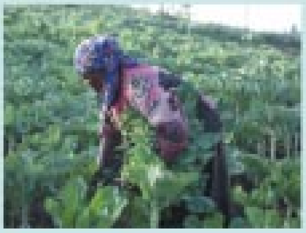
Enforcing the Competition Law in Namibia

A Toolkit



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PREFACE

I am pleased to write this preface for 'Competition Law in Namibia: A Toolkit'. The purpose of this toolkit is to suggest ways to deal with all types of competition abuses. What we have tried to do in this toolkit is look at different types of anticompetitive practices in light of the competition law of Namibia and juxtapose it with examples from the country and of similar cases from other jurisdictions, in particular from other developing countries.

CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER) has been working on competition regimes in this and other countries for many years since the mid-1990s, supported by a variety of development partners, such as the Department for International Development (DFID), UK; Swiss State Secretariat for Economic Affairs (seco); Norwegian Agency for Development Cooperation (NORAD); and International Development Research Centre (IDRC), Canada etc. In particular, DFID, UK which has been more than a funding support, but a comrade in arms.

This publication is among a series of toolkits being produced over the period 2007-08. The other countries that we are doing toolkits in this series include:

- Botswana;
- India;
- Malawi;
- Mauritius; and
- Uganda.

This toolkit is an outcome of the work that we have been doing, specifically to help citizens in Namibia to appreciate the problems and their solutions in order to promote an orderly market and economic democracy. It is a dynamic issue as the contours of competition practices and their regulation continue to evolve and change over time.

Another bit of extremely relevant literature is the Competition Assessment Framework developed by DFID, UK on which CUTS too has contributed actively. This should also be read to understand the issues better. It is available at: http://www.cuts-ccier.org/pdf/IRPDF-01.pdf

Implementing a competition law for the first time in any country, like Namibia, is quite a difficult task. Firstly, there is a lack of understanding of the relevant issues, which this toolkit tries to address, and secondly, the political economy of the country. Quite often a competition law creates new strictures which can affect vested interests, and thus there is a resistance to the implementation of the law. Thirdly, the implementation is often poor due to:

- lack of political will;
- lack of human and financial resources;
- opposition from vested interests; and
- lack of a strong civil society movement which can be a good ally and a countervailing power to business interests.

The last factor is rather unfortunate, because an effective competition law brings in business welfare by curtailing anticompetitive practices of input suppliers of goods and services, unshackling entry barriers etc. For more on this, please see: http://www.cuts-international.org/pdf/Viewpoint-CompeRegBusinessWelfare.pdf.

In Namibia, there is, however a strong political will, but lack of a strong civil society movement, which we are trying to build up through support from various development partners and the government itself.

I would also recommend that readers/users of this toolkit should have a look at an almanac that we have produced which takes stock of competition regimes around the world at www.competitionregimes.com. This would be of great help to readers to see how competition laws have evolved in over 100 jurisdictions and thus give an insightful comparative picture.

In many countries, new competition laws have been enacted after scrapping older ones, as it became irrelevant due to changes in the national and global economies. These include UK, South Africa and India. CUTS is currently engaged in another project to map out the causes and reasons as to why many countries are enacting new competition laws after scrapping their old ones, which can educate all of us on the reasons for the metamorphosis. However, this change which is taking place in many countries confirms the fact that a competition law is desirable and it needs to be updated as we move along in history.

In our experience, a new competition law has to be implemented gradually rather than with a bang, i.e. to say the authority has to run a marathon and not a sprint. It is, therefore, that we have evolved a matrix for different stages of implementation of competition regimes (please see Table 1 on page 95). Creating a healthy competition culture depends on effective implementation of the competition law and a supportive policy environment.

How does a competition law help the country's economy? There are few systematic studies done in Peru and South Korea, which have shown that the law has generated far greater benefits than the cost itself. In a study of the Peruvian competition agency, Indecopi, found that the first seven years of its operation yielded economic benefits amounting to US$120mn, which is significantly higher than the associated operating costs of US$20mn[1]. A study by the Korean Fair Trade Commission (KFTC) in 2003 found that the benefit (consumer welfare increases and income transfers) outweighed the costs (KFTC's budget) of competition law enforcement in 2000 and 2001 by 34 times[2] .

A study carried out on the Australian economy estimated the expected benefits from a package of competition-promoting and deregulatory reforms (including improvements in the competition rules) would create annual gains in real gross domestic product (GDP) of about 5.5 percent, or AU$23bn (US$20bn), of which consumers would gain by almost AU$9bn (US$7.96bn) – in addition to increases in real wages, employment and government revenue[3] .

In terms of acknowledgement, we must thank the DFID and NORAD, who have supported this publication, and Rahabeam Shilimela, Dr S Chakravarthy, Pradeep S Mehta, John Preston, David Ong'olo and Alice Pham to have commented extensively on the draft and helped us to develop this toolkit.

Finally, in conclusion, let us reiterate that a competition regime and its implementation is dynamic. Hence, this toolkit should be considered as such, rather than a final word. Readers are invited to share their views at c-cier@cuts.org.

Pradeep S Mehta
Secretary General

1 See Caceres, A (2000), "Indecopi's first seven years" in Beatriz Boza, ed., The Role of the State in Competition and IP Policy in Latin America: towards an academic audit of Indecopi, Lima.
2 Chapter on Korea by Joseph Seon Hur in Competition Regimes in the World — A Civil Society Report, Pradeep S Mehta (Ed), CUTS and INCSOC, 2006
3 *http://www.unctad.org/en/docs//c2em_d10.en.pdf*

LIST OF ACRONYMS

ACCC	:	Australian Competition & Consumer Commission
ACCC	:	Australian Competition & Consumer Commission
ACPs	:	Anticompetitive Practices
ADB	:	African Development Bank
AIOCD	:	All India Organisation of Chemists and Druggists
BHF	:	Board of Health Care Funders
COMESA	:	Common Market for Eastern and Southern Africa
CSOs	:	Civil Society Organisations
CUTS	:	Consumer Unity and Trust Society
DoJ	:	Department of Justice
EJC	:	The European Court of Justice
EU	:	European Union
EULA	:	End User License Agreement
FTC	:	Federal Trade Commission
GDP	:	Gross Domestic Product
HASA	:	Hospital Association of South Africa
IBC	:	International Broadcasting Corporation
ICASA	:	Independent Communications Authority of South Africa
ICN	:	International Competition Network
IPPR	:	Institute of Public Policy Research
IPRs	:	Intellectual Property Rights
ITP	:	Independent Television Publications Limited
KFTC	:	Korean Fair Trade Commission
M&As	:	Mergers and Acquisitions
MCOT	:	Mass Communication Organisation of Thailand
MNC	:	Multinational Corporation
MRTPC	:	Monopolies and Restrictive Trade Practices Commission
NaCC	:	Namibia Competition Commission
NCA	:	Namibian Consumer's Association
NDP	:	National Development Plan
OECD	:	The Organisation for Economic Cooperation and Development

RBPs	:	Restrictive Business Practices
RPM	:	Resale Price Maintenance
RTE	:	Radio Telefis Eireann
SADC	:	Southern African Development Community
SAMA	:	South African Medical Association
SMEs	:	Small and Medium-sized Enterprises
SoEs	:	State-owned Enterprises
TNCs	:	Transnational Companies
TRIPs	:	Trade Related Aspects of Intellectual Property Rights
UBC	:	United Broadcasting Corporation
UTV	:	United Television Network
WIPO	:	World Intellectual Property Organisation
WTO	:	World Trade Organisation

1. INTRODUCTION

1.1 Purpose of the Study

A tool is a device used to help accomplish tasks, and a toolkit is a set of such tools. A toolkit is generally regarded as a cross-platform application development framework, highlighting key issues and how they can be applied. Likewise a competition toolkit shows the development framework for competition policy and law and acts as a resource to increase understanding for applying a particular (country-specific) competition law. Consumer Unity and Trust Society (CUTS) decided to develop 'Competition Toolkits' for some countries in order to facilitate adoption and implementation of competition law therein.

This document, researched and compiled by CUTS and customised in the Namibia context, is meant to act as a manual for Namibia, providing a simple and concise handbook on various implementation issues relating to the Competition Act, 2003 (Competition Law of Namibia). It provides the definitions, characteristics of and ways to deal with all the major restrictive business practices (RBPs), which are prevalent in the Namibian markets, with real-life case studies. Wherever possible, similar cases from other developing countries have been cited in the text in order to help the reader understand the issues through case studies. The toolkit draws information regarding the prevailing competition regime, from the report on the state of competition in Namibia (developed under CUTS project entitled, "*Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa*", or the 7Up3 project).[1]

Last but not the least, the document analyses the constraints and challenges that the competition authority of Namibia may face towards building a healthy competition culture in the country, and suggests a framework for addressing the same. The paper is meant for competition authority officials and administrators. However, activists, journalists, academician, business community, etc. can also use it. Furthermore, it can also be used for enhancing the understanding on competition issues of other stakeholder groups who may have interest in the subject.

1.2 Background to Competition Law in Namibia

Regulation of competition issues was introduced in 2003 through the Competition Act of 2003 (Act No. 2 of 2003) in the country. In the past, competition issues in Namibia were regulated by the Regulation of Monopolistic Conditions Amendment Act, 1958 (Act 14 of 1958). However, this was a South African Act, which was not applied in Namibia after independence.

Over time, the Government recognised the urgent necessity for a competition law and, with the assistance of the European Union (EU), commissioned a study, which drafted the Competition Bill in 1996. The Government then established the Steering Advisory Committee on Competition, which widely discussed the Bill with all stakeholders. The Competition Act (Act No.2 of 2003) was passed on April 24, 2003.[2] The Namibian Competition Act resembles in many aspects the South African Competition Law enacted in 1998, as the inspiration flowed from models and patterns of the latter.

The adoption of the Competition Act in Namibia in 2003 exhibits the Government's commitment to ensuring a fair and competitive trading environment in the economy. However, there are challenges, which include the enormously difficult task of putting the law into force.

Box 1: An Overview of the Competition Act, 2003 of Namibia

Purpose of the Competition Act

The purpose of the Competition Act, as stipulated in Section 2, is to enhance the promotion and safeguarding of competition in Namibia in order to:

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

The prohibition of the anticompetitive practices and the abuse of dominance should be viewed as an implied purpose of the Act as these two prohibitions are not enumerated in the Section 2 of the Act.

Application scope of the Act

The law applies to all economic activity within Namibia or having an effect in Namibia. Thus, it is the nature of the economic activity concerned and not the status of the operator or the form of intervention that dictates how competition rules apply. The Act binds the State in so far as the State engages in trade or business for the production, supply or distribution of goods or the provision of any service, but the State is not subject to any provision relating to criminal liability. The Act applies as well to the activities of statutory bodies, except the case when those activities are authorised by law.

The Section 3 of the Act constitutes the **general statutory exemptions.** The Act does not apply to:

- collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 1992 (Act No. 6 of 1992 which has been replaced by Labour Act of 2004);
- concerted conduct designed to achieve a non-commercial socio-economic objective;
- in relation to goods or services which the Minister, with the concurrence of the Commission, declares, by notice in the *Gazette,* to be exempt from the provisions of this Act.

Anti-competitive Business Practices

The Namibian Competition Act aims to enhance the promotion and safeguarding of competition in Namibia by removing or reducing the distortions caused by:

- Collusive practices (Chapter 3, Part I of the Act);
- Abuse of dominant position (Chapter 3, Part II); and
- Mergers (Chapter 4).

The Law prohibits two broad types of anticompetitive practices called RBPs: (1) restrictive agreements, practices and decisions (Section 23); (2) abuse of dominant or monopoly position (Section 26).

Restrictive Agreements, Practices and Decisions

Under Section 23 (1) the Competition Act, agreements and concerted practices between undertakings, that are considered to have the potential to restrict competition or considered detrimental to public interest, are prohibited (general prohibition of restrictive practices). The Section 23 (2, 3) of the Act provides further details and prohibits the following conduct:

- Horizontal and vertical collusion; and in particular
- Price fixing;
- Market sharing;
- Collusive tendering;
- Minimum resale price maintenance;
- Output restriction;
- Applying dissimilar conditions (to equivalent transactions); and
- Tied selling.

Abuse of Dominant Position

The Act is meant to curb the behaviour of private enterprises inhibiting the creation and propagation of competitive market structures, and the efficient allocation of resources, thereby protecting public interest. The Act makes provision (Section 24) for the Minister, either in general or for specific industries, to determine a threshold of annual turnover or value of assets, below which an undertaking is not considered to be in a position of dominance.

Section 26 of the Act defines abuse of dominant position that includes:

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

Mergers

The Competition Act defines 'a merger to occur when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking'. Thus, a merger entails an *acquisition* of control through purchase of shares, or assets of other undertakings, and through *amalgamation* with other undertakings. The Act prohibits all mergers, which will substantially prevent or lessen competition or which are not justified on the grounds of public interest.

Under the Act, the parties to the proposed merger are required to give notice to the Competition Commission, which has the power to carry out an extensive investigation and then determine, within 30 days, by either approving or disapproving the merger. In this instance, the Competition Commission is required to give notice to the parties involved in the proposed merger, in writing and by notice in the Gazette. A merger can be approved or disapproved, based on the effect the merger will have on:

- The extent to which the benefits flow from the proposed merger, in the form of enhanced technical efficiency, increased production, efficient distribution of goods, and access to markets outweighing the negative effects of the merger;
- The extent to which the 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 to become competitive; and
- The extent to which the proposed merger will affect the ability of national industries to compete in international markets.

However, the Act provides the right, for the parties involved, to apply to the Minister to review the Commission's decision. If a merger is implemented in contravention of the provisions of the Act, the Commission may apply for an interdict restraining the parties to the merger from implementing the merger, to declare the agreement void or to impose a penalty.

Exemption of Certain Restrictive Practices

The Act makes provisions (Section 27 and following) for any undertaking to apply for an exemption from certain restrictive practices. Conditional or unconditional exemptions for agreements or practices may be granted to firms who apply if such an agreement or practice:

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

However, the Commission may revoke the exemption if it founds out that the exemption was granted on materially incorrect information, that there has been significant change of circumstances since the exemption was granted, or if the condition upon which it was granted has not been complied with.

Namibian Competition Commission

The Namibian Competition Commission is to be established as an independent authority for the administration and enforcement of the Act. Some of the powers of the NaCC, 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 this Act;
- prescribing the procedures for investigations under this 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.

The NaCC members are appointed by the Minister of Trade and Industry. Their remuneration is determined by the said Minister, with the concurrence of the Minister of Finance. Their term of office is three years with a possible re-appointment for the second consecutive term.

INTRODUCTION

1.3 Country Background

Namibia achieved its independence in 1990, which is rather late as compared to other countries in the region. However, since political stability was gained, the country has been striving to catch up with its neighbours, taking advantage of the reforms wave which was sweeping through the African continent then.[3]

Namibia's economic competitiveness was ranked 88th out of 128 countries in the world, just behind Botswana which was ranked 83, according to the African Competitiveness Report jointly published by the African Development Bank (ADB), the World Bank and the World Economic Forum. The results were disappointing compared to some of the other 29 African countries that were examined against the global market. Countries such as Tunisia (29), South Africa (46), Mauritius (58), and Egypt (65) emerged among the best economic performers with regard to competitiveness.[4]

Namibia is a lower middle-income country with an average per capita income of US$2,975. The economy is underpinned by sound macroeconomic fundamentals and improved terms of trade leading to a relatively strong growth performance. The average gross domestic product (GDP) growth for the period 2000-2006 was 4.5 percent[5] and the average over 2002-2006 was 5.1 percent, exceeding the target rate of 4.3 percent set in National Development Plan (NDP). Overall, this was slightly below the Sub-Saharan Africa average of 5.2 percent in 2006. The average inflation rate for the period 2003-2007 was 5.36 percent[6], while the average current account balance as a percentage of GDP for the period 2002-2005 was 6.6 percent[7].

