenue and balance of payments) are consequences, and not the primary purpose for which such measures are taken in the first instance. The famous infant-industry argument is both the theoretical and policy rationale for trade barriers. Both developed and developing countries use export subsidies as a way to promote exports. In the case of Namibia, there are no direct export subsidies. What would be equivalent to export subsidies are manufacturing incentives for industrial development, especially in the EPZ regime.

Many countries, including the popular Asian tigers had import-substituting policies during earlier stages of development, but they did not constitute the overall thrust of their economic industrialisation strategies. In the case of Namibia, there are some trade barriers, but the overall policy focus is more outward-oriented.

2.3.1. Tariffs on imports

Namibia has a set of common external tariffs with the rest of its SACU partners. Inputs of capital and products, which are not manufactured and which do not have substitutes in SACU, bear a zero rate. On the other hand, manufactured goods, or goods with substitutes in SACU generally bear relatively higher tariff rates.

2.3.2. Namibia Agronomic Board

Namibia Agronomic Board issues import licences as per Agronomic Industry Act (Act no. 20 of 1992). There is a number of trade restrictions, amongst them are on pasta (macaroni), milk and maize. In the case of pasta and milk, import levies are applied as a way to protect infant industries in Namibia as it has been provided for within the SACU framework. Despite the existence of the infant industry, South African producers do sell these products on Namibian markets, some times at lower prices than those supplied by domestic producers. Claims from the milk industry for instance alleges that, some of the imported milk is sold at lower prices in Namibia than where it is produced and this may well constitute predatory pricing. Trade restrictions on white maize are in form of temporary border closures for imports (until domestic supplies are depleted) and are basically to protect Namibian producers with the view to develop the domestic industry. The Board tries to ensure that local millers or processors use up Namibian produce before reverting to importing when necessary, and this is accomplished through occasional border closures for imports, accompanied by a floor price. The floor price is determined by considering a 5-year average price for the same product in South Africa, recorded by the South African Futures Exchange (SAFEX), transport margins and other issues.

This is good for the purposes on developing domestic industries as producers get guarantees that they will sell their produce and get at least the floor price. On the other hand, the arrangement represents reduced consumer choices and the floor price may work to suppress consumers especially considering that this is being applied on one of basic necessities. Another tool in place to promote domestic industry is the recently introduced Namibian market share promotion for fresh produce, whereby any business trading in horticultural products in Namibia is required to acquire at least 12.5% of its total supply from within Namibia. This requirement is revised each quarter and is set to be raised to 15% soon. So, there are entry barriers by tariff, temporary border closures and other conditions, but not by complete refusal. Besides the case of maize, whereby borders are closed, failure to adhere to these requirements for other products such as fruit may mean that you don't get an import permit for the next season. The plight of small and remote traders who find it difficult to source any supplies from the domestic market is under stress.

There are some policy areas that are likely to lead to stagnation rather than industrial growth in horticulture. One being due to the fact that a levy (to generate revenue for the functioning of the board) is imposed on domestic supply and not on exports, and this leads to producers to target the export markets rather than the domestic market, despite the fact that the country is a net importer of horticultural products.

2.3.3. Meat Board of Namibia

The Meat Industry Act (Act no. 12 of 1981) established the Meat Board of Namibia, among other things, to monitor and control imports and exports of livestock, meat and meat products by means of issuing import and export permits and by conducting inspections at border posts. In essence, this system is not trade restrictive, but is rather meant to, and works to record and manage trade in livestock, meat and meat products. The application of the Act focuses on the monitoring aspect. What is important for the Board is to ensure that health standards are maintained, and if importers do not comply, the Board restricts the import of the product under consideration.

There is also a domestic industry promotion component, which is monitored through the application of levies and other requirements. There is for instance a levy on the exportation of raw hides and skins, and to export small stock on hoof, you are required to provide proof that you have slaughtered the same in Namibia. These are non-tariff barriers, which are perfectly legal within the WTO as well as SACU framework.

2.3.4. Exchange controls

Exchange controls are often used to improve the current account of the Balance of Payments and at the same time, to give required protection to infant industry. As a member of the Common Monetary Area (CMA), Namibia is bound by the provisions of the Agreement to maintain exchange controls as long as it is necessary. However, with the political transition of 1994 in South Africa, and the coming in force of the WTO agreement in 1995, South African authorities moved to liberalise their trade regime.

In Namibia, the Ministry of Finance has delegated all exchange control powers, functions and duties to the Bank of Namibia, which in turn, delegated some of the exchange control functions and powers to authorised dealers, which are the country's four commercial banks (i.e. Bank Windhoek, Nedbank, First National Bank and Standard Bank). Exchange Control in Namibia is used both to discipline the local demand for foreign currency in order to stabilise the official foreign currency reserves of the country and to allocate available foreign currency in the best interest of the country as a whole (<http://www.bon.com.na/content/excon>). Restrictions on trading of foreign exchange are not that intense because limits are quite high. The equivalent amounts of foreign exchange allowed are N\$130 000 per person of 12 years or older and N\$40 000 per child under the age of 12 years for calendar year. Limits are even higher for things like study allowances and alike (Namibweb.com).

The Bank of Namibia can also be approached on a case-by-case basis through authorised dealers where the transaction, or its amount, does not fall within the general mandate given by Bank of Namibia to the authorised dealers.

2.3.5. Import/Export Licensing

Import licences are required as per existing laws for all imports outside SACU trading zone. According to officials of the Ministry of Trade and Industry, the function of the import licensing section is basically to record and manage imports into the country. There are however specific groups of products requiring import permits, of which the following products are not granted automatically: medical and related substances, chemicals, frozen, chilled fish and meat (including game), live animal and genetic materials, controlled agronomic products (maize, wheat, and dairy products), pornographic materials, controlled petroleum products, firearms and explosives, diamond, gold and other minerals, coins and all second hand and used goods such as cloths and vehicles.

In the case of exports, the following specific groups of products require export permits, and are also not automatically granted: medical and related substances, live animals and genetic materials, all ostrich breeding materials (eggs, chickens and birds), meat and game

products, protected species (fauna and flora), plants and plant products, propagating materials, firearms, explosives, diamonds, gold and other minerals, coins and bank notes, works of art which had been in Namibia for more than 50 years, national monuments and archaeological findings.

2.4. SME policy

The national policy and programme on small business development was launched in 1997, with main objectives of promoting employment, reducing poverty and inequality, increasing growth and economic diversification. This is believed to be the sector in which previously disadvantaged persons have the greatest chance of making an impact through effective participation. Five programmes have been devised to realise these objectives. These are:

- access to finance;
- development of markets for SME products;
- provision of information on input sources and the promotion of group purchasing schemes;
- development of sites and premises; and
- provision of support training in the form of mentoring and after-care services.

The policy was reviewed in 2004 and is in the process of being revised to address current challenges within the SME sector. The Small Business Credit Guarantee scheme is in place, while the Namibia Chamber of Commerce and Industry, together with the Ministry of Trade and Industry (MTI) provide advice and other necessary services to SME's. The prevalence of SMEs means that there are more participants in the market and consumers are presented with wider product choices, especially in instances where SMEs are involved in manufacturing activities. The small size of SMEs is usually compensated by public infrastructural facilities (at affordable terms in most cases), training and advance services provided in order to make them competitive. In practice, it is almost impossible to boost competition in technical sectors like financial services and telecommunication through SME policy. The GDP contribution by the SME sector is around 11% and the sector is a very important source of employment. The promotion of SME activities may distract competition in the short-run because of incentives given and because bigger firms whose activities have positive effects on SME development are given preference in the Government tender system, but in the long run that is how domestic industries and employment is created and competition is increased.