The Namibian economy is characterised by a large, non-tradable sector (government services), and an export oriented primary sector, mainly fisheries, agriculture and mining. Namibia is a small open economy heavily relying on imports, which are often subjected to distorted pricing by import cartels.[8]

For downloading the Namibian Competition Law, please visit: *http://www.globalcompetitionforum.org/regions/africa/Namibia/ACT511.pdf*

2. ABOUT THE MARKET ECONOMY

2.1 Markets and Prices – How they Work?

In the business or economics world, the term '*market*' is usually used to refer to a mechanism which allows people to trade, which is normally governed by the theory of supply and demand, so allocating resources through a price mechanism and bid and ask matching so that those willing to pay a price for something meet those willing to sell for it.[9]

Market = Products/Services + Suppliers + Customers

Demand and supply are affected by various factors, for example, demand is affected by changes in the prices of related goods, changes in income, tastes, population or expectations, etc; whereas supply is affected by changes in input prices, changes in technology, number of suppliers, etc. In a simplified economics model, the demand and the supply curve can be put together to describe market behaviours.[10]

As a general rule, *markets move toward equilibrium*, a situation in which no individual will be better off taking a different action. In the case of a competitive market, we can be more specific: a competitive market is in equilibrium when the price has moved to a level at which the quantity demanded of a good equals the quantity supplied of that good. At that price, no individual seller could make herself better off by offering to sell either more or less of the good and no individual buyer could make himself better off by offering to buy more or less of the good.

The price that matches the quantity supplied and the quantity demanded is the *equilibrium price*, which is also known as the *market-clearing price* – the price that 'clears the market' by ensuring that every buyer willing to pay that price finds a seller willing to sell at that price, and vice versa.

There are some markets where the same good can sell for many different prices, depending on who is selling or who is buying. For example, have you ever bought a souvenir in a tourists' shop and then seen the same item on sale somewhere else (perhaps even the next store) for a lower price? But in any market where the buyers and sellers have both been around for some time, sales and purchases tend to converge at a generally uniformed price, so that we can safely talk about *the market price*.

This is easy to understand. Suppose a seller offered a potential buyer a price noticeably above what the buyer knew other people to be paying. The buyer would clearly be better off shopping elsewhere – unless the seller was prepared to offer a better deal. Conversely, a seller would not be willing to sell for significantly less than the amount he knew most buyers were paying; he would be better off waiting to get a more reasonable customer. So in any well-established, active market, all sellers receive and all buyers pay approximately the same price – which is called *the market price*. If this price is above its equilibrium level, there will be a surplus that drives the price down. Similarly, if the price is below its equilibrium level, there is a shortage that drives the price up.

A market economy, thus, is different from a centrally planned economy. In market economy the aggregate interactions of buyers and sellers, producers and consumers in a society determine how different markets work, whereas in a centrally planned system, this is decided by administrative decisions made by government bureaus.

This is what essentially happens in a market economy, steered primarily by market forces, which allocate resources (presumably scarce) and goods and determine prices. A market economy, thus, is different from a centrally planned economy. In market economy the aggregate interactions of buyers and sellers, producers and consumers in a society determine how different markets work, whereas in a centrally planned system, this is decided by administrative decisions made by government bureaus.

2.2 Governments and the Rule of Law vs Free Markets

In the simplified model above, we have considered only two main actors of the marketplace, which are buyers and sellers, or consumers and producers. In all economies, whether based on market forces or centrally planned, the governments' role cannot be ignored. Governments can act as providers of public goods, or producers of many other goods and services. More important is their role as regulators. This is because markets left to its own have a lot of inefficiencies.

There are many causes of market inefficiencies. Commonly observed causes of market inefficiencies include monopoly power, externalities such as pollution, information asymmetry, uncertainty, and various forms of opportunistic and strategic behaviours. The governments can enforce laws and regulations, provide public goods, or obtain and disseminate information effectively.

Unfortunately, in many cases, the governments go beyond their role as regulators, or providers of public goods and services. Arbitrary interventions or over-intervention into the normal operations of the markets, favouritism over state-owned enterprises (SoEs), etc are typically such instances. It is, therefore, important to make sure that the rule of law prevails.

The rule of law has two main economic functions. First, it regulates and limits discretionary interventions of the state into economic activities. Secondly, it regulates the economic behaviour of individuals and enterprises to create an orderly, stable environment with fair competition, clearly defined and well protected property rights, and effectively enforced contracts.[11]

The situation in Namibia, despite the various undertaken reforms, is far from this ideal model. The legal framework is yet to be completed; regulatory institutions remain absent or are at an infant stage. Understanding of the markets and how they work is still tainted by the long history of state control over the market. This is further complicated due to the transformation from a purely natural resource based to a more diversified economy with some processing of natural materials and a strong contribution of the services sector. Yet, although the Namibian economy has the private sector and there are sufficient opportunities for private sector investment, parastatals provide most of the essential services such as telecommunications, transport, water, and electricity. There is also a strong feeling among various stakeholders in Namibia that the private sector is weak, particularly given that government services dominate GDP generation.

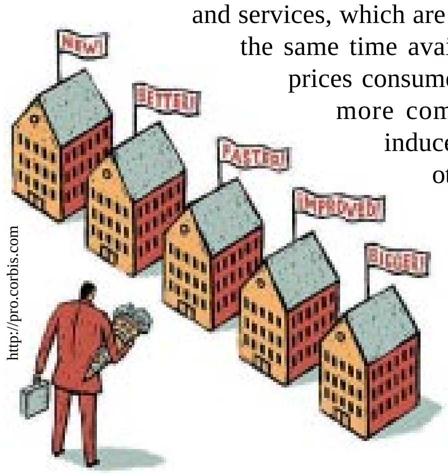
Namibian economy has the private sector and there are sufficient opportunities for private sector investment, parastatals provide most of the essential services such as telecommunications, transport, water, and electricity.

3. MARKET AND COMPETITION

3.1 Competition

In an idealised model, market [or business] competition is a process of rivalry by which producers/suppliers strive to offer the most attractive price and quality options to gain new sales and clientele.

As already mentioned in Chapter 2, there are several factors, which affect the consumption and supply decisions by consumers and producers in a free market. Demand by consumers, for example, is affected by price, i.e. if the price goes up, the quantity demanded goes down. As bread becomes more expensive, consumers turn to other goods, perhaps buying more rice or other cereals instead. Similarly, demand for a certain good or service by consumers is under the influence of their income level, prices of related goods and their tastes. Supply decisions by producers are also affected by price. Typically, it is reasonable to assume that the higher the price per loaf of bread, the greater the quantity that firms are willing to supply, since higher prices make it profitable for firms to produce more output. Similarly, supply is affected by price of inputs, and conditions of production, etc.



Accordingly, in a competitive market, where there are a wide range of products and services, which are substitutable for each other and at the same time available in the market at acceptable prices consumers can always shift purchase to a more competitive product/service, which induces producers to compete with each other to satisfy consumer preferences. Therefore, competition is a natural trend between various producers, of same or related products, in terms of price, quality, or after-sale services, etc, most notably through prices.[12] However, in fact, there may be different scenarios, for instance, in case of a monopoly; there is only one producer/

provider of a certain good and service in a market, with no substitute, which gives the only market player power beyond any market discipline.

For example, three supermarket chains operating in Windhoek provide similar products, such as food, clothing, toys, etc or products which are substitutable for each other, such as burgers and sandwiches, Coca Cola and Sprite or Nestle iced tea. They, therefore, have to compete for the patronage of customers/consumers of Windhoek by offering lower prices, better choices, providing better and faster cashier services, etc.

3.2 Relevant Market

Competition is not homogeneous in all markets. Two supermarkets in Rundu (Kavango) compete with each other for customers in Rundu, and not Walvis Bay. Or two mobile service providers compete with each other to provide better phone service and not postal service. Competition between these businesses also varies according to time, for example competition between two beer producers in summer, or during the World Cup Championship, will be fiercer than in winter.

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"Relevant Market" is the first and foremost concept to understand in almost any competition analyses. 'Relevant Market' identifies the extent of effective competitive constraints in the market, in terms of product/services, time and location.[13] To define the relevant market for a particular competition case, one usually looks at the 'Product Market' and the 'Geographic Market' in a specific 'Period of Time'.

Product Market: A Product Market includes all products that are close substitutes for one another – both in consumption and in production.[14]

In a simple example, one might attempt to determine if Glass Bottles are in the same product market as Plastic Bottles. In this scenario, one looks to see if Glass Bottle price increases leads to significant changes in the consumption patterns of both the two types of containers. If, in response to the price increase, consumers switch a "sufficient volume" of Glass Bottle purchases to Plastic Bottles, then Plastic Bottles would be considered to be within the same product market as Glass Bottles.

Geographic Market: A Geographic Market, similarly, is determined on the basis of customers' or consumers' ability to switch purchase between suppliers of substitute products in case of a price hike. If the airfare between Windhoek and Luanda, (Angola) provided by Air Namibia is increased, and passengers are able to switch to travelling by Taag Airlines (Angola) or South African Airways with least inconvenience, then all these airlines, though based in different countries, can be considered as competing in one geographic market, namely the Windhoek-Luanda route.

The Competition Act, 2003 of Namibia does not define "relevant market". The market definition helps to identify competitors involved and makes it possible to calculate market shares that would convey information regarding market power for the purposes of applying the Act, in particularly for assessing dominance.

In another case, even if it is otherwise convenient for a buyer to purchase a car from outside Namibia, the heavy import duty in Namibia will work as a disincentive for the Namibian consumers to buy a car from outside. Therefore, from the viewpoint of Namibian car users, Namibia is their geographic market.

In addition to import duties and explicitly protectionist measures, there are other factors, such as regulations protecting health and safety, or licensing requirements, or shipping costs, which establish barriers to competition, and thus, help define geographic markets.[15]

Relevant markets, therefore, are usually defined from the point of view of consumers. A simple example for expressing relevant market would therefore be, to say: "Company A and Company B are competitors in the market for telephone services (mobile, fixed line, satellite, etc) in Namibia".

Despite the fact that the definition of the relevant market[16] is the starting point in any type of competition analysis and the definition in both its product and geographic dimensions has often a decisive influence on the assessment of a competition case, ***the Competition Act, 2003 of Namibia does not define "relevant market"***. The market definition helps to identify competitors involved and makes it possible to calculate market shares that would convey information regarding market power for the purposes of applying the Act, in particularly for assessing dominance. It is important to stress that the concept of relevant market in competition law is different from other concepts of market often used in other contexts. For instance, companies often use the term market to refer to the area where they sell their products or to refer broadly to the industry or sector where they belong. ***That is why the definition of the relevant market should be an integral part of the Competition Act.*** Failure to have the definition in the Act results in stakeholders failing to understand the context in which "relevant market" is used in the Act, and decisions made by the Competition Authority may be unnecessarily challenged on these grounds.

Many countries have also issued detailed guidelines on implementation of the law in order to facilitate the market delineation (for example the European Commission has issued a Notice on the definition of relevant market for the purposes of Community competition law[17]). These guidelines provide information about factors to take into account while defining relevant product and geographic markets, including substitutability of products, market structure and practices of consumers, market for products auxiliary to the relevant product, capability of substitution in terms of supply, competitive conditions and barriers to market access. In determining the relevprant product market, it is common to use the test of *Small but Significant and Non-transitory Increase in Price* (SSNIP Test or "hypothetical monopoly test) to define the relevant market in a consistent way, as an alternative to *ad hoc* determination of the relevant market by arguments about product similarity.[18] Under this test, the hypothetical question asked is that "if the price of the product were increased by a factor of around 5 to 10 percent, which product would be used as a substitute by consumers?" The relevant product market would cover all such products. Consumer surveys might also be used during this process.

However, some techniques might be quite resource-intensive for a young competition authority like Namibian to undertake, given the paucity of resources (personnel, finance, time, public understanding and support etc.) Besides, the problems of information asymmetry and scarcity of data can also impose serious constraints. However, these should not deter the competition authority in making efforts to undertake the proofs of market definition.

Time Period: A third possible dimension to market definition is time. Examples of how the timing of production and purchasing can affect markets include:[19]

- Peak and off-peak services: This can be a factor in transport services or utilities such as electricity supply.
- Seasonal variations, such as summer vs winter: This might have significant implication on the purchasing pattern of consumers when it comes to such goods as clothing, air-conditioners or heaters, etc.
- Innovation/inter-generational products: Customers may defer expenditure on present products because they believe innovation will soon produce better products or because they own an earlier version of the product, which they consider to be a close substitute for the current generation. Some examples are trendy garments, or computer software, etc.
- Possibility of new entry in the future: In addition to those producers who have already supplied the market (on the assumption they will do so in the future), some others can and would supply the market in response to an anticompetitive action.

To some extent, the time dimension is simply an extension of the product dimension: i.e. the product can be defined as the supply of train services at a certain time of day. That's why it is advisable to mention the time dimension in the Competition Act, while defining "relevant market".

3.3 Market Share & Structure

Market share, in strategic management and marketing, is the percentage or proportion of the total available market or market segment that is being serviced by a company.[20] In the competition world, market share of a company will vary according to the definition of relevant market. The smaller the relevant market defined for a particular case, the higher share a company may account for in that market.

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In economics, markets are classified according to the structure of the industry serving the market. Industry structure is categorised on the basis of market structure variables which are believed to determine the extent and characteristics of competition therein. Those variables which are most popular are the number of buyers and sellers, the extent of product substitutability, costs, ease of entry and exit, and the extent of mutual interdependence. In the traditional framework, these structural variables are distilled into the following taxonomy of market structures:

Perfect competition: A market structure in which all firms produce a homogeneous, perfectly divisible output; producers and consumers have full information, incur transaction costs and are price takers; and there are no externalities.[21] Since perfect competition is rarely, if ever, encountered in the real world, it is mentioned here only as an ideal against which to compare other types of market structures.

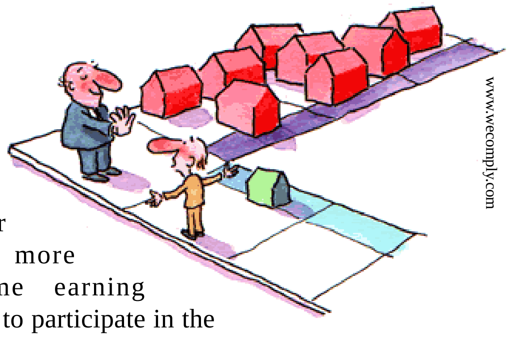
Normal or monopolistic competition: A market structure in which a large number of firms compete with each other by making similar but slightly different products.[22] Each of the firm has some control over the prices it charges since products are differentiated. However, since there are no significant barriers to entry and products are closely substitutable, the firm cannot affect the market as a whole. Such market structure is often referred to as 'normal' or 'workable competition'. Many markets can be cited as examples hereby, for example, the markets for books, clothing, films and service industries in large cities.

Oligopolistic markets, thus, can be said as being characterised by inter-relationship between market participants. The Banking sector in Namibia provides an example of an oligopolistic market.

Oligopoly: A market structure in which the market is dominated by a small number of sellers or buyers (*oligopolists*[23]). Because there are few participants in this type of market, each oligopolist is aware that it can affect market price and hence its competitors' profit: Ford cannot and does not ignore Honda when making decisions regarding automobile production. Oligopolistic markets, thus, can be said as being characterised by inter-relationship between market participants. A firm *must* consider rival firms' behaviours to determine its own best policy. The Banking sector in Namibia provides an example of an oligopolistic market.

Monopoly: This is a market structure characterised by a single firm selling a product for which there are no close substitutes or substantial barriers to entry.[24] In this case the monopolist can maximise its profit by charging the highest price the market will bear. The telecommunication sector of Namibia before the liberalisation of the sector was a perfect example of monopoly.

3.4 Competition Law & Policy



Competition has increasingly been recognised as the cornerstone of thriving economies throughout the world.[25] It is essential for the efficient allocation of resources, helps to promote innovation, increases factor productivity, creates more employment and income earning opportunities, enables SMEs to participate in the market. It is thus a useful tool for growth and poverty reduction.[26]

Competitive forces work best in the presence of markets that are free from distortions. However, as mentioned before, perfect competition rarely exists in real life, so the full benefits of competition do not often materialise.[27] The competitive process is more than often discouraged and is not fair for reasons of special interests, big government, and citizens' weak economic understanding. When markets are not competitive, whether due to policy-induced distortions, technological characteristics, or anticompetitive behaviour by market participants, an economy may miss many potential benefits for its citizens. Furthermore, government deregulation efforts that are intended to benefit consumers might even have counter-effects.

Consequently, in addition to disciplines to eliminate non-competitive behaviours by market participants, other measures are needed to enforce policies that encourage firms to compete (or discourage or prevent firms from resisting rivalry), in order to improve the efficient allocation of resources. Thus, the benefits from competition are not only limited to keeping prices at marginal cost for the benefit of consumers, as in static efficiency, but also create a conducive environment for new businesses to enter and grow while at the same time compel existing firms to continuously improve and perform better.

Competition policy[28] refers to those government measures that directly affect the behaviour of firms and the structure of the industry. It is an integral part of economic policy, and may embrace several elements such as trade liberalisation, industrial, investment, and privatisation policies, which have the main objective of preserving and promoting competition as a means to ensure efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices, and adequate supplies to consumers.

Competition law, on the other hand, is a body of legal rules and provisions that ensures fairness and freedom in the marketplace by regulating the conducts of firms, prohibiting anti-competitive arrangements and abuse of dominance, which impede the competitive process and hamper the legitimate rights and interests of other market players, including consumers.

Competition Policy = Economic Policies Affecting Competition + Competition Law

4. RESTRICTIVE BUSINESS PRACTICES

Restrictive business practices (RBPs), or anticompetitive practices, put simply, are actions by enterprises, whether in the private or public sector, designed to limit access to markets or restrain competition in the market in order to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

According to the Competition Law 2003 of Namibia, there are two types of RBPs:

- restrictive agreements, practices and decisions (called Part I prohibition, because the prohibition is imposed by Part I of Chapter 3); and
- abuse of dominant position (Part II prohibition).

Various types of RBPs will be explained in a nutshell. Legal provisions of the Namibian Competition Act will be clarified along with the relevant legal theory and quoted real-life cases from Africa or other jurisdiction in the world dealing with such practices will be provided.

4.1 Market Power

A key concept in many competition analyses is that of 'Market Power'. Without market power, no anticompetitive practices by firms can achieve their intended goal.

'Market power' refers to the ability of an individual firm or a group of firms to raise and maintain price above the level which would prevail under competition.[29] The highest degree of market power is associated with a monopoly, although all firms; except for those operating in perfectly competitive markets; possess some degree of market power.

High market share is generally considered as a necessary, though not a sufficient, condition to establish market power.[30] Besides, as debate exists on what criteria best reflect potential market power; even the measurement of market share is a controversial issue. For example, market share can be measured by current sales, historical sales or even capacity (potential).

Some jurisdictions have established *de facto* or *de jure* benchmark market shares above or below which market power is presumed to exist or not exist. Yet, it is not clear that there is an economic justification for pre-determining the existence of market power at any given market share. Alternatively, concerns about administrative efficiency sometimes justify a market share 'safe harbour', below which market power is deemed not to exist.

Determining whether a firm or group of firms have market power or not is the starting point for case analysis with regard to abuse of dominance. (This is a type of RBP, which would be discussed later under Section 4.7). Important factors that must be considered in measuring the market power of a firm or a group of firms, other than market share, include:

- number and market shares of competitors;
- nature of the relevant product;
- countervailing power of other market participants;
- intellectual property rights (IPRs);
- market characteristics such as regulatory environment, rate of technical change, existence of potential or poised competitors; and
- barriers to entry.

Though being last in the list, barriers to entry usually constitute the most important factor. Dominance does not exist if entry to a market is easy. A firm with a 90 percent share of the market is not dominant if, as soon as it raise the price of its goods, other firms would enter the market and sell their goods at more competitive prices. As a result, a definition of dominance requires an analysis of whether there are any barriers to entry.

Box 2: Four General Cases of Markets Classified According to Barriers to Entry

- *High* barrier to entry and *high* exit barrier (Telecommunications, Energy)
- *High* barrier to entry and *low* exit barrier (Consulting, Education)
- *Low* Barrier to entry and *high* exit barrier (Hotels, Siderurgy)
- *Low* barrier to entry and *low* exit barrier (Retail, E-commerce)

Markets with high entry barriers have few players and thus high profit margins. Those markets with low entry barriers have lots of players and thus low profit margins. Moreover, markets with high exit barriers are unstable and not self-regulated, so the profit margins fluctuate very much along time, whereas markets with a low exit barrier are stable and self-regulated, so the profit margins do not fluctuate along time.

Source: http://en.wikipedia.org/wiki/Barriers_to_entry

Barriers to entry may be constituted by various factors, ranging from government regulation, IPRs, access to capital, considerable costs of entry, economies of scale necessary to penetrate the market, a well-organised distribution system, advertising, customer loyalty and brand recognition, etc. Sometimes, barriers to entry may include restrictive practices by the dominant businesses already operating in the field trying to protect their position.

In order to be effective, it is of utmost importance that the thresholds set are neither too high nor too low, as they will defeat the purpose of the law. The Namibian Competition law does not provide such indicators.

Competition laws of many jurisdictions follow the usual method of defining market dominance (and group dominance) on the basis of holding a certain 'market share' (expressed in percentage) of the relevant market. In order to be effective, it is of utmost importance that the thresholds set are neither too high nor too low, as they will defeat the purpose of the law. The Namibian Competition law does not provide such indicators. However, Section 25 of the Law empowers the Commission to prescribe criteria to be applied for determining whether the undertaking has, or two undertakings have, a dominant position in a market. The criteria may be used on any factors which the Commission considers appropriate. This wording has a lot of implications on the capacity of the Commission; otherwise, it may even become a self-defeating provision.

4.2 *Per se* or Rule of Reason?

RBPs as well as other conducts that impose undue restraints on competition, such as mergers & acquisitions (M&As) which are to be analysed subsequently are regulated by competition law. Such regulation, however, may entail various approaches.

According to the rule of reason, some strategic behaviour by firms might have both restraining effects on competition and dynamic efficiency benefits.

Some restraints are considered illegal *per se* in some jurisdictions. This means they are conclusively presumed to impose unreasonable restraint on the competitive process and thus anticompetitive,[31] or can be held as illegal by itself, without further defence.

In other cases, it is established that only combinations and contracts unreasonably restraining trade are subject to actions under the competition law and that size and possession of monopoly power is not illegal. In these cases, restrictive trade practices (as well as other competition concerns) is said to be subject to the 'rule of reason'.

According to the rule of reason, some strategic behaviour by firms might have both restraining effects on competition and dynamic efficiency benefits. In case the latter consequences override the former effects, then that behaviour could be allowed to pass the scrutiny of competition statutes. A practice may be held as efficiency-enhancing if:

(i) it can be found to be pro-competitive (for example, in promoting innovation and technological advance, promoting exports or the country's international competitiveness, etc), or

(ii) it has been undertaken in public interest (for example, by avoiding unemployment or protecting the environment, etc)

Getting exemption on these grounds means that an agreement is accepted to be trade-restrictive, but the gain from it would outweigh the loss caused by its anticompetitive nature.

The Competition Law 2003 of Namibia requires rule of reason analysis. Restrictive practices are prohibited unless they are exempt in accordance with the provisions of the Chapter 3, Part III. This is similar to Article 81 of the EU Treaty, which states that the prohibitions on anticompetitive agreements are *per se* violations in Section 2, but then provides in Section 3 that there are further defences that may make the actions of Section 2 lawful. Accordingly, the entire consideration of the lawfulness or unlawfulness of business practices includes the defences (or in the language of Part III of the Namibian Competition Law – the "exemptions").

According to section 27 (1) of the Competition Law 2003 of Namibia, any undertaking or group of undertakings may apply to the Commission to be exempted from the provisions of Part I or Part II of Chapter III in respect of:

- any agreement or category of agreements;
- any decision or category of decisions;
- any concerted practice or category of concerted practices.

The unclear formulation of the Section 27 may cause confusion concerning the exemption from the provision of Part II (exemption from the abuse of dominant position). If the Commission finds that an infringement has occurred, the "abuse" can not be exempted from the application of the Act. On the other hand, the Commission may issue a "certificate of clearance" at a company's request if it considers that the practice concerned does not infringe the Act. Thus, a certificate of clearance can not be viewed as an exemption from the abuse of dominant position, because the Commission may issue the former only if the presumed abuse has never occurred.

The Commission must make a determination in respect of the application, and may:

- grant an exemption; or
- refuse to grant an exemption, accompanied by a statement of the reasons for the refusal; or

- issue a *certificate of clearance* stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the Part I or the Part II prohibition.

The determination of application for exemption depends, pursuant to section 28 of the Act, on whether the Commission is satisfied that there are exceptional and compelling reasons of public policy why the particular restrictive practices ought to be excluded from the Part I or the Part II prohibition. In taking the above-mentioned decision, the Commission must take into account the extent to which these practices (agreement, decision or concerted practice, or the category of agreements, decisions or concerted practices concerned)

- ➢ contributes to or results in, or
- ➢ will be likely to contribute to or result in :
  - maintaining or promoting exports;
  - enabling small undertakings owned or controlled by historically disadvantaged persons, to become competitive;
  - improving, or preventing decline in, the production or distribution of goods or the provision of services;
  - promoting technical or economic progress or stability in any industry designated by the Minister, after consultation with the Minister responsible for that industry;
  - obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

The important point is that the Namibian Act proclaims the RBPs listed in its Section 23 to be prohibited, thus unlawful, unless the parties have previously obtained an exemption in accordance with the provisions of the Part III, Chapter III. This essentially means that the business entities may not proceed with a transaction that literally violates the prohibitions even if the transaction is pro-competitive. If parties want to proceed in their transaction, they must firstly apply for the exemption, of which the Commission shall give notice in the Gazette, and await the Commission's decision after a due process.

In a country with low competition awareness like Namibia, such provision imposes unreasonable obligations of undertakings and adds unnecessary review workload on the Competition Commission. The difficulties in implementation arise also from the fact that undertakings are required to undertake a complex legal analysis of their "restrictive" practice in order to find out whether their agreement is really restrictive or not and to apply for the exemption.

Moreover, giving the notice of a received application in the Gazette could have huge practical consequences. Forcing companies to reveal their business plans could remove much of the competitive desire to innovate. Moreover the delay could make it impossible to respond to a competitive challenge from others.

4.3 Exemptions under the Act

Section 30 and 31 respectively provides special categories of exemptions in respect of intellectual property rights and professional rules.

4.3.1 Exemption in Respect of Intellectual Property Rights

Section 30 of the Act empowers the Commission to grant upon application an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights (IPRs).

4.3.2 Exemption in Respect of Professional Rules

Pursuant to section 31 of the Act, a professional association whose rules contain a restriction that has the effect of preventing or substantially lessening competition in a market may apply to the Commission for an exemption. The Commission may exempt all or part of the rules of a professional association from the provisions of Part I of the Chapter III for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of preventing or substantially lessening competition in a market is reasonably required to maintain:

- professional standards; or
- the ordinary function of the profession.

The "*rules*" according to the Act means rules regulating a professional association that are binding on its members, and includes codes of practice and statements of principle.[32]

The Act provides a legal definition of the *professional association* in section 31 (7). A "professional association" means a controlling body established by or registered under any law in respect of the following professions, and includes any other association which the Commission is satisfied represents the interests of members of any of the following professions: accountants and auditors; architects; engineers; estate agents; legal practitioners; quantity surveyors; surveyors; town and regional planners; health services professionals governed by:

- the Medical and Dental Professions Act, 1993 (Act No. 21 of 1993);
- the Nursing Professions Act, 1993 (Act No. 30 of 1993);
- the Pharmacy Profession Act, 1993 (Act No. 23 of 1993);
- the Veterinary and Para-veterinary Professions Proclamation, 1984 (Proclamation No. 14 of 1984);
- the Allied Health Services Professions Act, 1993 (Act No. 20 of 1993).

The above-mentioned list of profession is not complete, because it includes any other profession to which the provisions of this section have been declared applicable by the Minister by notice in the *Gazette*.

4.3.3 Notification of Grant, Revocation or Amendment of Exemption

The obligations of the Commission upon receiving an application are the following:

- publish a notice of the application in the *Gazette*;
- allow interested parties 30 days from the date of that notice to make representations concerning the application; and
- consult the Minister responsible for the administration of any law governing the profession concerning the application.

After considering the application and any submission or other information received in relation to the application, and consulting with the responsible Minister, the Commission must either grant an exemption or reject the application by issuing a notice in writing to the applicant and publish the notice of that decision in the *Gazette*. The Commission must give written reasons for its decision if it rejects the application.

The Act provides the possibility to revoke or amend the granted exemption, if the Commission considers that any rules, either wholly or any part thereof, should no longer be exempt. It may revoke the exemption in respect of such rules or the relevant part of the rules, at any time after it has:

- given notice in the *Gazette* of the proposed revocation;
- allowed interested parties 30 days from the date of that notice to make representations concerning the exemption; and
- consulted the responsible Minister referred to in subsection (3)(c).

The Commission must as soon as is practicable cause to be published in the *Gazette* notice of every exemption granted, and of every exemption revoked. Box 3 shows some agreements that can escape competition laws, after the

Box 3: Some Agreements can Escape Competition Law Prohibitions in EU

These agreements can be explicitly exempted by laws, regulations or "rule of reason" reasoning because they contribute to economic development and market efficiency. Within the EU, most of these agreements are "category exemption".

- Exclusive distribution agreements;
- Exclusive purchasing agreements;
- Patent licensing agreements;
- Motor car distribution and servicing agreements;
- Specialisation agreements;
- Research and development cooperation agreements;
- Franchise agreements;
- Technology transfer agreements;
- Certain types of agreements in the insurance sector.

Sources: OECD and European Commission.[33]

application of the rule of reason approach. As discussed in section 4.2, the Act can also exempt some of these agreements, provided that they are found to be beneficial, through the application of the rule of reason approach.

4.4 Anticompetitive Agreements

Agreements between competitors concerning price, customer allocation, etc. are the RBPs that have the most obvious potential for harming competition and consumers. Parties to those agreements may not be in possession of market power individually. However, they might enter into an understanding, written or verbal, implicit or explicit, which will help to exercise their collective market power in order to seek unjust economic rents for all members.

Such agreements may either be between firms, which are in a *horizontal relationship* (i.e. all parties are at the same level of production or marketing in a chain to bring a product/service to the end consumers, such as between different producers of gas burners or cars, or between various sellers of soft drinks, etc), or between those, which are in a *vertical relationship* (i.e. parties are at different level of production or distribution process. For example, one party is the supplier of inputs to the other party's business activity, such as component vendor. Distribution agreements between the manufacturers and the distributors serve also as an example of vertical relationship).

Section 23 subsection 1 sets out a general prohibition of restrictive practices. Not only agreements between undertakings, but also decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited. Agreements and concerted practices include agreements concluded between:

- parties in a horizontal relationship, being undertakings trading in competition; or
- parties in a vertical relationship, being an undertaking and its suppliers or customers or both.[34]

4.5 Horizontal Agreements

Horizontal anticompetitive agreements, or cartels, as they are usually called in competition jargon, have traditionally been considered the most serious of all anticompetitive practices and constitute that category of violations most susceptible to criminal penalties in many jurisdictions in the world.