2.5. Labour and Employment policies

The Ministry of Labour and Manpower (now the Ministry of Labour and Social Welfare) was established immediately after independence in 1990. Through this ministry, the Government enacted policies and legislation aimed at furthering labour relations, in consistency with other national development goals i.e. growth, employment etc. This includes policies and legislation to:

- advance persons who have been disadvantaged by past discriminatory laws and practices;
- ensure equality of opportunity for women, particularly in relation to remuneration;
- provide maternity leave and employment security for women;
- promote sound labour relations and fair employment practices by encouraging freedom of association by way of, *inter alia*, the formation of trade unions to protect workers' rights and interests, and to promote the formation of employers' organisations;
- lay down certain obligatory minimum basic conditions of service for all employees;
- ensure the protection of the health, safety and welfare of people at work and to prevent the abuse of child labour;
- where possible, adhere and give effect to international labour conventions and recommendations of the ILO.

Having multiple national goals and objectives means that the nation needs to optimise and compromise based on priorities given to various development objectives. Competition and competitiveness are essential to attain economic development through national and international trade. Since the *self-interest principle* may not always achieve a desirable distributional outcome, the Government may need to use other mechanisms to re-allocated resources based on other criteria, rather than on allocative efficiency. In most cases, these criteria are based on the achievement of equity e.g. Namibia has mechanisms (including labour policy and legislation) to correct income imbalances from the past.

2.5.1. The Labour Act

The Labour Act of 1992 established the Labour Advisory Council, labour courts and set out basic conditions of employment, including maximum working hours, overtime, annual, sick, and maternity leave. It regulates the termination of contracts, unfair disciplinary actions, trade unions, employers' organisations and collective agreements. Though information about its actual coverage is not available, it can be assumed that it is limited to regulating employment in the formal sector. The ability of the ministry to enforce the act is also limited due to a small number of Labour inspectors (Nielsen and Hansohm, 2003).

The office of the Labour Commissioner was enacted through the act of parliament in 1992. This is a neutral office whose main functions include providing advice on labour issues and mediation in conflicts. The 1992 labour Act was replaced by the 2004 Labour Act. The latest analyses and comparisons of the old and the new Act's indicated that the new legislation is bound to increase costs of labour and possibly hamper production and growth (Lejonhud & Haimbodi 2005:iii). This is mainly due to increased annual leave days, introduction of compassionate leave, increased allowances for maternity leave and other provisions. Having too generous working conditions would mean high business operation costs and local firms will be therefore less competitive internationally. Concerted agreements reached in terms of the labour Act are exempted from the competition law (GRN 2003, section 3(1)). The Government is again reviewing the labour Act 2004.

2.5.2. The Social Security Act

The Social Security Act (34 of 1994) requires that every employer and employee to be registered. Every employer registered is entitled to maternity leave, sick leave, and the death benefit fund.

The system provides for the protection against economic and social distress that may be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, injury, unemployment, invalidity, old age and death. The social security system also provides for medical care, and subsidies for destitute families.

Section 20 of the Act stipulates that employers whose employees are younger than 65 years and who work for more than two days a week, must register with the Social Security Commission as an employer and must register all their employees. A self-employed person who does not employ any person may voluntarily register himself or herself as an employer and employee. The Commission issues a Certificate of Registration to each registered employer, and a Social Security Card to each employee upon registration. Membership contributions include an N\$10.00 registration fee for each employer/employee and monthly contributions determined as 0.9% of monthly salary, but these cannot be less than N\$2.70 or more than N\$27.00.

2.5.3. Employment policy

The National employment policy was formulated in 1997, with the following objectives:

- To develop and transform the economy in order to achieve a high rate of growth of per capita GDP;
- To create adequate jobs to absorb the annual entrants to the labour market and to reduce the inherited high levels of unemployment and underemployment, and;

- To promote the protection of the working population.

It is also notable that the various policy objectives are not prioritised, nor are any potential conflicts among them accounted for. Most importantly, however, it needs to be noted that the 1997 Employment Policy is not in fact a reference point for the actual policy making process (Nielsen and Hansohm 2003).

2.5.4. Affirmative action

The Affirmative Action [Employment] Act, 1998 was enacted with the aim of achieving equal opportunity in employment in accordance with Articles 10 and 23 of the Namibian constitution. The main focus of the Act is to enforce equality and fair treatment of all persons when it comes to employment issues. It requires that previously disadvantaged persons, persons with disabilities and women enjoy equal employment opportunities and conditions. The Act established the Employment Equity Commission to enforce affirmative action plan. In fact, preferential treatment has to be given to suitably qualified nationals.

The overall labour policy and regulatory framework is flexible and even more so in some areas such as EPZ where industrial strikes and black-outs are not allowed.

Labour Hire Companies provide labourers to those firms that choose to outsource personnel services. By using this system, firms can avoid having to go through rigidities associated with firing workers and can be more flexible in hiring labourers for seasonal jobs without much commitments. This system has however featured in recent national discussions because to its alleged exploitative nature when it comes to the welfare of labourers and this highlights the weaknesses in supervision of Labour Hire companies by labour inspectors.

This system has a potential to constitute unfair competition if competing firms operate under different labour conditions, some having to pay worker benefits, some not. International experience however shows that in the long-run, worker motivation that is achieved through incentives and job security leads to high productivity, implying that firms are likely to go back to employ full-time workers rather than having all of them switching to the labour hire system.

3. Market structures, competition and economic regulation in select sectors

3.1. The Nature of Namibian Markets

The Namibian economy is closely linked with the South African economy, the former colonial power.

Firstly, Namibia has a limited monetary autonomy as it mainly relies on Common Monetary Area's (CMA) for monetary policy, practically done by South Africa who is the dominant member. Other CMA members are Lesotho and Swaziland. All other CMA currencies are also pegged one-to-one with the South African Rand.

Secondly, most of big firms in Namibia are subsidiaries of South Africa based firms. Finally, Namibia sources over 80% of its imports from South Africa, even though some imports originating from other regional countries 'are believed to be mistakenly recorded' as from South Africa as they pass through the country.

Namibia has a small open economy, heavily dependent on trade, with a trade to GDP ratio in the range of 95% to 106% between 1996 and 2005. Despite having low population, Namibia offers significant market opportunities because of high per capita income, when compared with the rest of the region or continent, but a skewed distribution of income makes the markets less attractive. Most of markets are fairly competitive, for instance the retail industry has attracted a lot of big retailers with shops in major towns. In most instances, competition is becoming limited to those big firms as smaller local firms are forced out of the markets.

One challenge when it comes to promoting competition in Namibia is the business ownership composition, where you have operators in some sectors owned by more or less the same shareholders. Private business managers strive for the goals that maximise the interests of their principals – the shareholders and competition may not be in the interests of shareholders. To increase competition in such sectors, one needs to have new firms from different markets, and with different ownerships and that is a problem for Namibia.

Good examples are in finance and furniture retailing industries. In the retail industry for instance, there seems to be many firms in the sub-sector, but all of these firms (except one) belong to two holding companies.

Namibia has several monopolies, some of which are considered to be natural monopolies based on infrastructure requirements and the necessity of products they produce and supply to the nation. These include the main three regulated monopolies, which are the

telecommunications company (Telecom Namibia), Power Utility company (NamPower) and the Water utility company (NamWater). Plans have been in place to liberalise the telecommunication industry (not much has been said about other sectors) and it looks like it will take a long time before it can happen.

One major barrier to entry is a natural one, which is also common for many developing economies - the shortage of necessary skills. The commercial banking sector is, for instance alleged to charge high handling fees especially when compared to those in other developing countries. The limit to local skills and infrastructure requirements however make it impossible for the creation of new competitors for any of existing firms in these technical industries such as finance, telecommunications, power etc.