Being horizontal anticompetitive agreements by nature, cartels are arrangements between groups of firms that produce and sell the same product for the purpose of exacting and sharing monopolistic rents. Most commonly, they accomplish this by agreeing on a relatively high common asking price for their product that none of the member firms will be permitted to underbid (i.e. price-fixing cartels). Alternatively, the member firms may simply agree to divide the market by geographic territory or by customers and grant each other local monopolies without necessarily enforcing a uniform price structure (i.e. market allocating or customer sharing cartels).

Cartels are considered as a cancer of market economies. They are quite prevalent, ranging from the global agreement between huge multinational vitamin manufacturers, to maybe the understanding between four or five departmental stores in Windhoek. Cartels are secretive by nature, and hence are very difficult to detect and investigate. However, it is said that industries or markets, which have the following characteristics are more prone to cartelised behaviours:

(i) Markets where there are a relatively small number of firms and a large number of customers;
(ii) Market demand is not too variable;
(iii) Products/services are generally homogeneous, and there are no substitutable products; and
(iv) Individual firms' outputs, asking prices and sale turnovers can be easily monitored by the cartel organisations, for example in the retail petrol market, where the retail prices are displayed all the times at all gas stations (so as to discourage cartel members from cheating and breaking up the cartel).

Cartels are secretive by nature, and hence are very difficult to detect and investigate.

The Organisation for Economic Cooperation and Development (OECD) defines the essence of a "hard-core" cartel as being: an anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating

Box 4: Malignity of Cartels

Hard-core cartels either raise or maintain prices at higher levels than they would be if competition were not distorted. They can restrict the supply of goods and services to consumers and businesses or make them unnecessarily expensive. The money that leaves consumers' pockets simply becomes extra profit for the firms involved.

The US competition authorities estimate that cartels, on average, lead to a **10 percent** increase in the price of the goods or services affected. By adversely affecting the efficient running of the economy, the potential harm to society could be much greater given that a cartel can affect up to **20 percent** of the volume of commerce.

Source: http://www.archive.official documents.co.uk/document/cm52/5233/523310.htm

Box 5: The OECD's Work on Hard-core Cartels

The Competition Law and Policy Committee of the OECD has reported that in the US alone, ten recently condemned international hard-core cartels:

- Cost individuals and business many hundreds of millions of dollars annually.
- Affected over US$10bn in US commerce, with overcharges of over US$1bn.
- Caused even more harmful economic waste estimated at over US$1bn.

The OECD recognised that, to calculate the global harm of all cartels, these striking numbers would have to be increased by:

- The harm these cartels had done inside the US.
- The harm these cartels had done outside the US.
- The harm done by other successfully challenged international and domestic cartels.
- The much larger number of undiscovered and unproven hard-core cartels.

They concluded that although no such calculation was possible, cartels are clearly a major and largely invisible drain on the world's economy. The OECD estimates that the drain to the US economy from recently exposed cartels runs into billions of dollars. But academics estimate that the US authorities, even with their stronger investigation powers, only manage to detect around a sixth of cartel activity.

Source: OECD: Hard Core Cartels: Meeting of the OECD Council at Ministerial Level, 2000.

customers, suppliers, territories, or lines of commerce.[35] Boxes 4 and 5 discuss the malignity of such hard core cartels. The Namibia Competition Commission can adequately deal with cartel agreements on price-fixing, market sharing, collusive tendering, resale price maintenance, or output restriction as they are forbidden under Section 23, subsection 1 and 2 of the Competition Act, 2003.

The Namibia Competition Commission can adequately deal with cartel agreements on price-fixing, market sharing, collusive tendering, resale price maintenance, or output restriction as they are forbidden under Section 23, subsection 1 and 2 of the Competition Act, 2003.

4.5.1 Price Fixing

As mentioned before, the most common practice undertaken by cartels is price-fixing. This is the term generically applied to a wide variety of concerted actions taken by competitors having a direct effect on price. The simplest form is an agreement on the price or prices to be charged on some or all customers. In addition to simple agreements on which price to charge, the following are also considered price-fixing agreements:

- on price increase;
- on a standard formula, according to which prices will be computed;
- to maintain a fixed ratio between the prices of competing but non-identical products;
- to eliminate discounts or to establish uniform discounts;
- on credit term what will be extended to customers;
- to remove products offered at low prices from the market so as to limit supply and keep prices high;
- not to reduce prices without notifying other cartel members;
- to adhere to published prices;
- not to sell unless agreed on price terms are met; and
- to use a uniform price as starting point for negotiations.

Without prejudice to the general provisions of Section 23 subsection (1) prohibiting the anticompetitive agreements, the subsection 3 of the same section prohibits in particular any agreement, decision or concerted practice which directly or indirectly fixes:

- purchase or selling prices or
- any other trading conditions.

The weak point of the competition regime is that no guidelines to back up the implementation of the Act are in place to provide further details on the conducts by price-fixings cartels.

The special wording of the Section 23 enables a liberal interpretation of anticompetitive agreements, decisions and practices and implies that subsection 3 does not provide their exhaustive list. In fact, the list is intended to serve as an example of the most common agreements, decision and practices. The weak point of the competition regime is that no guidelines to back up the implementation of the Act are in place to provide further details on the conducts by price-fixings cartels.

Box 6: Price-fixing in Healthcare and Motor Vehicle Manufacturing Industries

The South African Competition Commission initiated and completed an investigation into price fixing in the healthcare industry, and has referred its findings to the Competition Tribunal. The Tribunal has determined that the Respondents: the South African Medical Association (SAMA), the Hospital Association of South Africa (HASA) and the Board of Health Care Funders (BHF) have all contravened Section 4(1)(b)(i) of the Competition Act of 1998, by directly or indirectly fixing prices.

Within SAMA, there are practitioners that are competitors, for example urologists competing with other urologists or general practitioners competing with other general practitioners. The recommendation of tariffs for such practitioners to use, therefore, constitutes price fixing. In the case of HASA, the association recommends tariffs, in terms of which charges can be levied for certain services provided by the private hospital groups, who are all competitors and members of HASA. Likewise, the BHF recommends a scale of benefits to its members. The tariffs are intended to be guidelines for the purchasing of healthcare services.

It came to the Commission's attention that the respondents recommend and publish tariffs annually. Precedent by international competition authorities views this conduct as price fixing under competition law. The Commission agrees and has determined that it constitutes a prohibited practice regardless of whether the tariffs are adhered to or not.

Source: Achal Prabhala (2006), South Africa, in Competition Regimes in the World – A Civil Society Report, CUTS

Motor Manufacturers are Suspected of fixing Vehicle Prices

The South African Competition Commission has initiated a formal investigation into the high prices of vehicles. The Competition Commission started with a formal investigation into alleged setting a minimum resale price, collusion and price coordination. The main focus of the investigation, however is the setting of a minimum resale price by manufacturers which we think might be the standard practice in the industry.

As a result of that announcement, Internet chat rooms and discussion sites on motor websites are filled with car enthusiasts crying for the blood of vehicle manufacturers in South Africa. They feel that they have been cheated and betrayed and claim to have suspected as much for a long time.

Namibians that keep up-to-date with South African news are wondering how the results of the investigation will affect Namibian motorists. More to the point, Namibians are asking whether Toyota, recently fined N$12mn for fixing prices, will refrain from such practices in Namibia. They feel that local motor dealers are influenced in the same way by vehicle manufacturers.

The investigation is expected to reveal whether anticompetitive pricing exists in the industry and if that might be contributing to high prices for consumer. Information gathered by the commission suggest that it is almost a standard practice amongst manufacturers and importers of new motor vehicles to maintain minimum prices. In other words, the manufacturer imposes a minimum resale price on a dealer and by so doing limits a dealer's ability to offer discount. The competition authority will not hesitate to recommend that the highest fine be imposed on the perpetrators, which can be up to 10 percent of the firms' annual turnover.

The findings by a Tribunal of Investigation, appointed by the Commission, will not relate to the companies' activities outside South Africa, as that would be in violation of the South African Competition Act. However, seeing that the Namibian Competition legislation is in place the findings should serve as a basis for guidance in dealing with practices of this nature in Namibia. The Commission could also assist Namibia with advice regarding anticompetitive practices. The Namibian authorities should make sure that companies that operate there know that anticompetitive behaviour is also not tolerated in Namibia and the necessary provision of the Act must be invoked to deal with such practices.

Source: The Namibia Economist, May 14, 2004 (http://www.economist.com.na/2004/14may/05-07-19.htm)

It is important to note, in this regard, that though price-fixing cartels are normally deemed as illegal *per se* in most jurisdictions, in the case of Namibia, it may be possible to establish the grounds for an exemption even for this type of anticompetitive agreement. (See Section 4.2)

4.5.2 Market Allocating and Customer Sharing

Next on the list are cartel agreements that divide markets by allocating customers, suppliers, areas (territory) or specific types of goods or services among competitors.[36] Such arrangements are even more restrictive than the most formal price-fixing agreement, since they leave no room for competition of any kind, and hence are often held illegal *per se*. This, however, is not the case in Namibia, as a rule of reason approach should be used.

In developing countries like Namibia, a prevalent form of market sharing is unspoken/unwritten understanding between provincial monopolists, which has the same effects as cartels. A firm selling construction materials in Karas region may not venture to cater to the demand of a customer located in Erongo region. A courier company in Windhoek may refuse to serve a consumer from

Keetmanshoop. This conduct may not have anything to do with collusion, and might only be an independent decision taken with due consideration to business efficiency, and therefore is both lawful and strategically rational. However, the competition authorities should keep a watchful eye on them, in case they are sham covers for market allocating agreements.

In developing countries like Namibia, a prevalent form of market sharing is unspoken/ unwritten understanding between provincial monopolists, which has the same effects as cartels.

Box 7: Syndicate System in Surface Transportation

Majority of transport entrepreneurs in Nepal have formed local syndicates, which allow none other than syndicate members to ply their vehicles on the designated long routes. They have not only prevented other entrepreneurs from entering the transport business, but were also involved in vandalising buses which trespass on the demarcation of different syndicates.

Syndicate operators claimed that they did not allow non-members/buses to ply on 'their' highway, and if they did ply, they would be fined heavily. Companies outside the syndicate system felt that it created problem for their operations. They blamed the Government for being a mute spectator of the system and held it responsible for perpetuating near monopoly, thereby rewarding inefficiency and carelessness.

The Nepalese Government has adopted a liberalised and free economy about a decade ago. Even though in its Transportation Act, the government still recognises the role of bus syndicates, there is no question of allowing for artificial maintenance of monopoly. Enforcement, however, remains weak, and the unstable political situation recently does not help much, if not worsening the situation.

Nepal is in the process of adopting a competition law, in view of its accession commitments to the World Trade Organisation (WTO). However, even this process has been greatly delayed.

Source: Anticompetitive Practices in Nepal, Adhikari and Regmi, CUTS and SAWTEE, 2001

4.5.3 Output Restriction

Under this agreement, enterprises producing/supplying the same products/ services agree to limit their supplies to a lower proportion of their previous sales. The effect of limiting supplies is to create scarcity in the market, which makes it possible for sellers to raise prices of products/services.[37]

Any agreement, decision and concerted practice which limit or control production or market outlet is prohibited under section 23 (3) (e) of the Competition Act. However, the exemption in accordance with the provisions of Part III of Chapter 3 can be granted.

In many developing countries, output coordination has been quite a common feature activity of associations between manufacturers. Justifications given include avoiding the 'supply-over-demand' situation, to eliminate 'cut-throat' competition between small producers, or reducing the level of resources wasted, towards stabilising the market and benefiting consumers with stable prices and good quality. Some sectoral laws or regulations may, thus legalise

Box 8: Bloc Calendar –
Cartel or an Efficiency-Enhancing Agreement

Until 2006, an association of 48 publishing houses in Vietnam were coordinating the output of bloc calendars for a decade, when they fell apart. Bloc calendars are the every day tear-off calendar, and produced and sold around the time of a new year.

In 2005, the association had agreed to produce a total amount of 13.5 million bloc calendars to cater to the demand for the 2006 New Year of the whole country. These calendars were then produced and kept in stock with the Vietnam Book General Corporation, ready for distribution. Towards the end of 2005, however, the National University Publishing House of Ho Chi Minh City (NUPH-HCM) suddenly withdrew their participation from the association and at the same time, announced that they would produce and market, all by themselves, a total amount of 2 million bloc calendars.

The association and its other members were very agitated with this sudden move. Since the NUPH-HCM was supposed to produce only 200,000 calendars, the amount of calendars they then produced would overwhelm the market. The association, therefore, lodged a complaint with the General Department of Publication (Ministry of Culture and Information). However, due to the introduction of the Law on Publication 2004 and a document No. 1187 on opening up the publishing business, the General Department could neither find any fault with the decision of the NUPH-HCM, nor forced them to rejoin the association.

While the old association accused the NUPH-HCM of not honouring their commitment, which caused supply to exceed demand, creating loss for all, the latter argued that they were only following the spirit of liberalising the publishing sector. On the other hand, the NUPH-HCM accused the association of output restricting, and fixing prices at a level higher than should be, causing loss to the consumers.

Source: Pham, Alice (2007), Competition Law in Vietnam: A Toolkit, CUTS HRC, Hanoi the formation and operation of cartels, which is against the letter and spirit of many competition laws. The conflict between sectoral laws and competition law can be resolved by giving the NaCC superseding powers in relation to competition issues. A clear definition and demarcation of the jurisdiction in the Competition Act is highly advisable.

Similarly as in the case of market sharing agreements, the competition authority should make sure that limiting or controlling production, market outlets is not a 'sham' to cover an anticompetitive intent. Inquiries could be made into the actual market demand, in correlation to individual firms' capacity and quotas enforced on them by the association. Further, output coordination does not mean shared distribution channels, identical prices or allocation of markets or customers. Any such additional 'coordination' may point to the existence of a cartel.

4.5.4 Collusive Tendering (or Bid Rigging)

Another type of cartel behaviour is collusive tendering. It is prohibited by Section 23 (3)(c) of the Competition Act 2003 of Namibia.

www.building.co.uk

Collusive tendering usually involves competitors collaborating in some way to restrict competition in response to a tender, regardless of whether the tender is issued by a public authority or a private entity. It is universally viewed as one of the worst 'hard-core' cartel-type offences alongside price-fixing, output restriction and market allocation, and is often a combination of these practices.[38]

Collusive tendering may include various types of agreements. The most significant are the following:

- Agreeing with a competitor that the competitor will not answer a request for tender;
- Agreeing with a competitor or potential competitor that the competitor will submit a higher price than others so that others can win the tender;
- Agreeing with a competitor or potential competitor that the competitor will submit a tender with terms which they know will be unacceptable to the tendering body.
- Agreeing to take turns with a competitor in being the lowest tenderer;
- Agreeing with competitors that a competitor will refrain from producing the other's products;
- Agreeing with competitors that a competitor will refrain from selling in the other's territory;
- Agreeing with competitors that a competitor will not sell or try to sell to the other's customers;

- Agreeing with competitors that they will not enter into a market in which the other is a potential or actual rival.[39]

Collusive tendering, as all other cartel-type behaviours, can be difficult to detect and prosecute. However, as most competition laws broadly prohibit anticompetitive agreements and concerted practices between competitors, there need be no legally binding or formal agreement or any punishment or other enforcement mechanisms envisaged for a collusive tendering offence to be established. As in the case of other cartel types, circumstantial, rather than direct evidence is often enough to infer violations.[40]

Collusive tendering, as all other cartel-type behaviours, can be difficult to detect and prosecute.

Authorities are increasingly recognising the market conditions that make collusive tendering more likely to occur. These include, for instance: (i) the presence of a few sellers or of a small leading group of sellers that control most of the market; (ii) lack of ready substitution with other products; and (iii) standardised products. This is also quite similar to the case of other cartel types, as discussed above. While recent research shows that the building and civil engineering sector is at most risk of cartel activity, collusive tendering cases have also been found in numerous other industries.

Box 9: Alleged Bid-rigging in Namibian State Food Supply Contracts

The Namibian Government annually spends about Rs 40–50mn on various food supply contracts to service, among others, school hostels, prisons and annual drought relief programmes. Although these contracts are supposed to be given out on a competitive tender basis, the industry is dominated by two companies. Available information shows that there is a large degree of collusion between these two companies, namely Global Foods and Independence Caterers, who appear to share the business between them.

These two companies work closely in conjunction with a non-governmental organisation that operates more like a private company. It seems that the two principals of Independence Caterers and Global Foods essentially act as a cartel by ensuring that they do not make competing bids on the same contract. For example, the hostel food contracts are divided by region (of which there are 13 in Namibia) in order to encourage rural-based companies to also bid on these contracts. Global and Independence then find themselves willing partners in these regions to act as 'nameplates' for bids essentially compiled by themselves, for which the 'nameplate' company receives a commission of 10 percent.

To ensure that they do not bid against each other, each region is allocated to one of the two companies. While both may enter bids, prices are compared in advance to ensure that the contract is awarded to the right one. Bids are literally rigged to ensure, for example, that Global gets the Kavango contracts, and Independence gets the Ohangwena contracts. Although the bids appear competitive on paper, both companies refuse to allow the receiving parties (e.g. the hostel superintendent) to keep delivery notes against which to check their supplies against the original bids; both companies appear to short-change the system by then supplying inferior foodstuffs to what was asked for originally: for example, instead of supplying fresh fruit, dried fruit is supplied, or instead of meatballs in gravy, a soya-based product is supplied.

Source: Penetrating State and Business Organised Crime in Southern Africa, Volume 1, CHAPTER 2 NAMIBIA by John Grobler, published in Monograph No 86, September 2003, edited by Peter Gastrow
Institute for Security Studies: http://www.iss.co.za/pubs/Monographs/No86/Chap2.htm

4.5.5 Boycott or Joint Refusal to Deal

An illegal boycott or joint refusal to deal is a joint action by competitors that has the purpose of using the combined market power of those competitors to force a supplier, a competitor or a customer to agree to an action that harms competition, which would not be agreed to, absent the joint action. For example, by threatening to stop buying from a supplier, two very large retailing

customers might be able to force a supplier to agree not to sell one or more of its products to other retailers. If the supplier agreed, other retail stores would be losing sales if no other business was available to supply the product to them. Further, the public would probably be hurt both by the inconvenience of finding the product only at two stores. The use of this kind of threat is usually designed either to put the other retailers out of business or to limit competition in the sales of the item to two stores to make it easier to raise the price to the public.

Box 10. India's Pharma Retail Cartel

In India, though there are 20,000 pharma manufacturers, there are nearly 800,000 retailers. These retailers are said to dictate to the pharma companies what number of stockists a company should appoint; how many brands or its combinations should be available in the market; what should be the free samples policy and so on. Liberal margins are demanded and offered by the pharma companies on generic drugs, going up to 2000 percent.

In 1984, the Retail and Dispensing Chemists Association, Bombay, was brought before the Monopolies and Restrictive Trade Practices Commission (MRTPC) after it directed all wholesalers and retailers to boycott a company's product till the Association's demands were met by the company. The MRTPC observed that the impact of the chemists' boycott could by no stretch of imagination be considered negligible. The boycott represented an attempt to deny the consumers certain products to which they are accustomed and, therefore, the hardship to such consumers was patent. The MRTPC then passed a 'cease and desist' order.

Even before that, in 1982, the All India Organisation of Chemists and Druggists (AIOCD) had to face a similar fate. The AICOD was hauled up before the Commission in 1983 when it issued a circular to various pharmaceutical companies threatening that if they dealt with the State cooperative organisations and appointed them as stockists granting them sale rights, it would expose the companies to a boycott by its members. The case was decided in 1993 and the Commission struck it down as a restrictive trade practice of 'refusal to deal'.

Source: Pradeep S Mehta (2005), Competition Breaks Cartels, The Hindu Business Line on January 12, 2005, available at http://www.thehindubusinessline.com/2005/01/12/stories/2005011200330900.htm

Despite the fact that the Competition Act 2003 of Namibia does not expressively mention boycott or joint refusal to deal in the list provided in Section 23 (3), such practices are prohibited and hold illegal irrespective of the combined market share of the parties to the agreement, under the general Section 23, and such practices, as reflected in box 10 can be prohibited in terms of the Act.

4.5.6 Other Horizontal Agreements between Competitors

Many non-cartel horizontal agreements may be efficiency-enhancing by promoting research and development, create new or improved products or methods of distribution or improve information flow. Many, on the other hand, may eliminate competition, restrict output and raise prices.

One example of such agreements is the case of standard-setting organisations. Efficiency justifications happen when, for instance, some trade association or testing company says this kind of electrical plug will safely fit in this kind of socket, or this quality, grade, or whatever is safe to eat or safe to use in construction. These standards usually do not forbid the use of alternatives (unless they are put into a building code or health code) but buyers are generally afraid to use uncertified products so the effect is similar to a refusal to deal. And the standard setting process can be abused to keep out competitors or keep up prices which can be a violation of competition law.

In another instance, plumbers were able to discourage the building safety association from approving the use of plastic sewage pipes because the plumbers could charge more for welding metal sewage pipes than they could for gluing plastic ones.

The Competition Act of Namibia, as mentioned above, adopts a rule of reason approach towards all such agreements. The Commission has the power to examine the pro-competitive effects of such practice. An investigation over such practices should include delineation of relevant market for the case, verification of the parties' market share in the relevant market and collection and analysis of evidence on the anticompetitive acts. It should be reiterated at this point that the legal definition of the relevant market is crucial, because every competition case needs a clear starting point and its lack poses serious obstacle in implementation of the Act. Five other questions, which should be analysed to complement the investigative process, include:

- whether the restraint is likely to restrict output and raise prices?
- whether the restraint is naked or obviously related to some pro-competitive integration of economic resources?
- whether the restraint will restrict outputs and raise prices, or otherwise create or facilitate the exercise of market power?
- whether the restraint is necessary to achieve the asserted pro-competitive goals?
- whether the restraint's pro-competitive benefits outweigh its anticompetitive risks?

4.6 Vertical Agreements

Vertical agreements are, generally speaking, treated less severely than horizontal ones, often under the rule of reason by competition authorities. The Competition Act 2003 of Namibia does not deal with vertical restrictive agreements in a direct manner.

Vertical anticompetitive agreements involve businesses operating at successive stages of a production process. Simply put, in a vertical arrangement, for example bilateral, one party is the supplier of inputs to the other party's business activity. Vertical agreements are, generally speaking, treated less severely than horizontal ones, often under the rule of reason by competition authorities. However, to be sure, certain vertical agreements, which have adverse impact on competition in the market, have been uniformly condemned, such as that of tied sale, exclusive dealing or resale price maintenance.

Vertical anticompetitive agreements, which come under competition scrutiny, are usually contractual arrangements between suppliers (manufacturers) and distributors (retailers), which extend beyond simple arms-length pricing. They are usually motivated by the desire for vertical control within a principal-agent relationship, where the principal (the manufacturer) imposes contractual obligations on its agent (the retailer) when delegating responsibility for selling its good.[41] This is in distinction from vertical restraints based upon dominance, which will be dealt with separately under a section on abuses of dominance.

Such agreements may have a benign effect, e.g. by removing pricing distortions, optimising investment levels and eliminating avoidable transaction costs. They may also have an adverse effect not only by foreclosing markets to new entrants (which is the standard criticism) but also by dampening competition between existing rivals through restrictions on inter-brand and/or intra-brand competition.[42]

Similarly as horizontal restraints, it is often viewed that market power at one or both levels is a necessary condition for vertical restraints to have a substantial adverse effect on competition. With market power present, a number of other factors, notably the effects on competition of the subject agreement, and any indicator of efficiency, which might offset the agreement's adverse effect on competition, should also be taken into account while dealing with these types of vertical restraints.[43]

The Competition Act 2003 of Namibia does not deal with vertical restrictive agreements in a direct manner. The Act merely says, that prohibited agreements and prohibited practices include parties in vertical relationship, being an undertaking and its suppliers or customers or both.[44]

4.6.1 Resale Price Maintenance

Resale price maintenance (RPM) is the practice whereby a manufacturer and its distributors agree that the latter will sell products of the former at certain prices (resale price maintenance), at or above a price floor (minimum resale price maintenance) or at or below a price ceiling (maximum resale price maintenance).[45]

RPM sometimes might have a benign effect, or help promote business efficiency, and would accordingly be treated under the rule of reason. It is most often an instrument for encouraging services of all types at the retail level. These services are matters like providing advice to customers, keeping enough staff so that cashier lines are short, keeping inventory organised, even being enthusiastic, anything that a retailer does apart from setting the price. Box number…..provides a case dealing with pros and cons of the RPM, which occurred recently in the US.

Box 11: South Africa Tribunal Puts Brakes on Minimum Resale Price Maintenance

The Competition Tribunal of South Africa imposed a penalty of (Rand) ZAR3mn (US$419,000) on Federal Mogul Aftermarket South Africa (Pty) Ltd, for having contravened the Competition Act. This is the largest penalty levied by the Competition Tribunal. It follows an earlier finding by the Tribunal that Federal Mogul had engaged in RPM by obliging distributors to sell Ferodo brake pads at a determined price and penalising those distributors who did not comply.

Federal Mogul initially argued that the Tribunal's power to impose an administrative penalty was unconstitutional. However, the Tribunal found that a respondent in prohibited practice cases was not in an analogous position to a person accused in criminal proceedings, and that the Act provided adequate procedural mechanisms. Hence, the constitutional attack failed.

Whilst the maximum penalty (i.e. 10 percent of annual turnover) the Tribunal was entitled to impose amounted to just over ZAR6mn (US$838,000), the Tribunal found, after closer analysis of the factors specified in section 59(3) of the Competition Act, ZAR3mn (US$419,000) was an appropriate penalty. As per the South African Competition Act, resale price maintenance is a species of price fixing, and cannot be justified on the grounds that it may result in any technological, efficiency or pro-competitive gains.

Source: Prabhala (2006), South Africa, Competition Regimes in the World – A Civil Society Report, CUTS, p.282

Box 12: Hungarian Book Publishers in Trouble

The Hungarian Association of Book Publishers and Book Retailers have been found guilty of competition violations by the National Competition Council.

In a decision on April 11, 2006, the Council decided that certain rules of the association were intended to introduce RPM, by restricting independent retailers from selling books below a certain price. The Hungarian Competition Code contained provisions prohibiting 'resale at a loss' – prices lower than the purchase price. This is illegal, if the seller is not an agent of the publisher.

The code also prohibited the sale of big quantities on lower prices between March 01 and June 15 and between October 01 and December 31, 2005. Big quantities are books worth more than €192,300 (US$281,421). According to the Council, this was not only restricting inter-brand but also intra-brand competition.

The Council has not imposed a fine but has prohibited the use of these provisions and obliged the association to notify its members within 15 days.

Source: http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=3891

However, in the early days of competition law, RPM was considered to be nothing more than an attempt to fix retail prices at a monopoly level by a monopolist. The principle of *per se* illegality, therefore, was generally applied to deal with this practice, which is still applicable today in many countries' competition laws. This is, however, more a unilateral conduct rather than a vertical concerted action or agreement.

A practice of minimum RPM is expressly forbidden under Section 23 (3) (d) of the Competition Act 2003 of Namibia. Nevertheless, pursuant to subsection (4) of the same Section, the paragraph (d) does not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided:

- it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and
- if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, the words '*recommended price*' appear next to the price so affixed or applied.

However, the provision may not protect the consumers as retailers would generally be loathe to not adopting the recommended price for fear of termination of the retail contract. In general, the power to recommend the resale price for the supplier or producer is not at all desirable.

Box 13: Split Court's Ruling Expands Leeway to Dictate Retail Rates

Striking down an antitrust rule nearly a century old, the US Supreme Court ruled that it is no longer automatically unlawful for manufacturers and distributors to agree on setting minimum retail prices. The decision will give producers significantly more leeway, though not unlimited power, to dictate retail prices and to restrict the flexibility of discounters. The Supreme Court instructed judges considering such agreements for possible antitrust violations to apply a case-by-case approach, known as a rule of reason, to assess impact on competition.

Five justices said the new rule could, in some instances, lead to more competition and better service. But four dissenting justices agreed with the submission of 37 states and consumer groups that abandonment of the old rule would lead to significantly higher prices and less competition for consumer and other goods.

For example, such agreements can make it easier for a new producer by assuring retailers that they will be able to recoup their investments in helping to market the product. In addition, some distributors could be unfairly harmed by others (like Internet-based retailers) that could offer discounts because they would not be incurring the expenses of providing product demonstrations and other specialised consumer services.

Nevertheless, there was no compelling reason to overturn a century's worth of Supreme Court decisions that had affirmed the prohibition on resale maintenance agreements. The only safe predictions to make the decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles. Congress allowed the states to adopt laws that permitted retail price fixing from 1937 to 1975, and economists estimated that such agreements covered about 10 percent of consumer good purchases. In today's dollars, it is estimated that the agreements translate to a higher annual average bill for a family of four of roughly US$750 to US$1,000.

Source: Split court's ruling expands leeway to dictate retail rates by Stephen Labaton (Leegin Creative Leather Products, Inc. v. PSKS, Inc., 2007))
New York Times News Service: http://www.signonsandiego.com/uniontrib/20070629/news_1b29scotus.html

One of the most common areas of RPM is branded products. Manufacturers wishing to maintain a certain brand image often pressure retailers not to discount their goods, fearing that it may diminish the 'exclusive image' of their goods.

Another area where RPM routinely occurs is franchising. In this case, the franchisers may maintain a high degree of control over franchisee businesses, for example dictating what products they can buy and sell, and how all the operations of the business are to be conducted, and in some cases, even dictating the minimum prices for resale of goods, below which their franchisees must not sell, depending on the content of the franchising agreement. In Namibia, as well as in most other countries, franchising is an absolutely lawful way of doing business. Therefore, the application of Section 23 towards such agreements ought to be undertaken with caution.

4.6.2 Exclusive Dealing

Exclusive dealing is a vertical agreement by which a retailer or wholesaler is 'tied' to purchase from a supplier on the understanding that no other distributor will be appointed or receive supplies in a given area.

It is frequently argued that exclusive dealing agreements help a firm organise their distribution more efficiently. In such cases, where these agreements result in cost reduction or some other efficiency dividend, there might not be any competition problems associated with them, or only some minimal ones.[46]

On the other hand, such agreements also tend to have adverse effect on competition, since they may restrict the access of upstream rivals to distributors. Rivals may be foreclosed from the market altogether or, more commonly, forced to use higher cost, or less effective, methods to bring their products to market. In either case, competition can be reduced through either reducing the number of manufacturers serving the market or by artificially raising the costs of some manufacturers.[47]

Exclusive dealing agreements as an anticompetitive practice falls within the general prohibition of the Section 23 of the Competition Act 2003 of Namibia, even though the term 'exclusive dealing' is not specifically mentioned in the Act.

Due to this dual nature, in some jurisdictions, the conduct is prohibited outright (*per se*), while it is subject to an effects test (whether it has substantially lessened competition in a market) in others. In the US, for example, exclusive dealing was *per se* unlawful. However, a few years after making this announcement, the US Supreme Court reversed itself in the *GTE Sylvania* case and declared that, in general, exclusive dealing agreements are lawful.[48] There might be limitations to this ruling if it could be shown that the exclusive dealing requirements were, in a particular case, an effective method for monopolisation.

Exclusive dealing agreements as an anticompetitive practice falls within the general prohibition of the Section 23 of the Competition Act 2003 of Namibia, even though the term 'exclusive dealing' is not specifically mentioned in the Act. However, instead of prohibiting them per se, the Namibian Act subjects these agreements to the rule of reason.

Box 14: Namibian Manufacturers Cry Foul over SA Products

Many Namibian companies are losing business due to unfair trade practices from their counterparts in South Africa. Not only are the prices of South African goods more competitive, there are also allegations that agencies are forced to sign contracts to prevent them from supplying Namibian products to chain stores.