3.2. The financial sector

The Bank of Namibia Act, 1997 (Act 15 of 1997) made provision for the establishment of the Bank of Namibia (the Central Bank) to serve as the state's principal instrument in performing the basic functions of the central bank, including the regulation of the commercial banking sector. The financial sector is very crucial to the economy as it provides finance for industrial development and economic growth. Namibia's financial sector consists of four commercial banks and many non-banking financial institutions. Recent analyses have found oligopolistic competition in the commercial banking, with limited price competition.

The commercial banking sector in Namibia consists of four commercial banks, an investment bank and a savings bank. The commercial banks are First National Bank (FNB), Standard Bank (STB), Bank Windhoek and Nedbank. Three of the four banks are branches of South African banks. One of the smaller local banks was recently created, called the City Savings and Investment Bank (CSIB), but it did not last for long. CSIB was fully Namibian owned and was first taken over by the Building Society Company – SWABOU, to form a subsidiary called the SWABOU Bank, which later merged with FNB, the largest commercial bank. The case of CSIB illustrates the point that it is difficult for smaller institutions to enter the financial sector.

There are clear indications that there is no real price or product competition in the Namibia's banking sector. FNB and Standard Bank hold about 62% of total assets and receive about 60% of total deposits and loans (Ashipala 2004:7). The ownership composition in the commercial banking is possibly one the obstacles to competition. Competition is however increasingly coming from micro lenders and NamPost bank and the Agricultural Bank.

The non-banking financial sector is regulated by, and are registered with the Namibia Financial Institution Supervisory Authority (NAMFISA), which was established in terms of NAMFISA Act, 2001 (Act no. 3 of 2001). NAMFISA operates under the Ministry of Finance and it has an agreement with its South African counterpart, the Micro Finance Regulatory Council (MFRC). This sector comprises of Contractual Savings Institutions (Pension funds, Long-term and short-term Insurance), Unit trusts, Cooperatives and Micro finance lenders. The non-banking financial sub-sector is also not competitive - at least three biggest institutions dominate the market. Jonathan Andongo and Christoph Stork (2005) made use of the Herfindahl-Hirschman Index and found an oligopolistic market structure for Namibia's banking sector. Their policy brief also found that the size of the banking industry increased by more than 100% between 1997 and 2003, measured in terms of total assets. This growth is mainly attributed to four factors:

- Increased demand for banking services due an increasing numbers income earners as historical inequalities continued to be addressed;
- Establishment of new branches in under-banked parts of the country (expansion of local banks);
- Domestic and cross-border mergers and acquisitions leading to economies of scale; and
- Increased competition from non-banking financial institutions such as pension funds and insurance companies.

One can however argue that there have been no significant mergers and acquisitions that might have led to economies of scale in Namibia's banking sector. Small banks, which have been taken over by larger banks may have had no major influence on the overall sector at the first place.

3.3. The electricity sector

Of the first attempts to address the challenges and inefficiencies in the Namibia's Electricity Supply Industry (ESI) was the Cabinet decision in 1997 to instruct the Ministry of Mines and Energy (MME) to launch an in-depth investigation into the ESI.

The main objective of the study was to make recommendations on possible future structures, which would enable the ESI to continue being the engine for economic development and prosperity in Namibia in an effective and efficient manner. The White Paper on Energy Policy, released by the MME in May 1998, gave further guidance to the restructuring exercise.

The Electricity Act, 2000 (Act no. 2 of 2000), which came into effect in July 2000 made provision for the establishment of the Electricity Control Board (ECB) to regulate the ESI in Namibia. This Act requires electricity undertakings to be licensed by the ECB, with the

main objective to foster competition in generation, transmission and distribution of electricity in Namibia. Thus, the key functions of the ECB are licensing, electricity pricing, standard setting, consumer protection, mediation and dispute resolution, efficiency enforcement and electricity sector development planning (Ashipala 2004:6).

Round three of the ESI restructuring study carried out by 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 (SAD ELEC 2000). Thus the ECB embarked upon the restructuring of the ESI aimed at the creation of a single buyer market structure, creation of Regional Electricity Distributors (REDs) and introduction of a licensing system, which was approved by cabinet in 2000 (Ashipala 2004:6). In addition to the provision for the establishment of the ECB, the Act also provided for the establishment of four REDs for the North, West, Central and Southern Namibia, which will be opened up for the private sector participation. However, the generation and transmission of electricity is still a monopoly of NamPower, the national electricity provider, while distribution is done by various players, including a number of regional and local authorities. The creation of REDs, which are monopolies (currently fully owned by the state) is likely to increase costs as they are not competing, but they may fulfil the social function of cross-subsidisation of poor local authorities.

3.4. The telecommunications sector

As part of the transition from the pre-independence institutions, the Department of Posts and Telecommunications was dissolved in 1992, and replaced by Telecom Namibia and NamPost. Telecom Namibia, which is a state owned enterprise, was granted a full monopoly over all basic telecommunications services. The telecommunication industry, which has long been scheduled to be fully liberalised by the year 2004, is regulated by the Namibia Communications Commission (NCC) created in 1992, as a quasi-independent regulatory body.

Telecom Namibia was granted a monopoly license for five years with the objective of extending telecommunication services in Namibia to facilitate economic development. The plan was to grant telecom Namibia a monopoly status over all basic communication services for the period of 5 years, while building necessary infrastructures and preparing for deregulation after such period. Once competition is introduced, the NCC would ensure that competition is taking place on fair and equitable terms (Ashipala 2004:6).

In realistic terms, telecommunications seem to constitute natural monopolies, being having fixed lines and having to provide some of their services based on social rather than economic reasons. For most of poor localities in rural areas where people's willingness to

pay is too low, no private firm may be in the position to supply such necessary services on a competitive basis. This is in itself a market failure or a missing market situation. It is in that light, that Governments assume their responsibility of providing social goods. Due to fast changing technology, with increasing mobile telecommunication networks, it has now been realised that telecommunication products are not subject to the same cost conditions. This has created a number of close substitutes, which weaken the natural monopoly and increasing consumer choice, although the mobile communication service provider (Mobile Telecommunications Limited or MTC) is still using infrastructures of the Telecom Namibia. The mobile telecommunication services has improved since the establishment of MTC in 1995 (Telecom Namibia and MTC are owned by one holding company belonging to the state) and it is effectively competing with Telecom in call services. The cabinet has recently approved the licensing of the second mobile network operator and this is expected to increase competition and efficiency in the sector once the new company enters the market.

3.5. The transport sector

In the transport sector, the white paper on transport policy (of June 1995) led to the commercialisation of a number of Government activities. This led to the creation of State Owned Enterprises (SOEs) also called Parastatals, in the sector. These include Namibia Airport Company and Namibia Ports Authority in the airports sub-sector, the Roads Contractors Company, Roads Authority and Road Fund Administration in the road sub-sector. The rail network is owned by Government and operated by TransNamib Limited, also a Parastatal.

Probably the most important form of transport to the nation is road transport. Namibia has a fairly competitive, but regulated public transport sector, which consists of short-distance taxis and long distance taxis. All taxis are regulated by the Ministry of Works Transport and communications (MWTC), as well as by Local Authorities. Most of Taxi operators are members of the Namibia Bus and Taxi Association (NABTA), but membership to NABTA is not compulsory. NABTA consults with the MWTC and local authorities when setting or changing transportation prices.

The only monopoly is in the rail transport whereby it is believed that the market is too small to justify having more than one operator. Transport operators that provide international air and road transport do operate in the country, but only on certain routes.