Since a year ago, manufacturing companies feel that products from South Africa, with which they cannot compete, flood the local market.

The Namibian Ministry of Trade and Industry is inundated with complaints of unfair practices that a number of companies in the manufacturing sector are experiencing. These complaints have also been forwarded to the NaCC.

Businesses that manufacture and trade in pet food, dairy products, toilet paper and tracksuits have a host of complaints about the business they have lost due to the practices.

Co-owner of A&R Pet supplies, Roland Bauer said yesterday if the company does not get more shops to supply to, it would close down its business, situated in the Southern Industrial area, which employs two workers.

In a letter addressed to the Permanent Secretary of Minister of Trade and Industry in Namibia, the NaCC and copied to the Ministry of Agriculture, Water and Forestry and also to the Agronomic Board, Bauer said the local companies were being pushed out by actions of South Africans to the extent that they have drawn up contracts with local agents to only supply South African products.

An agent that supplies mainly South African products to the retailers in Namibia, Pro trade Agencies said it would be more than happy to supply Namibian products if they were available.

Other matters that have been brought to the attention of the ministry include a toilet paper manufacturing company Professional Support Services, which complained about Shoprite's stoppage from printing the Rite Brand 10s and the singles toilet paper.

Source: Tjaronda, Wezi; http://allafrica.com

Box 15. Manufacturer vs Manufacturer in Ghana

Accra Brewery Ltd sued Guinness Ghana Ltd, seeking an order of interim injunction to restrain the latter from entering into or enforcing an agreement entitled 'Guinness means profit' with outlet owners of alcoholic beverages. The plaintiff manufactures products (Club Super Stout, Club Dark Beer and Castle Milk Stout) that compete with the products (Guinness Foreign Extra Stout) of Guinness. Accra Brewery's arguments were that:

- Guinness Ghana Ltd had entered into a 'money induced' agreement with about 183 retailers of alcoholic beverages in 1999, which bound these retailers to stock and advertise of only their products. Hence, these retailers refused to stock the products of the Accra Brewery;
- It was unlawful for Guinness to induce their common customers to break their contracts with Accra Brewery;
- The conduct of Guinness was preventing the Ghanaian public from exercising their freedom to choose any alcoholic or non-alcoholic beverages in drinking bars, or other authorised places where both the companies' products were sold;
- Guinness's act of inducement contravened the tenets of social and economic liberty and prosperity of the individual to trade with whom he pleases and the prosperity of the nation by the expansion of the total volume of trade; and
- Accra Brewery had lost substantial income as a consequence of the activity of Guinness.

The Judge ruled against Accra Brewery, giving the judgment that:

- There was no evidence of Guinness seeking to create a monopoly;
- There was no evidence that Guinness, by their own actions, was seeking to prevent customers from buying similar products more cheaply from elsewhere. This was since the products had the same sale price that was determined by agreement among the producers; and customers were free to choose which outlets they could buy from;
- There was no evidence that Guinness's market share had risen, as a consequence of the agreement; and
- There was no evidence that the public interest was likely to suffer, as a result of the agreement between Guinness and the selected retailers, since consumers still had a choice.

Source: Aryeetey & Ahene (2006), Ghana, Competition Regimes in the World – A Civil Society Report, CUTS

4.6.3 Tied Selling

Tied selling is the practice of making the sale of one good (the tying goods) to customers on the conditions of the purchase of a second good (the tied goods). Some kinds of tying, especially by contract, have historically been regarded as anti-competitive as it is implied in this that one or more components of the package are sold individually by other businesses as their primary product, and thereby this bundling of goods would hurt their business. It is also implied that the company doing this bundling has a significantly large market share so that it would hurt the other companies who sell only single components.

Tying has been defended as maximising overall welfare in a variety of circumstances. If the main product works better with the tied product than with others, the manufacturer may tie the products to avoid quality problems that could lead to product liability lawsuits or loss of reputation. Tying may also be used with or in place of intellectual property to help protect entry into a market, encouraging innovation.

Tying may also be used with or in place of intellectual property to help protect entry into a market, encouraging innovation.

Tying is often used when the supplier makes one product that is critical to many customers. By threatening to withhold that key product unless others are also purchased, it is said; the supplier can increase sales of less necessary products.

In the recent infamous antitrust cases that Microsoft faced in the US and EU, the software giant was alleged to have tied together Microsoft Windows, Internet Explorer, and Windows Media Player. Microsoft's view of it is that a web browser and a media player are simply part of an operating system (and are included with all other personal computer operating systems). Just as the definition of a car has changed to include things that used to be separate products, such as speedometers and radios, the definition of an operating system has changed to include those formerly separate products. However, the dealing US court, for example, rejected Microsoft's claim that Internet Explorer was simply one facet of its operating system. At the same time, the court held that the tie between Windows and Internet Explorer when analysed under the rule of reason is not *per se* illegal.[49]

The Competition Act of Namibia does not provide for the prohibition of tied selling specifically. It, however, prohibits in Section 23 (3) (g) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions, which by their nature or according to commercial usage have no connection with the subject of the contracts. Thus the Act can also deal with such issues as in Box 16.

Box 16: Tie-up Sales of Gas Stoves with Supply of Gas Connections

Like in any other command and control economies, some goods and services were always in short supply, which led to political patronage and exploitation. Businesses exploited the situation through restrictive practices like tie-up sales. One such case, which came before the MRTPC of India in 1984, was that of Shyam Gas Company. Shyam Gas Company, the sole distributor to Bharat Petroleum Corporation Ltd, for cooking gas cylinders at Hathras (Uttar Pradesh), was allegedly engaging in the following restrictive practices:

- Giving gas connections to the customer only when he purchased a gas stove or a hot plate from the company or its sister enterprise, Shyam Jyoti Enterprises; and
- Charging customers for the supply of fittings and appliances at twice the market price.

The MRTPC held that the company was indulging in an RTP that was prejudicial to public interest. When charged, Shyam Gas Co. agreed to stop the RTP, and the MRTPC directed the company to abide by the undertaking.

The company was also asked to display, on its notice board, that the consumers were free to purchase the gas stoves and hot plates from anywhere they liked, and that the release of the gas connection would not be denied or delayed if the stove or hot plate was not purchased from the company or its sister company. This order formed the basis of asking all LPG dealers to put up a similar notice in their premises.

Source: Monopolies Trade Regulation & Consumer Protection, D P S Verma, 1985.

4.7 Abuse of Dominant Position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The term 'abuse of dominant position' refers to anticompetitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market. Abuse of dominance is broadly of two types: Exploitative and Exclusionary. *Exploitative abuse* means exploiting customers by ignoring the needs of consumers and competitors. *Exclusionary abuse* involves exclusion of competitors.[50] These business practices by the firm, not without controversy, may be considered as "abusive or improper exploitation" of monopolistic control of a market, aimed at restricting competition.

> **Abuse of dominance is broadly of two types: Exploitative and Exclusionary. *Exploitative abuse* means exploiting customers by ignoring the needs of consumers and competitors. *Exclusionary abuse* involves exclusion of competitors.**

The term 'abuse of dominant position' has been explicitly incorporated in competition laws of various countries such as Canada, the EU and Germany. In the US, the counterpart provisions would be those dealing with monopoly and attempts to monopolise or monopolisation of a market. Which of the different types of business practices are considered as being abusive will vary on a case-by-case basis and across countries. Generally, the business practices which have been contested are the following:

- price discrimination;
- predatory pricing;
- price squeezing by integrated firms;
- refusal to deal/sell;
- tied selling or product bundling; and
- pre-emption of facilities.

Quite a few of these practices have already been discussed in the earlier sections on vertical restrictive agreements, such as tied selling or product bundling and pre-emption of facilities (of which distribution/retailing outlet is one), and horizontal restrictive agreements as well, such as that of boycott and joint refusal to deal. This section, however, focuses more on the 'unilateral-conduct' aspect of these practices.

Besides, as also already mentioned in preceding sections, the anticompetitive effects of various restrictive agreements are usually treated more harshly when there is a certain degree of market power among the colluding firms. Similarly, in this section, the subject practices, before being examined about their harms/restraints on competition, have to go through the fist filter, which is to establish whether the alleged firms possess market dominance or monopoly.

Abuse of dominance or monopoly position, as mentioned before, is prohibited by the Competition Act of Namibia in its Section 26 (1) in the following wording: Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or a part of Namibia, is prohibited.

Section 23 (2) provides, without prejudice to the generality of subsection 1, a list (though not necessarily exhaustive) of various practices by dominant firms, which would be deemed as violations of the Act. Thus, the abuse of a dominant position includes:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting or restricting production, market outlets or market access;
- limiting investment, technical development or technological progress;
- applying dissimilar conditions to equivalent transactions with other trading
- parties; and
- making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.

The important point is that this group of prohibitions does not have an exemption section as in the case of anticompetitive agreements.

4.7.1 Price Discrimination

Price discrimination refers to the practice of applying different conditions, normally different prices, to equivalent transactions. A simple example is the practice of charging of different prices to different customers, or categories of customers, for the same product where the differences in prices do not reflect the quantity, quality or any other characteristics of the items supplied.

Price discrimination is prohibited in the Competition Act of Namibia, under Section 26 (2) (c). According to the Act, such are the practices of "applying dissimilar conditions to equivalent transactions with other trading parties".

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In countries with a long heritage of state control over the market like Namibia, where the state sector assumed, and still does, a great importance, such discriminatory treatment is quite prevalent. However, it is important to stress that 'enterprises producing/supplying products or public-utility services, enterprises operating in the public sectors and domains' are also subject to the scrutiny of the competition law. In such cases where the competitive balance is unjustly tilted because of such practices, the competition should try to protect economic justice.

Box 17: Local Businessman Squares up to Sasol

South Africa's competition watchdog has recently handed a local business a big victory over the international oil company Sasol.

On April 01, 2005, the Competition Tribunal found Sasol – a Johannesburg-based Multinational Corporation (MNC), which converts coal into liquid fuel, such as gasoline, diesel and heating oils – guilty of unlawful price discrimination, following a complaint by small business Nationwide Poles.

Nationwide had originally complained to the Competition Commission. Following an investigation, the Commission concluded that there was no evidence of illegal price discrimination. Nationwide then complained to the Tribunal.

Nationwide Poles buys creosote, a wood-treatment chemical, from Sasol. It had complained that Sasol discriminated against small businesses, alleging that it was entitled to the full discount offered to Sasol's bigger customers, such as its rival Woodline.
Sasol claimed that it was not a dominant group and that creosote substitutes were freely available. The Tribunal disagreed, ruling that Sasol had broken antitrust law.

Source: http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=2513

Box 18: The Conduct of MTN of Charging Cell C the Commercial Interconnection Rate Amounts to Price Discrimination

Interconnection refers to connection that occurs between the various telecommunication networks to enable subscribers of one network to call and receive calls from subscribers of the other networks. A reduced interconnection fee is charged for CST areas. CSTs are telephones available for public use, operating on the mobile telecommunication networks, which are placed in areas where there is limited access to fixed line telephones. CST users are generally classified as being part of Living Standards Measure categories with an income of less than R4000 per month.

In terms of mobile phone operators universal service obligations, imposed by the Independent Communications Authority of South Africa (ICASA) and set out in their respective licenses, each of the cellular network operators is obliged to roll-out CSTs in 'under-serviced areas'. Cell C determined potential locations for the placement of CSTs with reference to a study of countrywide fixed line teledensity. ICASA approved the method used by Cell C to determine where to place its CSTs as well as the proposed roll out on the Vodacom network.

However, MTN objected to the placement of CSTs by Cell C, alleging that Cell C had rolled out CSTs in areas which did not fall within the ambit of 'under serviced areas'. As a result, MTN is charging Cell C the **commercial interconnection rate** of R1.25 per minute in stead of **CST interconnection rate** of R0.06 per minute, for all calls made from every Cell C CST to phones on the MTN network. On the contrary, MTN charges Vodacom the agreed upon **CST interconnection rate** of R0.06 per minute, when a user of a Vodacom CST, situated in the same vicinity of certain Cell C CSTs, phones MTN.

The Commission found that the conduct of MTN of charging Cell C the commercial interconnection rate in the same areas that it charges Vodacom CST rates amounts to price discrimination. Price discrimination occurs when a dominant firm, without any objective justification, charges different prices to purchasers for equivalent transactions. Price discrimination is prohibited by section 9(1) of the Competition Act if it is likely to result in a substantial lessening of competition. The Commission has found that MTN's conduct is likely to have the effect of substantially lessening competition between the telecommunication network operators.

Source: South African Competition Commission www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202007/PR03_2007.doc

4.7.2 Predatory Pricing

Predatory pricing occurs when a dominant firm temporarily charges particularly low prices below the cost of production in an attempt to eliminate existing competitors, or create a barrier to entry into the market for potential new competitors. The predator will incur temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits. Such behaviour may offer consumers advantages in the short run but will be disadvantageous if the seller is able to maintain the exploitation prices at a monopoly level in future.

Box 19: Price War in Namibia: Predatory Pricing

The Institute of Public Policy Research (IPPR) reported that the price war that ensued between **Holcim** and **Cheetah Cement** seems to have ended in the past year with retail prices now averaging NA$55 (US$7.16) way up from a low seen in late 2005 when prices were deliberately set slightly above NA$20 (US$2.60).

The IPPR said in its economic outlook for 2007 that it is expected that high demand for both cement and steel in South Africa could push up building costs and thereby dampen demand for construction activities. "However, the real danger emanates from the fact that virtually all four cement companies in South Africa (from where Namibia currently imports about 25 000 tonnes of cement a month) have to import extra volumes to augment local supply. Such practice brings to fore the impact of the exchange rate as prices are priced in US$. These developments should see the sector returning to negative territory this year after having had an uphill ride since 2003"," the IPPR said.

The entry into the local market by Cheetah Cement, which was selling Brazilian cement, sparked a price war with the long established Holcim South Africa. Holcim has been supplying cement to Namibia for the past 40 years. Holcim reduced its price of cement to NA$20 (US$2.60) per pocket from NA$45 (5.86) when Cheetah Cement entered the market and started selling cheaper cement from Brazil.

The Ministry of Trade and Industry accused Holcim of unfair trade practices and of trying to put Cheetah Cement out of the market. The trade ministry was supporting Cheetah Cement on the basis that the company had undertaken to build a cement manufacturing plant in Namibia. "We shall not accept any unfair trade practices and especially from those who do not want to see our country industrialised", said the trade ministry in support of Cheetah Cement.

Source:http://www.economist.com.na/content/view/1318/33/

Box 20: Predatory Practices in the Beer Sector in Zimbabwe

Nesbitt Brewery (Pvt) Limited, a small brewing company located at Chiredzi, Zimbabwe, lodged a complaint with the Competition Commission of Zimbabwe that National Breweries Limited was engaged in predatory pricing, having drastically reduced the price of clear beer in Chiredzi to unprofitable levels, with the intention of driving Nesbitt Brewery out of the market.

Investigations revealed that the clear beer industry in Zimbabwe was highly concentrated. Nesbitt Brewery was a new entrant into the market, challenging the long-standing monopoly position of National Breweries, which held a market share of 90 percent. National Breweries has a national distribution network, whilst Nesbitt Brewery only operates in Chiredzi.

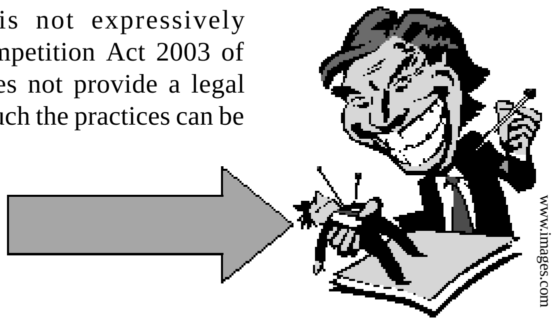
Investigations further revealed that the National Breweries had organised a beer promotion in Chiredzi from May 1999 to April 2000, when the Commission started gathering information on the case. The promotion included free snacks and T-shirts, lucky draw tickets, free beers and substantial price reductions. The promotion was only held in Chiredzi, where Nesbitt Brewery is based and also sells the bulk of its beer. The National Breweries retail prices for its beer, in Chiredzi during the promotion period, were below its normal landed costs in that town.

The Commission conducted a full-scale investigation under section 28 of the Competition Act of 1996. The alleged practices were found to be predatory within the terms of Section 2 of the Act. Although National Breweries stopped their promotion activities as soon as they became aware that they were being investigated, the Commission made them sign an undertaking that they would desist from future promotional activities primarily aimed at driving Nesbitt Brewery out of the market.

Source: UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 03-05, 2002

Predatory pricing necessarily involves the ability to raise prices once rivals have been disciplined or have exited the market. Consequently, a key consideration in determining that low prices are in fact predatory and may lead to a substantial lessening of competition is whether the market is viewed by potential competitors as having high barriers to entry. Such barriers might include high financial costs for entry, with difficult technology and little ability to sell off the assets if the new entry fails. Without such barriers, any post-predation price increase by the dominant firm might attract entry so that the dominant firm would not be able to raise prices and recoup the costs of predation.[51]

Predatory pricing is not expressively prohibited in the Competition Act 2003 of Namibia. The act does not provide a legal definition; however, such the practices can be viewed as a violation of general prohibition of the Section 26 (1). Although the Act can deal with cases similar to those given as examples in boxes 19 and 20, there may be limitations due to this absence of a definition. It is advisable to provide a clear definition of this practice and to set criteria for calculation costs in such cases.



4.7.3 Refusal to Deal/Supply

Absent a statute or other special circumstances, a business in a free market has an unlimited right to refuse to do business with any buyer for any reason or for no reason at all.

However, in many a case, one will see that the competition statutes of many countries prohibit such practice whereby a supplier refuses to supply goods to a dealer without reasonable justifications. In other more special instances, it might be the case that one dominant business which is in possession of 'essential facilities' in an industry or a market is prohibited by the competition law to refuse/restrict access to those facilities by competitors, if this is seen as an effort to maintain its dominant position.[52]

A supplier may refuse to supply for various reasons, for example to control the retail prices at which its products are sold or to protect its downstream markets. A situation may arise in which a supplier recommends resale prices to its dealers and refuses to supply those dealers who do not resell at these prices.

The problem arises when one firm is active in both upstream and downstream activities (it is vertically integrated) and refuses to grant other firms, who wish to provide either upstream or downstream services only, access to the "facility". The refusal to supply may be anti-competitive if it prevents third party firms from entering the market and consequently has the effect of lessening competition. A dominant firm, which controls access to an essential facility, may be abusing its dominant position if it refuses access to the facility without reasonable justification or grants access only on discriminatory terms such that its competitors in the related market are disadvantaged.

Refusal to deal/supply is not explicitly mentioned as being prohibited in the Competition Act 2003 of Namibia, even though it is perceived importance to developing countries.

Refusal to deal/supply is not explicitly mentioned as being prohibited in the Competition Act 2003 of Namibia, even though it is perceived importance to developing countries. However, refusal to deal/supply might fall under the general prohibition of the Section 26 (1). As this issue is very controversial and economically complex, the competition authorities are well-advised to proceed cautiously in this area. In order to develop a useful body of case law, the Competition Commission should be careful not to mistake injury to competition with injury to individual competitors. Orders requiring firms to provide mandatory access to "essential" facilities should sought only when the benefits of providing such access clearly outweigh the costs. The Commission should avoid applying excessively an "essential facilities doctrine" that means routinely compelling firms to deal with rivals. Such attitude would benefit competitors, but not competition. Moreover, it would discourage firms from investing in new products and services for fear that they may not earn an adequate recompense.

Box 21: IPRs over Weekly TV Guide Abused

The European Court of Justice (EJC), in its decision of 6 April 1995, confirmed that Radio Telefis Eireann (RTE) and Independent Television Publications Limited (ITP), who were the only sources of basic information on programme scheduling, which is an indispensable raw material for compiling a weekly television guide, could not rely on national copyright provisions to refuse to provide that information to third parties. Such a refusal, the Court held, in this case constituted the exercise of an IPR beyond its specific subject matter and, thus, an abuse of a dominant position under Article 86 of the Treaty of Rome.

The court argued that RTE and ITP held a dominant position, because they were the only source in Ireland of the basic information necessary to produce weekly television programming guides and were thus in a position to reserve for themselves the secondary market for weekly television guides by excluding all competition from that market.

The Court considered that, whilst refusal to grant a license in exercising an IPR is not of itself an abuse of a dominant position, it might be an abuse where special circumstances exist. Such circumstances included the lack of an actual or potential substitute for a weekly television guide, the existence of a specific, constant and regular demand for such a guide, and the fact that the refusal to grant a license to Magill to produce such a guide prevented the appearance of a new product on the market which RTE and ITP did not offer.

Source: Joined Cases 241/91 P etc. RTE and ITP v Commission [1995] ECR I-743

5. ENFORCEMENT OF THE COMPETITION LAW AGAINST RBPs

RBPs in Namibia, according to the Competition Act 2003, fall within the purview of the Namibian Competition Commission. The Commission is responsible for the administration and enforcement of this Act and, in addition to any other functions conferred to it.[53]

RBPs in Namibia, according to the Competition Act 2003, fall within the purview of the Namibian Competition Commission.

Pursuant to Section 33 (1) the Commission may, either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of:

- the Part I prohibition (Restrictive Agreements, Practices and Decision); or
- the Part II prohibition (Abuse of Dominant Position).

Any organisation or individual believing their rights and interests have been infringed by a violation of the Act (for instance, a company that thinks the practices of a competitor are in breach of the Act) has the right to lodge a complaint with the Commission. Section 57 of the Act imposes the time limit for commencement of investigation. An investigation into an alleged infringement of the Part I or the Part II prohibition may not be initiated after three years from the date the infringement has ceased.

If the Commission, having received from any person a complaint or a request to investigate an alleged infringement decides not to conduct an investigation, the Commission must in writing inform that person of the reasons for its decision. The Act does not give the right to appeal against such decision.

On the other hand, if the Commission decides to conduct an investigation, it must in writing give notice of the proposed investigation to every undertaking the conduct of which is to be investigated and must in the notice:

- indicate the subject-matter and purpose of the investigation; and
- invite the undertaking concerned to submit to the Commission, within a period specified in the notice, any representations which the undertaking may wish to make to the Commission in connection with any matter to be investigated.

A complaint file must include evidence of the anti-competitive practice, which is complained of. If the file is not complete, The Commission may, pursuant to Section 33 (4), by notice in writing served on any person in the prescribed manner require that person:

- to furnish to the Commission in writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation;
- to produce to the Commission, or to a person specified in the notice to act on the Commission's behalf, any document or article, specified in the notice which relates to any matter which the Commission considers relevant to the investigation;
- to appear before the Commission at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice.

The Competition Act empowers the Commission to make rules with the approval of the Minister, by notice in the Gazette, which will deal in detail with the practical aspects regarding the investigation. Pursuant to Section 22 (b-e), the Commission may:

- prescribe the procedure to be followed in respect of applications and notices to, and proceedings of, the Commission;
- prescribe forms of applications, notices, certificates and other documents required for the purposes of this Act;
- prescribe fees to be paid for the purposes of this Act;
- the manner for making a submission in relation to the subject matter of any application to, or investigation by, the Commission.

The Competition Act itself does not provide the detailed information, but it leaves space for Competition Commission to make rules, with the approval of Minister, by the notice in Gazette relating to

- the administration, organization and operations of the Commission;
- prescribing the procedures for investigations under this Act;
- prescribing the requirements for a small undertaking;
- relating to any other matter which is required or permitted to be prescribed under this Act, or considered necessary or expedient by the Commission in order to achieve the objects of this Act.

5.1 Detection of Violations

At least three classes of people will provide competition authorities with information that sometimes leads to investigations and findings of competition law violations:

- *confidential informants* (employees or persons or businesses seeking to take advantage of leniency provisions. The advantages of the leniency programme, which is not established under the Act, are explained hereinafter);

- *victims of anticompetitive practices* (generally customers, suppliers or competitors who suspect that they cannot get a deal for expected price, because of existence of a cartel artificially raising prices/supply etc.; and
- *employees of the competition authorities* who monitor public actions of industries (for example, a competition investigator would not find it unusual for prices of different producers to be about the same for identical products because the higher price seller would find no buyers; but the investigator would strongly suspect that a price cartel exists if the only five producers of identical products announced at the exact same time a price increase of the exact same amount).

Now there are strong reasons that some people, perhaps most, who fall into these three categories might be unwilling to file a public complaint. Consider for example an employee who overhears a conversation or sees a document that indicates that his (or her) company is party to a price cartel. As a good citizen, he may be willing to tell the competition authorities about his suspicions. However, as long as they are only suspicions, he or she would not like the company to know what he said. In fact, competition authorities normally would attempt to keep both the person's identity and the allegations confidential until more information was obtained. Indeed, they are likely to want the informant to seek further evidence of the unlawful activity, which would be impossible if the company knew the employee was talking to the competition authorities.

If the cartel members have been careful in arranging meetings and have no written agreements, and especially if there has been some cheating by cartel members, the testimony of a single competitor may be insufficient to prove that the cartel existed.

Much the same is true of a co-conspirator who is seeking leniency. Such an enterprise may have enough money, but they may not be sure that there will be enough evidence to prove the conspiracy if the allegations are made public before an investigation. If the cartel members have been careful in arranging meetings and have no written agreements, and especially if there has been some cheating by cartel members, the testimony of a single competitor may be insufficient to prove that the cartel existed. They might simply deny the meetings or agreement and point to the instances of cheating (selling at less than the agreed upon price) as evidence that there never was an agreement on price. Competition authorities might, therefore, encourage the informant to meet again with the other cartel members at a place where the authorities might videotape the cartel members (as happened in the US in the lysine cartel case).

Customers might be willing to suggest to the competition authorities that their suppliers seem to be engaged in a customer allocating cartel. The customer might suspect this if he tried to find a new supplier and the first two new suppliers he tried said that they have committed all of their supplies to existing customers. The customer who has made this allegation might try to find out if his rivals also face the same problem, but it is not clear that his rivals have an incentive to tell him the truth and if word gets out that he has complained to the competition authorities, the suppliers may make his supply problems more difficult. While it is likely that the customer will have to testify at some time, he could assist the competition authorities if he could try to gather additional evidence of a customer allocating cartel before the cartel member become aware of the investigation.

The timing of notification to suspected violators is also crucial to being able to gather additional information about a suspected violation. In the example of firms raising prices at the exact same time, it is possible that some external event or series of events caused the companies to announce their price increase at the same time. For example, if an association of business that purchased their products was about to meet and the competitors all learned that their suppliers were going to increase their prices; it is conceivable that all the firms individually decided that it would be prudent to announce the price increase before the meeting. A non-public investigation is more likely to be able to determine the facts and avoid the possibilities of wrongly accusing a group of innocent companies of violating the law or giving violators warning of the investigation and allowing them to make up an untrue story to disprove the violation.

Section 33 (3) requiring that the Commission must in writing give a notice of the proposed investigation to every undertaking the conduct of which is to be investigated will constitute a huge obstacle in investigation of anticompetitive practices. It is not advisable to announce publicly that a competition investigation is taking place before the investigation is concluded. An announcement should be made only when the investigation is concluded. The reasons why all investigations should not be public are to make it easier to conduct the investigation and to prevent unnecessarily harm to a company, if it is known to be under investigation and then later it turns out that the company has committed no violation.

5.2 Obtaining Proof of Violations

The kind of proof needed will depend on the nature of the violation and the proof required in order to show that the competition law has been violated.

Market shares: These are a set of number that are required in proving certain unlawful restrictive business practices, abuse of dominance, and unlawful mergers or joint ventures (as will be discussed in Section 6). For example, the proof of dominance also requires a demonstration of market shares.

In order to determine market shares, it is necessary to define the relevant market and determine the share of the enterprise or enterprises that are being investigated. As discussed earlier, this requires both a determination of the product market and the geographic market. In general, competition authorities begin with what their investigators know as individuals, what the authorities know from previous investigations, and what information is available from public sources.

As a result, an investigation might be compared to creating a map of undiscovered territory. In an investigation of manufacturers of a product, one might start by interviewing retail stores to determine what products are considered substitutes by consumers and what enterprises can sell the retailer the supplies, whether the suppliers must have local production facilities or whether the product is produced on a national or international level. Such interviews might be just a start to defining the product and geographic market. The list of manufacturers gained from the retailers would provide a start that might be followed up with interviews with distributors or wholesalers. Any of these interviews might point to other manufacturers who could make the products or who might be planning to make the products. Little by little a consistent picture of the industry is likely to emerge as the answers of businesses are cross-checked. Ultimately, it will be necessary to gain information from the manufacturers themselves to determine the size of their sales in the relevant market and their capacity to manufacture additional products for that market.

Most established competition authorities can quickly put together a preliminary sketch of an industry from voluntary interviews with market participants. Obtaining such information voluntarily and quickly is possible only if the businesses have confidence that the competition authorities will keep business information secret. The Competition Act 2003 of Namibia provides in Section 55 (1) the prohibition on disclosure of information. Each member of the Commission or of a committee, the Secretary, any other employee of the Commission and any other person required or permitted to be present at any meeting of the Commission or of a committee or at any investigation in terms of the Act, may not publish or communicate or in any other way disclose any

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information relating to the affairs of any person or undertaking that has come to such person's knowledge:

- in the exercise of any power or performance of any duty or function under this Act; or
- as a result of such person's attendance at such meeting or investigation.

Competition authorities should find it easier to obtain information informally if they make it known that they are required to keep business secrets confidential and they have demonstrated that they comply with the requirement of confidentiality. Accordingly, for a new competition authority, it is important to build trust with the business community; but it is also helpful if the authority has the formal authority to require the submission of the information. At some point in a competition proceeding, it will be necessary to obtain formal records, but in making the preliminary determination whether an investigation should be pursued, it may be that the burden on everyone will be less if the interviews in a preliminary investigation are informal. Many allegations or suspicions of violations can be dismissed quickly and at a low cost by using informal investigative techniques.

Intent evidence*:* It is often much more difficult to obtain. As noted above, evidence that enterprises are parties to illegal agreements is often difficult to obtain, especially if there is no confidential informant. An abuse of dominance case may present the same kind of difficulties in obtaining adequate proof of a violation. But obtaining such proof is not simply a matter of luck or magic, it is more often the product of intense investigative work. For example, it might be possible to prove that managers of rival firms met regularly in secret from hotel or restaurant records or by credit card or banking records. Establishing a predatory pricing case generally requires the use of an accountant to show below-cost pricing and the use of other investigators to determine whether the enterprise was simply eliminating excess inventory of discontinued product lines. If we think of determining market shares to be like mapping unknown territory, we might think of obtaining evidence about intent to be like detective work. The objective is not usually to obtain a confession, but to eliminate the possibility of innocent explanations for the business events that have occurred.

There are occasions in which special techniques like the offer of leniency to a co-conspirator or a "dawn raid" on facilities may be the key to establishing violations.

Dawn raids*:* In the competition world, dawn raids mean those surprise inspections carried out by the officials of the competition authorities at the premises of the business or businesses suspected, to obtain incriminating evidence. Dawn raids are not too difficult to undertake, and can generally bring good results, especially in the case the alleged companies refuse to cooperate.

Pursuant to Section 34 (8), an inspector may without a warrant enter any premises, other than a private dwelling, to ascertain or establish whether any undertaking has engaged in or is engaging or is about to engage in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition. In such case the inspector must on reasonable grounds believe:

- that a warrant would be issued under Section 34 (3) if applied for; and
- that the delay in obtaining a warrant would defeat the object of the entry and search.