4. Competition Policy and Law

4.1. The global context

Empirical data and experience suggest that economies with greater competition are better able to withstand economic shocks, and have higher levels and rates of growth in per capita GDP (World Bank 2005). This means that trade liberalisation, promotion of inward foreign direct investment and encouraging entrepreneurship are profound ways of increasing competition in the domestic market and thereby growth.

Governments often use two basic instruments to enforce a competitive business environment: The competition law and competition authorities. Competition institutions, objectives and enforcement mechanisms do vary across countries, but authorities share core objectives of avoiding anti-competitive business practices, trying to enforce competition in markets where it does not exist or is weak and scrutinise new regulations to ensure that they do not induce anti-competitive behaviour in the market. Competition authorities are usually established under competition law. An effective competition policy fosters a flexible, dynamic, and competitive private sector that leads to sustained and widely shared economic development (World Bank 2005). The theoretical rationale of competition policy is to circumvent or deal with market failures resulting from the prevalence of un-competitive market structures and externalities. The emphasis of competition policy is however on market failure arising from abuse of market power (Ashipala 2004:1).

On the global competition issues, reference can be made to the United Nations set of principles and rules on competition. In 1980, the United Nations Conference on Restrictive Business Practices adopted the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices, which were approved by the UN General Assembly during the same year. These principles recognised the importance in international trade and development, of competition and consumer welfare especially relevant for the development needs of developing countries. As such, these are general principles, mainly to provide guidance with respect to the formulation of national, regional or international competition policies. The abridged set of these principles and rules are as below (adopted from UNCTAD 2000):

1. *Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of those countries;*

2. *Collaboration between Government at bilateral and multilateral levels should be established, and where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices;*
3. *Appropriate mechanisms should be devised at the international level and/or the use of existing international machinery improved to facilitate exchange and dissemination of information among Governments with respect to restrictive business practices;*
4. *Appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices;*
5. *The provision of the principles and rules should not be construed as justifying conduct by enterprises which is unlawful under applicable national or regional legislation;*
6. *The extent to which conduct of enterprises is acceptable under applicable legislation should be taken into account;*
7. *Developed countries should take into account, in their control of restrictive business practices, the development, financial and trade needs of developing countries, particularly the LDCs.*

Since the adoption in 1980, this set of principles and rules has been reviewed three times under the auspices of UNCTAD – in 1985, 1990 and in 2000. The last review (November 2005) adopted a resolution reaffirming the validity of this set of principles and rules as “UN Set of Principles and Rules on Competition”, and called on all member states to implement the provisions of the Set.

4.2. The Namibian competition law

Before independence in 1990, competition issues in Namibia have been regulated by the Regulation of Monopolistic Conditions Amendment Act, 1955 (Act 24 of 1955) and its Amendment versions of 1958, 1975 and 1976. Section 9A of this Act states: ‘*This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel*’ (Legal Assistance Centre, Namlex). This Act was then replaced in South Africa by the Maintenance and Promotion of Competition Act 96 of 1979, which was not made applicable to Namibia. After independence, the Regulation of Monopolistic Conditions Amendment Act was then repealed by the Namibia Competition Act (Act no. 2 of 2003), which is yet to come into force as of now. This Competition Act made provisions for the establishment of the Namibian Competition Commission (NaCC) to implement the Act.

As part of its endeavours to enhance efficiency in the allocation of resources and protecting public interest, the Act set the following specific objectives:

- To promote the efficiency, adaptability and development of the Namibian economy;

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

GRN 2003 (Act no. 2 of 2003, section 2)

The Act applies to all economic activity in Namibia, or having an effect on Namibia, except the following:

- Collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 1992 (Act no. 6 of 1992);
- Concerted conduct designed to achieve a non-commercial socio-economic objective; and
- In relation to goods or services, which the Minister of Trade and Industry, with the concurrence of the NaCC, declares by notice in the *Government Gazette*, to be exempt from the provisions of this Act.

Furthermore, the Act binds the state, when the state engages in trade or business for production, supply or distribution of goods or provision of any service, but the state is not subject to any provision relating to criminal liability. The Act applies to activities of statutory bodies, except in cases when such activities are authorised by the any law. *GRN 2003 (Act no. 2 of 2003, section 3)*

4.3. Independence, capacity and powers of the NaCC

For effective implementation of the competition law, competition authorities need to be independent, having the capacity (authority and resources) to carry out their functions effectively. Hartzenberg (2003:3) argued that it is necessary that the NaCC is independent from the MTI in a sense, for the NaCC to get its funding from somewhere else rather than directly from MTI. Furthermore, the NaCC needs to have adequate human and financial resources, which will enable it to carry out proper research and investigations in order to make sound and informed decisions. From the outset, the Act established the NaCC to be:

- having jurisdiction throughout Namibia;
- independent and subject only to the Namibian constitution and the law; and
- that must be impartial, and must perform its functions without fear, favour or prejudice.

The NaCC is allowed to collaborate or cooperated with its counterparts from other countries on competition related issues. Section 5 (2) of the Act obliges the Minister of Trade and Industry to appoint persons, who are in the opinion of the said Minister, have expertise in industry, commerce, economics, law, accountancy, public administration or consumer affairs. The current situation is that consumers are not represented in various economic decision-making platforms due to the absence of active consumer forums or lobbies in the country. MTI is reportedly in the process of developing parameters to facilitate the establishment of a consumer forum. One would feel that the NaCC is not that independent from political influence based on the fact that one or two Government officials determine the terms rather than the whole parliament or cabinet:

- NaCC members are appointed (and re-appointed) by the Minister of Trade and Industry for a term of 3 years with a possible re-appointment for the second consecutive term;
- NaCC members are remunerated as the Minister of Trade and Industry, with the concurrence of the Minister of Finance, may determine;
- Key decisions by the NaCC require the approval or concurrence of the Minister of Trade and Industry.

Some of the powers of the NaCC, some with the approval of the Minister of Trade and Industry are as below:

- prescribe procedures to be followed in respect of applications and notices to, and proceedings of, the commission;
- prescribe fees to be paid for the purposes of the competition Act;
- prescribing the procedures for investigations under the competition Act;
- prescribing the requirements for the small undertaking;
- NaCC Inspectors have powers to enter and search any premises in the course of their duties;
- to search any person or premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation;
- make extracts from, or make copies of any book or document found on the premises that has a bearing on the investigation;
- use any computer system on the premises, or require assistance of any person on the premises to use that computer system, in the course of their investigation.

GRN 2003 (Act no. 2 of 2003, sections 22 and 34)

4.4. Restrictive Business Practices

The rationale for the competition law derives from the need to achieve the best possible efficient allocation of resources in the economy. That is, the resource allocation that is

most beneficial to both producers and consumers taken together. The underlying objective of the Namibian competition policy is to restrict distortionary effects resulting from:

- collusive practices
- abuse of Dominant position
- mergers

4.4.1. Prohibited collusive practices

The theory of competition policy argues that some form of policy intervention is needed to monitor monopolistic behaviour when buyers are numerous and sellers are few due to economies of scale (Ashipala 2004:2). The Namibian competition Act prohibits practices and arrangements between undertakings that are considered anti-competitive, and thereby detrimental to public interest. The Act prohibits the following conducts:

- horizontal and vertical collusion,
- market sharing,
- collusive tendering
- price fixing,
- minimum resale price maintenance and
- bid-rigging.

More exceptions are again made within the Act to promote national socio-economic development goals. This means that the competition Act is applied in consistency with many other policies and Act's. In this regard, its coverage is limited e.g. it cannot regulate matters agreed under a collective bargaining in terms of the Labour Act, 1992 (Act No. 6 of 1992), concerted conduct designed to achieve non-commercial socio-economic objective and goods and services which the Minister together with the commission declare by notice in the gazette to be excepted from the provision of the Act. In addition, it does not prevent a supplier or producer from recommending a resale price provided that the recommended price is not bidding and the words recommended price appears next to the price.

Furthermore, the Act makes provision for any undertaking to apply for an exemption from certain restricted practices. Conditional or unconditional exemption for agreements or practices may be granted to firms who apply if such agreement or practice:

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

Other exemptions are based on intellectual property rights and on professional rules. The Commission may, however, revoke the exemption if it is found 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 (*GRN 2003, section 29*).

4.4.2. Abuse of dominant position

The Act left the issue of the dominant position to the NaCC and the Minister of Trade and Industry to determine, but it is to be determined in terms of annual turnover and/or the value of total assets. Dominance can be defined as the ability of firms to raise price without losing customers while the abuse of dominant position occurs when firms raise price above long-run marginal cost (Ashipala 2004:3). Under the Namibian competition Act, 2003, the Minister is allowed or tasked 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 or purchase prices, or other unfair trading conditions;
- restricting production, market outlets, market access, investments and technical development or technological progress;
- applying dissimilar conditions to equivalent transactions with other trading parties; and
- making the conclusion of a contract subject to acceptance by other parties, of supplementary conditions, which have no connection with the subject matter of the contract.

4.4.3. Dealing with Mergers

The Namibian 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 (*GRN 2003, section 40*). Thus, a merger entails an acquisition of, control through purchase of shares, or assets of other undertaking and through amalgamation with other undertakings. This Act prohibits all mergers which are believed to substantially prevent or lessen competition or which are contradictory to public interests.

The theoretical rationale in favour of mergers stands from the economies of scale argument. Larger firms can achieve productive efficiency through increased scale of production, which results in reduced long-run average costs. This can come about when previously small firms combine forces in terms of capital, research and development, production technologies and other forms in order to become competitive in wider markets context.

From the other perspective, mergers do not increase competition in the rest of the economy. They reduce the number of competing brands, may create conditions for collective dominance and may lead to increased non-price competition and reduce competition at retail level, thereby creating an entry barrier to smaller rivals (Ashipala 2004:3-4).

Parties to the proposed merger are required to give notice to the NaCC, which will then carry out an extensive investigation and then announce its verdict within thirty days, by a notice to parties and in the Government Gazette.

In order to preserve public interests, the following factors are crucial in consideration of a merger proposal:

- Whether the flow of benefits from the proposed merger in the form of enhanced technical efficiency, increased production, efficient distribution of goods and access to markets outweigh the negative effects of the merger;
- The extent to which the proposed merger would lessen competition or restrict trade;
- 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 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, especially those owned by historically disadvantaged persons;
- The extent to which the proposed merger will affect the ability of national industries to compete in international markets.

If parties to the proposed merger are not satisfied with the commission's verdict on the proposal, the struggle can be long. The Act provides for the right of 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 this Act, the Commission may again apply for an interdict restraining the parties to the merger from implementing the merger, to declare the agreement void or to impose a penalty.

In the regional context, the Namibian competition law is applicable to issues within the Namibian borders as well as cross-border issues that have effects on the Namibian market. The NaCC is also allowed and tasked with the duty to liaise and exchange information, knowledge and expertise with authorities of other countries entrusted with functions similar to those of the NaCC (*GRN 2003, section 16b*).

It is very important for Namibia to have a competition law that takes into account, regional business activities because most of big firms in Namibia are non-Namibian companies, mainly with their bases in South Africa. Even if the country can not directly regulate a

foreign business, whose activities have negative effects on the domestic economy, it can at least regulate its business activities, say restrict imports if they are found to constitute an unfair trade practice. Allowing the national competition authority to collaborate with their foreign counterparts can as well mean that we are a step closer to reaching a formal agreement on how to collaborate on cross-border competition matters. Such collaboration can be bilateral or multilateral (say a SACU or SADC-wide collaboration).

4.5. Implementation of competition law

The Namibian Act is still due for enforcement as a law. The Ministry of Trade and Industry is now working on regulations, which will be given to stakeholders for their inputs and the Government will then promulgate such regulations and the Act will be enforced.

Chapter 9 of the Namibian competition Act makes provision for the transitional period, between the promulgation of the Act and enforcement of the Act. According to this chapter, if a merger is effected during this transitional period and such a transaction is concluded after the date of commencement of the Act, such a merger is regarded for a period of 12 months from the date of commencement of the Act, to be a merger implemented in contravention of chapter 4 of this Act. This presents some investment problems, at least for the time-being. Investors are very cautious and hesitant to implement any joint ventures of significant magnitudes due to uncertainties as to whether such ventures will be allowed to continue or abolished upon the commencement of the NaCC. Namibian consumers appear to be under-represented as national institutions, formally representing consumer interests are at best weak, or non-existent. The Ministry of Trade and Industry is however in the process of setting up or to facilitate the formation of a consumer lobby.

Are we expecting to see the NaCC operating soon? The renewed commitments from the side of the responsible ministry (MTI) are visible in a recent re-thinking and restructuring of its programmes. The importance of competition appears to have been more appreciated, following the renaming of the Registration of Companies, Patents and Trade marks (combined with standards weights and measures) to become the Domestic Market Competitiveness programme (DMCP), which is responsible for the development of policies, regulations and setting up of the NaCC in terms of the Competition Act of 2003.

A rather conservative 3-year rolling budget for the financial years 2006/7 to 2008/9 was presented to parliament by the Minister of Finance on 16 March 2006. The new budget period has seen votes increased from 29 to 30 in order to include a recently inaugurated Anti-Corruption Commission (ACC). Over the whole three-year period, however, the establishment of the Competition Commission has merely been mentioned under the vote of the Ministry of Trade and Industry (under DMCP to be precise), but no financial

commitments have been made for the commission. While budget allocations for the whole Ministry are declining in absolute figures, specific allocations to the DMCP are only expected to grow at less than inflation rate over the three years ahead.

5. Regional economic integration

Namibia became a member of the WTO in 1994 as a founding member. The goal of WTO is to try to ensure that member states conduct their business in a transparent and predictable manner. It is expected that all bilateral and multilateral trade agreements would be consistent with the requirements and principles of the WTO. Namibia is a member of the Southern African Customs Union (SACU), the Common Monetary Area (CMA), the Southern African Development Community (SADC), the EU-ACP agreement (known as Cotonou Agreement), the country is also having bilateral trade agreements with Zimbabwe and with Angola, other members of SADC, and it has recently dismembered from the Common Market for the Eastern and Southern African countries (COMESA) during 2003.

Of all these Regional Trade Arrangements, SACU is the most important as far as trade and competition issues are concerned. SACU consists of the regional economic powerhouse in the region – South Africa, and four small countries, namely, Botswana, Lesotho, Namibia and Swaziland, shortly referred to as the BLNS countries. The integration of the Namibian economy into SACU as a Customs Union means that there are no trading borders between member states and many international initiatives and frameworks such as international principles and rules on competition do not apply within Customs Unions.

Though there is no sufficient hard evidence to prove it, there are always outcries from firms based in these small countries about unfair trade practices by the South African companies. As it may be the case in most parts of the world, infant industry protection has been granted to a couple of emerging industries in these small countries, but they grossly fail to take advantage. For Namibia, infant industry status has been granted to two sub-industries within the Agricultural sector – in the Dairy (UHT milk) and Milling industries (Pasta), in both cases for an eight-year period running from 2000 to 2008. There are opinions that smaller members of SACU should do something about South African firms instead of keeping complaining, but having the national competition policy should be a starting point before we talk about having a regional competition policy. Against this background, opinions are held that a regional competition policy will not help much, since from the present evidence it has been noticed that competition laws are only enforceable at national level.

Articles 40 and 41 of the 2002 SACU agreement are on competition policy and unfair trade practices respectively. The agreement encourages member states to implement

competition policies and to co-operate with each other with respect to the enforcement of competition laws and regulations. The SACU council is also charged with the responsibility to develop policies and instruments to address unfair trade practices between member states.

Since most, if not all of the BLNS countries do not have fully developed competition policies and regulations in place, implementing national frameworks in this context would be the starting point before going further to develop a regional competition policy. It would then be up to national implementing institutions such competition commissions and sector regulators to keep checking for unfair trade practices constantly. It is also important that competition regimes take account of other policies such as infant industry protection to ensure harmony between various implementing agencies since all these issues have a bearing on trade.

The CMA comprises of SACU countries, but excluding Botswana. This is a monetary area that centralised monetary policy with the aim of achieving greater financial stability for the region. The monetary policy is controlled by South Africa, and all other CMA currencies are pegged to the South African Rand.

SADC is another regional trading block to which Namibia is a member, but SADC is not yet at an advanced stage like SACU. Of all the member states of SADC, only South Africa and Zimbabwe had fully-fledged competition policy and legislation by the year 2002 (Isaksen 2002) and member states are still in the early stages of reducing trade barriers amongst themselves.

6. Consumer protection

To date, Namibia has no consumer protection policy or legislation. Before Namibia's independence in 1990, most of South African laws were applied to Namibia. Some of these old South African laws that are still applicable to Namibia are rather product specific, not applied to general protection of consumers and are mainly regulating credit. Examples include the following (see Legal Assistance Centre):

- *Formalities in respect of contracts of sale of land Act 71 of 1969 (amended in 1978)*, which set necessary formalities for the sale of land or certain interests in land. Section 3 of this Act states that this Act and any amendment thereof, shall also apply in the territory of South West Africa (now Namibia).
- *Sale of land on instalments Act 72 of 1971 (amended in 1978)*, which regulated the sale and purchase of residential land where payments are to be made in instalments over a period of at least one year. Section 19 of this Act states that this Act and any amendment thereof, shall also apply in the territory of South West Africa.

- *Credit Agreements Act 75 of 1980 (amended in 1981)*, which replaced the Hire-Purchase Act 36 of 1942. It regulates transactions where movable goods are purchased or leased on credit. It also applies to services rendered on credit. It is applied to Namibia through section 1 of the credit agreements proclamation (AG 17/1981). Two amendments have been made to the Act after 1981 and before Namibia's independence, but have not been applied to Namibia.

Despite insufficiency on the legal framework, there are still initiatives on the ground, which are aimed at protecting consumers. The Namibia Consumer Lobby (NCL) was established in 1988 with its main goal of protecting the consumer from possible exploitative practices by firms, as well as producing better understanding between producers and consumers. The NCL has a good vision, but struggled to make a significant impact, mainly due to limited human resources and is little known in the country. Further, media coverage of consumer protection issues is very limited and often absent.

In addition, NAMFISA provides consumer education on various services provided by the non-banking financial sub-sector that it regulates. This includes educating consumers on microlenders; short term insurance; capital markets; medical aid funds, and life assurance and pension funds. This educational information is available on the website, but it may only be accessible by small proportion of consumers with access to computers and internet since other avenues of disseminating this information are at least not known.

The Ministry of Justice's Law Reform and Development Committee was working on drafting a consumer protection law a couple of years ago, but this has not gone far. According to officials from the Ministry of Trade and Industry, the development of consumer protection legislation will be next on the Ministry's agenda after the completion of the legislation on the national quality infrastructure.

At the same time, the civil society initiatives to establish a consumer group for Namibia is taking some shape, with the emergence of Namibia Consumers Association (NCA), a consumer organisation recently formed that appeared in the media criticising high bank charges in the country. NCA is in the process to be registered, first with the Namibia Non-Governmental Organisation Forum (NANGOF) and then with MTI, following which it would engage more proactively on relevant consumer issues. However, a considerable amount of hand-holding and capacity development of NCA and its staff would be imperative, especially on consumer protection and competition policy issues.

7. Views of respondents to competition and anti-competitive practices survey

7.1. Survey tools

The aim of the survey was to document views of consumers, business people and government officials on the state of competition in the domestic economy, with a special focus on the prevalence and severity of anti-competitive trade practices in Namibian markets. A structured questionnaire was used for all types of respondents, but wider views regarding competition issues were collected as well. A total of 85 respondents were interviewed, composed of 30 consumers, 30 business managers or heads of business associations and 25 policy makers/government officials. While consumers were randomly picked at shopping centres, business people and government officials were selected based on their relevant knowledge and experience. Selected businesses were those that are subject to competition in their operations and key respondents were managers/owners for small undertakings or directors/marketing managers for larger businesses. Policy makers were selected ~~from the Ministries of Trade and Industry, Agriculture, Finance, Mines and Energy etc.~~ Other policy makers ~~were~~ from sector regulators. The survey was conducted in Windhoek, the capital city where most of business activities are concentrated.

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7.2. Anti-Competitive Practices in Namibian markets

This section gives the outcomes of the survey for all respondents, with comparisons being made for the three types of respondent i.e. businesses, consumers and government.

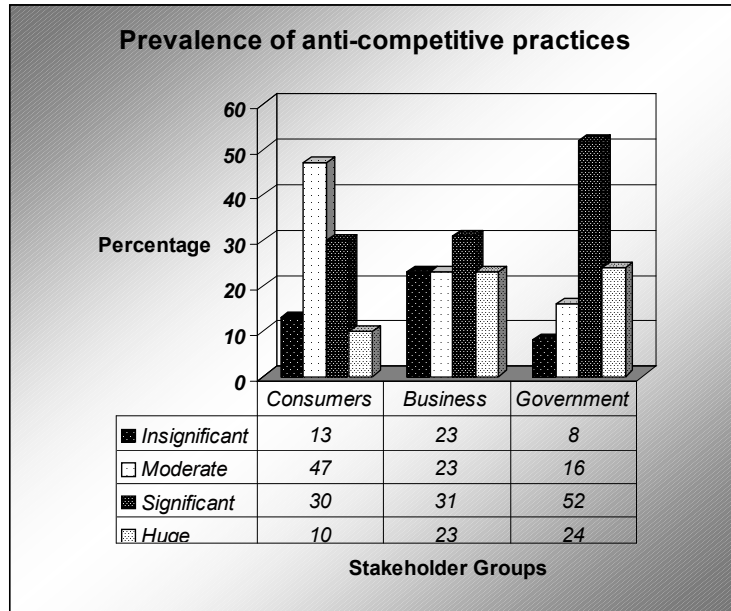
The respondents were asked to rate the prevalence of Anti-Competitive Practices (ACPs) and their perceived effects on consumer welfare. At least 55% of all respondents indicated that such practices are significantly or hugely prevalent in Namibian markets, 29% said these are moderately prevalent, and the remaining 15% said these are insignificant or not prevalent at all. Table 2 below shows the distribution of responses by different stakeholders.

Table 2: Prevalence of ACPs, percentage distribution of responses

	<i>Business</i>	<i>Consumers</i>	<i>Government</i>	<i>Overall</i>
Insignificantly or not at all	23.3	13.3	8.0	15.3
Moderately	23.3	46.7	16.0	29.4
Significantly	30.0	30.0	52.0	36.5
Hugely	23.3	10.0	24.0	18.8
Total	100.0	100.0	100.0	100.0

Government officials indicated that ACPs are much severe (76% said ACPs are at least significantly prevalent in Namibia); responses by business people were much more evenly distributed, while only 40% of consumers indicated huge or significant prevalence (see Fig. 1). Similarly, Government officials felt that the effects of ACPs on consumer welfare are enormous, but this time followed by consumers than by business people.

Fig 1: Perception of various stakeholder groups on prevalence of anti-competitive practices in the Namibian market



Various types of ACPs were listed and definitions and examples provided to the respondents (see questionnaire in the appendices). Respondents were then asked to list and rank the three most prevalent ACPs in order importance. Table 3 below shows that market sharing and collective price fixing are the most ranked number one problems, with 17.6% and 15.3% respectively. Entry barrier and collective price fixing have been identified by most respondents to be amongst the three most prevalent ACPs on Namibian markets (last column, Table 3).

The results in Table 3 also shows that votes are widely distributed amongst various anti-competitive practices, conforming to some views that all listed ACPs are prevalent in Namibia.

Table 3: Most prevalent ACPs in Namibian markets – by all respondents, %

	Rank 1	Rank 2	Rank 3	All Ranks
Collective price fixing	15.3	21.2	7.2	14.6
Market sharing	17.6	8.2	13.3	13.0
Bid ridding	1.2	8.2	7.2	5.5

Tied selling	9.4	5.9	12.0	9.1
Exclusive dealing	5.9	8.2	6.0	6.7
Concerted refusal to deal	1.2	3.5	4.8	3.2
Resale price maintenance	15.3	5.9	4.8	8.7
Price discrimination	8.2	11.8	18.1	12.6
Entry barrier	12.9	16.5	15.7	15.0
Predatory pricing	12.9	9.4	8.4	10.3
Other	0.0	1.2	2.4	1.2
Total	100.0	100.0	100.0	100.0

Business people identified entry barrier, price discrimination and predatory pricing as the most prevalent ACPs, consumers voted for collective price fixing, price discrimination and market sharing to be on top, while policy makers identified collective price fixing, market sharing and predatory pricing as the top three.

Having identified the most prevalent ACPs, table 4 below contains information about sectors that are believed to be the most affected by ACPs i.e. sectors in which most ACPs are prevalent.

By looking at the last column of this table, the sectors identified to be in the top three as the most affected by ACPs include retailing, utilities and transport. Looking at table 4, we can see that utilities, retailing and financial sectors have been ranked number one by most respondents, transport was the most ranked number two, while wholesaling was the most ranked number three. In terms of overall ranks, utilities, financial services and retaining are the most identified sectors, where ACPs are most prevalent.

Table 4: Economic Sectors most affected by ACPs, % distribution

	Rank 1	Rank 2	Rank 3	All Ranks
Retailing	20.2	10.8	17.7	16.3
Utilities	29.8	16.9	16.5	21.1
Transport	10.7	20.5	15.2	15.4
Financial sector	19.0	15.7	17.7	17.5
Telecoms	7.1	12.0	7.6	8.9
Wholesaling	8.3	18.1	19.0	15.0
Others	4.8	6.0	6.3	5.7
Total respondents	100.0	100.0	100.0	100.0

There are no significant differences in the type of ACPs that are prevalent at local level and those that are experienced nationwide, mainly because operators whose trade strategies give rise to ACPs apply their policies nationwide. Given the kind of economic relations of Namibia and South Africa whereby most of big companies in Namibia are branches of South African entities and the fact that the two countries are members to a customs union, ACPs in the Namibian markets originates either within the country or from South Africa.

About 65% of the respondents indicated that ACPs originates from outside the county as well and this was against a 32% of the respondents who said these are purely domestic problems. The remaining 3% chose the option of don't know/cant say.

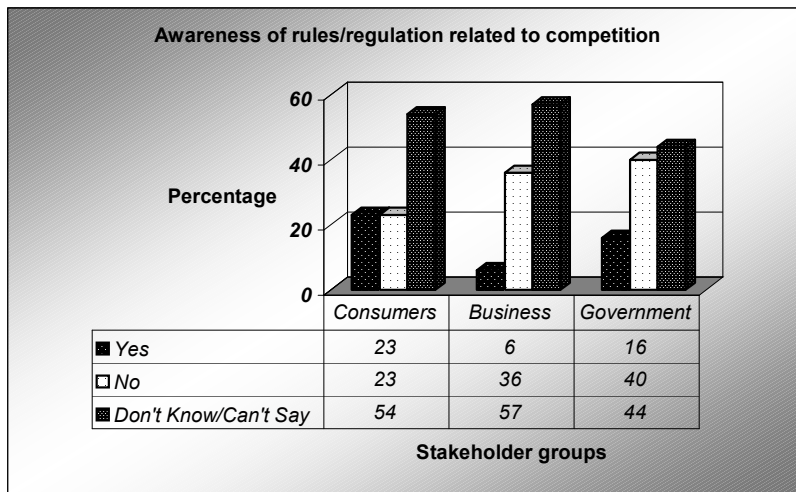
The competition issue does not feature much in public discussions in Namibia, and this has come out clearly that most people don't know whether there are competition related rules and regulations in the country or not.

Posing the question whether there are rules and regulations to check ACPs to ordinary consumers produced a response rate of 53% in *don't know* category, with the remaining percentages equally shared between yes and no. Similar responses have been observed for the business people and Government officials (see Table 5 and Fig. 2, below). For all the respondents together, about 52% didn't know whether there are competition related rules and regulations in the country.

Table 5: Awareness about rules and regulations to check ACPs, % distribution

	<i>Business</i>	<i>Consumers</i>	<i>Government</i>	<i>Overall</i>
Yes	6.7	23.3	16.0	15.3
No	36.7	23.3	40.0	32.9
Don't know/cant say	56.7	53.3	44.0	51.8
Total	100.0	100.0	100.0	100.0

Fig 2: Stakeholders' awareness of rules and regulations related to competition issues in Namibia



With the competition Act still not in force, there is no legal basis to for checking most of the listed ACPs at the national level (see Table 3 above), except in specific cases where sector regulations are in place. This means that “No” is the most correct response.

7.3. Views and facts on the Competition Regime

About 78% of all respondents preferred that a comprehensive competition law that covers all areas of commercial activity and all types of enterprises and persons be put in place. This is pretty much what the Namibia Competition Act (due for enforcement) provides, by covering all commercial activities and making exemptions on a case-by-case basis. Exemption can be granted to entities that promote exports, entities whose activities are promoting the development of small undertakings owned by previously disadvantaged persons with an intention to make these undertakings competitive, promoting technical progress etc (GRN 2003, sub-section 28).

Over 60% of respondents preferred to have an autonomous Competition Authority over other forms of institutional set-ups, emphasising that such an authority can achieve both autonomy in decision making and financial sustainability by being funded in a similar way as the national judiciary. The competition Act did make provision for the NaCC to be independent, but that independence may well be undermined procedures regarding appointment of commissioners, determination of benefits of the commissioners and the power of the commissioners to make decisions (see section 4.3 of this report). Furthermore, about 55% of respondents prefer that the Competition Regime should have both investigative and adjudicative powers and around 97% feel that it should deal with unfair trade practices and consumer protection issues as its core business. This is well in line with the provisions of the Competition Act. The current procedure is that NaCC would investigate, and impose fines (if necessary) based on its findings. If the fined entity is not happy, then the issue can be taken to the higher court.

Based of the survey, a competition regulator, which coordinates with specialised sectoral regulators (as opposed to having power over sectoral regulators) is slightly preferred over other forms of institutional set-ups. Other institutional arrangements that have been suggested are concerning the number of regulators who have a lot to do with competition e.g. having the competition regulator with power over sectoral regulators or even to have a single utility regulator, combining all specialised regulators. The later is mainly justified on the need to avoid having too big and too many institutions (single regulator requires less support staff), but it also have a bearing on implementation of competition rules. In this case, the prevailing relationship between the competition regulator (NaCC) and specialised sector regulators is that if there is a conflict between NaCC and a sector regulator regarding competition, the decision of NaCC will prevail. NaCC is going to sign MOUs with specialised sector regulators.

Should NaCC involve different stakeholder group in its functioning? The competition commission needs to source information and other inputs from the public and from stakeholders who may be in better positions to know. The question is whether these stakeholders should be involved as part of investigations or any other formal structures of the NaCC. It is good to have different perspectives into an investigation, but there is also fear that various stakeholders will attempt to influence outcomes to suit their particular interests or even make the whole process bureaucratic.

Posing the question to respondents, about 80% agreed that stakeholders should be involved, preferably through structured consultative committees. Table 6 below shows that Government officials prefers more that stakeholders become part of NaCC structures (by 91.3%), followed by consumers (87%) then by businesses (60%).

Table 6: Preferences on involvement of stakeholders in NaCC functioning

	Business		Consumers		Government		All Respondents	
	No.	%	No.	%	No.	%	No.	%
Yes	12	60.0	20	87.0	21	91.3	53	80.3
No	6	30.0	1	4.3	1	4.3	8	12.1
Don't know	2	10.0	2	8.7	1	4.3	5	7.6
Total	20	100.0	23	100.0	23	100.0	66	100.0

With the competition Act not yet into force, and with weak or non-existent consumer forums, there is a concern about how to safeguard the welfare of ordinary consumers who are the most likely to have the least information about markets in which they find themselves as participants. Consumers are not the only vulnerable group as new or small businesses may well find themselves on the receiving end as their competitors may try to eliminate them from markets. The question was posed to all respondents as to how one would react when an ACP is encountered.

Despite having no competition law in place and considering limited affordability of judiciary litigation, over 33% of respondents indicated they would seek help from judiciary (Table 7, last column). Table 7 shows that the majority of consumers and business people indicated they would revert to the legislature for help, while the majority of Government officials would seek help from judiciary. The Government does have the policy to intercede in the market when competition is not fair, but limiting such intervening cases is part of the policy objectives as well. Some respondents, who fell into the category "other", felt that there is nothing an ordinary person can do at the moment given that there is no specific law in place and even more, taking the issue to the high court is not something that many can afford.

Table 7: Necessary action against ACPs, number and % of responses

	Business		Consumers		Government		All Respondents	
	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>
Legislation	14	48.3	19	63.3	3	12.0	36	42.9
Judiciary	11	37.9	6	20.0	11	44.0	28	33.3
Consumer Forums	2	6.9	2	6.7	4	16.0	8	9.5
Other	2	6.9	3	10.0	7	28.0	12	14.3
Total	29	100.0	30	100.0	25	100.0	84	100.0

Table 7 also gives differences in awareness of the current competition regime by various stakeholders. It appears good and realistic that few have indicated consumer forums (which do not exist), but a high ratio mentioning the judiciary may be the cause of concern since there is limited legal basis for that option.

8. Conclusions

Namibia has four natural monopolies in the telecommunications (Telecom Namibia), utilities (NamWater and NamPower) and rail transport (TransNamib) sectors. The economy faces challenges that include the need to diversify export products and import/export destinations in order to reduce vulnerability. To achieve and build competitive markets, Namibia does not only need to encourage the entry of new firms, but more importantly new firms with different ownerships and from markets with different characteristics.

Namibia lacks written policy and legal frameworks in areas of trade, industrial development and competition. These shortcomings make it difficult to regulate and control trade and competition related matters in the country and also not having these frameworks in place makes it difficult for the country to embark on regional (SACU) trade competition frameworks.

The prevalence of multinational corporations in the economy (at least in the sense that Namibia is part of SACU), particularly their dominance in developing economies calls for regional or international collaboration on competition issues in order to curb cross-border anti-competitive practices. The Namibian competition legislation makes room for such collaboration, by allowing the NaCC to collaborate with their counterparts outside the country's borders, but Namibia has no trade borders with its main trading partner.

The Namibian Government is one of big producers, making large contributions to its national output. It also maintains monopolies and oligopolies in various markets, the situation which may remain for decades before any serious liberalisation could be witnessed in some of those economic sectors. Examples of such sectors are electricity, water, telecommunications and transport industries.

The Namibian Competition Act (2003) is underway for implementation. Under this Act, competition related developments that take place over the period of 12 months before the enforcement of this Act will be subjected to the scrutiny of the NaCC i.e. competition related developments over this period are required to comply with the provisions of the Act as well. All cases regarding Restricted Trade Practices (RTPs) will be recorded and dealt with once the NaCC comes into operation. What this means to hesitant investors is that there is more uncertainty when making some business decisions, which may involve acquisitions or mergers because the competition law will basically come in place 12 months before the enforcement of the Act and the subsequent commencement of the NaCC.

The Act makes provision for the establishment of NaCC, as an independent body subject only to the Namibian constitution and has jurisdiction throughout Namibia. This

independence may however be limited as political approval is required in most of decisions that NaCC would make. Furthermore, at most two Ministers determine the benefits of the NaCC members. The usual preference is that the benefits of the commissioners be determined by the Parliament, and that the Competition Commission should remain responsible to the Parliament and to the Constitution of the Republic.

There is no clear sign of the NaCC commencing with its full functions in the very short term because of the following:

- *The NaCC is not explicitly catered for in the current 3-year National Budget, which runs from 2006 to early 2009. However, since this is a rolling budget, there is nothing preventing us from believing that financial resources may be allocated for the establishment of the Competition Authority as from April 2007;*
- *Upon the enforcement of the Competition Act, and official inauguration of the NaCC, Commissioners and the Minister of Trade and Industry will have to determine procedures and other issues left open by the Act (to be gazetted) before they can start. Examples include the need to prescribe criteria for determining whether a firm has a dominant position or not; the Minister with the occurrence of the NaCC may need to determine classes of mergers to be exempted from provisions of chapter 4 and so on;*
- *The Minister needs to give notice in the Gazette about the date when this Act or various provisions thereof should come into operation, which means that the whole competition law would not be expected to come into operation at the same time.*

It is however expected that NaCC will be funded from other sources when it commences with its operations.

Despite the fact that consumers are not a minority group in any sense, consumer interests are under-represented in Namibia. Namibia still does not have a consumer protection law in place; no effective consumer lobby at the moment; and consumer welfare sections in regulatory institutions and in private businesses operates voluntarily with no real obligations. It is however the responsibility of the state (not only Government) to ensure that consumers are organised, empowered and be brought on board as key stakeholders in policymaking. There is some hope on the horizon with the recent establishment of the Namibia Consumer Association (NCA). In view of the fact that the Government had already embarked on an exercise to operationalise a Consumer Protection Act for Namibia, it is recommendable that the Government accelerates this process, and facilitates the activities of NCA.

From the survey that was conducted as part of this report, entry barriers, collective price fixing and market sharing came out on top as the most prevalent *ACPs*, but ranking votes were widely distributed, conforming to the view that most types of *ACPs* are prevalent in Namibia. The sectors identified to be the leading ones in which *ACPs* are most prevalent are utilities (water and electricity), financial services and general retailing.

The awareness of respondents about competition related rules and the status of the current competition regime are rather weak and one can only expect that to improve once the competition authority is in place and when the activities of consumer associations are intensified.

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