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Otherwise, an inspector may not enter upon and search any premises unless the inspector obtains a warrant authorising such entry and search in accordance with Section 34 (3).

Box 22: Dawn Raids in South Korea

South Korean Fair Trade Commission (KFTC) mounted raids on Intel's local offices, as part of the authority's investigation into allegations that the giant abused its leadership position in the chip market. The move was part of an ongoing investigation into Intel's business practices that started in June 2005.

The KFTC launched its probe two months after asking Intel to submit documents pertaining to the manufacturer's relationships with South Korean PC companies. In particular, the KFTC said at the time, it wanted information concerning "marketing and rebate programmes" run by the chip giant locally.

European Commission officials mounted similar raids on Intel sites in Germany and the UK back in July 2005.

Source: http://www.theregister.co.uk/2006/02/09/intel_korea_offices_raided/

More information about the necessary techniques to carry out searches, raids and inspections in general can be obtained from the website of the International Competition Network (ICN) at:
<*http://www.internationalcompetitionnetwork.org/cartels/Section2_Anti-Cartel_Enforcement_Manual.pdf*>

Leniency: Leniency is a generic term to describe a system of partial or total amnesty from the penalties that would otherwise be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency.[54] In addition, agency decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. The term leniency, thus, could be used to refer to total immunity and "lenient treatment", which means less than full immunity.

A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process. A leniency policy is one component of a leniency programme, which also includes internal agency processes, for example, how the agency implements their leniency policy.

Many jurisdictions have developed programmes that offer leniency in order to encourage violators to confess and implicate their co-conspirators with first-hand, direct "insider" evidence that provides proof of conduct parties want to conceal. The programmes uncover conspiracies that would otherwise go undetected, can destabilise existing cartels and can act as a deterrent effect to entering into cartel arrangements. The programmes elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence can be obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete leniency.

No leniency is available in the Namibian Competition Act, however Namibia should build up proper leniency programme to facilitate the investigation of anticompetitive practices.

No leniency is available in the Namibian Competition Act, however Namibia should build up proper leniency programme to facilitate the investigation of anticompetitive practices. More information on how to draft an effective leniency programme again can be obtained from the website of the International Competition Network (ICN).

Box 23: Japan's Leniency Programme "A Great Success"

The leniency programme introduced in 2006 by Japan's Fair Trade Commission has been praised by Commissioner Akira Goto at the IBA conference in Singapore.

Commissioner Goto said that the programme was "a very powerful weapon which, combined with increased penalties, has changed the mindset of Japan's business community". Goto said that since the programme came into effect in January last year, there had been 150 applications for leniency from companies involved in cartels, mostly from the construction sector. This showed how broad the change in mindset had been.

Source: Global Competition Review, October 16, 2007

5.3 Preserving Proof of Violations

The idea is that the competition authorities should build a file, while obtaining evidence, which includes proof of every element of the violation. In the US, for example, when an enterprise is first notified that an investigation has been initiated, the enterprise is told that it is forbidden by law from destroying any documents that may relate to the investigation. At an appropriate time, this evidence should be collected in a manner, which is both admissible in a competition hearing and, if possible, in a form that cannot be denied by the enterprises charged with a competition violation. For example, the request or demands for information and documents always require that the submitting enterprise include a certification by an authorised official that the submission contains all of the documents requested (or certified copies of them) and that these are unaltered documents. Written submissions and oral testimony is sworn under penalty of perjury.

The Competition Act 2003 of Namibia deals with this issue very briefly and generally in its Section 35. Pursuant to subsection (1) the Commission may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, whether or not such statement, document, information or matter would otherwise be admissible in a court of law.

According to Subsection 2 the Commission may take evidence on oath or affirmation from any person attending before it, and for that purpose any member of the Commission may administer an oath or affirmation. The Commission may also, pursuant to subsection 3, permit any person appearing as a witness before it to give evidence by tendering and, if the Commission thinks fit, verifying by oath or affirmation, a written statement.

Subsection 4 grants a person attending before the Commission the same immunities and privileges as a witness before the High Court.

Box 24: Baby Milk Cartel from Italy

In October, 2005 the Italian Competition Authority announced that it had fined seven sellers of baby milk, comprising three legal entities, a total of €9,743,000 (US$14,104,019) for engaging in a cartel in violation of Article 81 of the EC Treaty. The Italian Government had noted during the period 2000-2004 that these firms had engaged in parallel pricing of their products, and that their prices in Italy were significantly higher – between 150 percent and 300 percent – than prices in other European countries. The Authority developed evidence of contacts between the firms, both direct and indirect, that supported a finding of concerted action. Direct contacts included participation in special meetings at the headquarters of the manufacturers' Association, following a request by the Health Minister to reduce prices. The evidence showed that there was open discussion among the manufacturers regarding their response to the Minister's request, and that they agreed not to reduce prices by more than 10 percent.

Indirect contacts occurred as the respondents established recommended resale prices for pharmacies, which were the principal retail outlet for their product. Special characteristics of the market made it possible for sellers to compute their rivals' wholesale prices by reference to their recommended resale prices.

The Authority noted that since it began its case in 2004, prices of baby milk had declined by 25 percent and there had been other pro-competitive developments in the market, including more advertising and consumer information, the introduction of new products and a greater presence of the respondents' products in supermarket chains.

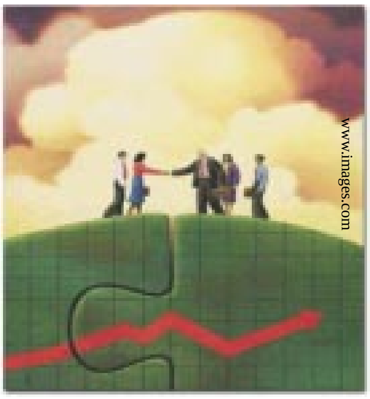
Here is a list of the types of evidence employed by the Competition Authority in the case:

- direct evidence: the producers apparently agreed on a maximum price reduction;
- communication evidence: the producers had met at the trade association and discussed prices, although with the exception of the maximum price reduction there was no direct evidence that they had reached an agreement;
- conduct evidence: parallel pricing; steep price reductions and increased competition following the investigations which suggested that earlier high prices were not the result of competitive behaviour;
- conduct of the entire industry: the prices were significantly higher than in other European countries;
- market structure evidence: this was a highly concentrated industry with only three independent suppliers, and they sold a relatively homogenous product; and
- facilitating practices: recommended resale prices for pharmacies with significant price transparency; sales occurred predominantly through pharmacies, eliminating outlets such as grocery stores that likely would have used discount prices.

Source: Prosecuting Cartels without Direct Evidence of Agreement, OECD Policy Brief, June 2007

6. MERGERS & ACQUISITIONS

The phrase 'mergers and acquisitions' or 'M&A' refers to the aspect of corporate finance strategy and management dealing with the merging and acquiring of different companies as well as other assets.[55]



6.1 Distinction between Mergers and Acquisitions

Although they are often uttered in the same breath and used as though they were synonymous, the terms M&A mean slightly different things.

An acquisition, or a takeover, is the buying of one company by another. Acquisition usually means a purchase of a smaller firm by a larger one.

In the pure sense of the term, a merger happens when two firms agree to go forward as a single new company rather than remain separately owned and operated. For example, both Daimler-Benz and Chrysler ceased to exist when the two firms merged, and a new company, DaimlerChrysler, was created.[56]

In Namibian Competition Act, M&A cases are, for the purposes of the Act, called "Mergers", as the term "merger" is used in a broad sense covering combinations of enterprises in various forms. The Act defines the merger as follows: a merger occurs 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. A merger may be achieved in any manner including:

- purchase or lease of shares, an interest, or assets of the other undertaking in question; or
- amalgamation or other combination with the other undertaking.[57]

A crucial term of "control" is subsequently defined in Section 42 (3). According to its wording a person controls an undertaking if that person:

(a) beneficially owns more than one half of the issued share capital of the undertaking;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

(c) is able to appoint, or to veto the appointment, of a majority of the directors of the undertaking;
(d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act, 1973 (Act No. 61 of 1973);
(e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
(f) in the case of the undertaking being a close corporation, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
(g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

6.2 Varieties of M&As

Mergers can be characterised according to three categories: horizontal mergers, which take place between firms that are actual or potential competitors occupying similar positions in the chain of production; vertical mergers, which take place between firms at different levels in the chain of production (such as between manufacturers and retailers); and other mergers, such as those which take place between companies that sell the same products in different markets (market-extension mergers), or companies selling different but related products in the same market (product-extension mergers), or conglomerates with different types of businesses.


www.images.com

An acquisition may be only slightly different from a merger. In fact, it may be different in name only. Like mergers, acquisitions are actions through which companies seek economies of scale, efficiencies and enhanced market visibility. Unlike all mergers, all acquisitions involve one firm purchasing another – there is no exchange of stock or consolidation as a new company. Two types of acquisitions are distinguished as follows:

- The buyer buys the shares, and therefore control, of the target company being purchased. Ownership control of the company in turn conveys effective control over the assets of the company.[58] The company is acquired intact as a going business with it all liabilities accrued in the past and all of the risks that company faces in its commercial environment.
- When a buyer buys the assets of the target company. The cash the target company receives from the sell-off is paid back to its shareholders by dividend or through liquidation. If the buyer buys out the entire assets,

this type of transaction leaves the target company as an empty shell, which will eventually liquidate or enter another area of business.This usually happends in case of foreseeable liabilities which may entail future damage awards.

It is important to note that after acquisition, policies of the target company will be subject to the direction of its new owner(s), although the target company might continue to operate under its original name. Thus, customers/consumers may remain unaware of the acquired company's new ownership and underlying consequences including competition concerns.

6.3 Concerns about M&As

The review and approval of mergers, acquisitions and other corporate combinations (hereinafter referred to as 'mergers' for convenience) is normally entrusted to competition authorities or other relevant branches of government such as ministries of company affairs or sectoral regulators.

Many mergers will have little or no negative impact on competition. Some mergers may be pro-competitive, for example, by enhancing production efficiencies resulting from economies of scale or scope. Mergers may also create new synergies, lead to innovation by combining talents of different firms, and provide additional resources to develop new products and services.

Mergers may also create new synergies, lead to innovation by combining talents of different firms, and provide additional resources to develop new products and services.

Concerns about mergers, acquisitions and other corporate combinations are generally based on the same concerns about anticompetitive behaviour as discussed earlier in this paper. The main concern is that a larger merged firm may increase its market power. To the extent a merged firm becomes more dominant in a market, there is a greater potential to abuse the accumulation and exercise of market power to the detriment of competitors and consumers. In practice, merger reviews and the exercises of related powers by competition authorities are usually based on an evaluation of the impact of specific merger on competition in the relevant markets.

As will be discussed in subsequent sections on cross-border competition concerns, at times, a merger might not, by itself, be competition-problematique at home, but might affect its subsidiaries in a developing country. However, despite the fact that such merging of subsidiaries has apparent negative effects on the competitive process of host countries, competition authorities of host countries can do very little to regulate a *fait accompli* merger.

6.4 Control of Mergers

The control of mergers applies to every proposed merger not falling within a class which the Minister, with the concurrence of the Commission, has determined and specified by notice in the *Gazette* to be excluded from the provisions of the Act.

Section 43 (2) empowers the Minister determine a class or classes of proposed mergers on any basis which the Minister considers appropriate, including with reference to:

- the aggregate value of the assets of the parties to the proposed merger, or
- the value of the assets of any one or more of them;
- the aggregate turnover over a specified period of the parties to the proposed merger, or the turnover of any one or more of them;
- specified industries or categories of undertakings;
- the number of parties involved in the proposed merger.

The formulation of the above-mentioned article in not considered prudential as it confers the discretion power upon minister. This may lead to arbitrary decisions, as well as open door for political interventions and business lobbying. Moreover, the exclusion of certain classes of mergers can undermine effective regulation of mergers by the NaCC and it also prejudices the independence of NaCC.

Pursuant to Section 43 (3) no person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless either:

- the proposed merger is approved by the Commission and implemented in accordance with any conditions attached to the approval; or
- the relevant period referred to in paragraph set in section 45 has elapsed without the Commission having made a determination in relation to the proposed merger.

The Commission must consider and make a determination in relation to a proposed merger:

- within 30 days after the date on which the Commission receives that notification; or
- if the Commission requests further information within 30 days after the date of receipt by the Commission of the information; or
- if a conference is convened within 30 days after the date of conclusion of the conference.

If the Commission is of the opinion that the abovementioned period should be extended due to the complexity of the issues involved it may, pursuant to Section 45 (2) before expiry of that period, by notice in writing to the undertakings involved extend the relevant period for a further period, not exceeding 60 days, specified in the notice.

6.5 Merger Review

Large merger cases require prior review and approval in many jurisdictions. As part of their review, competition authorities may prohibit mergers or approve them subject to conditions. Mergers are usually only prohibited or subjected to conditions if the authority concludes that the merger will 'substantially harm competition'. Given the discretion inherent in the interpretation of this threshold, various competition authorities have published merger guidelines. These are intended to assist firms and their advisers to anticipate the procedures and criteria that will be applied in assessing a merger.

Mergers are usually only prohibited or subjected to conditions if the authority concludes that the merger will 'substantially harm competition'.

An example of such guidelines is contained in the Horizontal Merger Guidelines published in 1997 by the US Department of Justice (DoJ) and the Federal Trade Commission (FTC). The Guidelines set out a five-stage analysis of the following subject areas:[59]

- market definition;
- identification of firms participating in the relevant market and their market shares;
- identification of potential adverse effects of the merger;
- analysis of barriers to market entry; and
- evaluation of any efficiencies arising from the merger.

Further details about investigative techniques recommended for use during the merger review process can be found at the website of the International Competition Network.

6.6 Information in Merger Review

As part of the merger review process, the merging firms must normally provide information to the reviewing authority. It is standard practice in jurisdictions, which impose merger review, to require parties to be merger to submit advance notice of the proposed transaction. The information disclosed in the pre-merger notification will normally be used by a competition authority in the first stage of merger review (i.e. to determine if any anticompetitive concerns are present and whether to proceed with a more detailed review of the proposed transaction).[60]

Where a merger is proposed each of the undertakings involved must according to Section 44 (1) notify the Commission of the proposal in the prescribed manner. If after receipt of a notification, the Commission is of the opinion that in order to consider the proposed merger it requires further information, it may, within 30 days of the date of receipt of the notification, request such further information in writing from any one or more of the undertakings concerned.

Many merger control regimes impose mandatory pre-merger notification for mergers of certain size in order to reduce the review workload of the competition authorities. Provisions requiring the notification for mergers valued above certain thresholds only are not introduced in the Namibian Act. In other words, the Act requires notification of all mergers, regardless of size or character. However, the Minister may introduce them to establish exemption from merger notification obligation. In contrast to mandatory notification for all mergers, applying certain criteria for notification would reduce the administrative burden for the Commission. Thus, Commission could identify and focus upon the mergers, which are of high important for the whole economy.

Box 25: Merger Led to Monopoly in the Cable TV Sector

The nation-wide cable television service in Thailand became a monopolistic industry, in February 1998, as the two operators, the International Broadcasting Corporation (IBC) and the United Television Network (UTV), merged to become one single entity - the United Broadcasting Corporation (UBC).

Against public sentiment, the Mass Communication Organisation of Thailand (MCOT), the State Enterprise holding television licensing authority in Bangkok, approved the merger4. The main justification for the merger was the need for the operators to consolidate, given the cost hike following a sudden sharp devaluation of the baht in June 1997, marking the beginning of the country's financial crisis, which spread globally.

In May 1999, UBC raised its monthly subscription fee for its 'gold package' – i.e. the subscription package with the largest number of channels – by a whopping 22.47 percent from 890 bahts (US$23) to 1090 (US$28) per month.

An expert sub-committee was established to investigate whether the cable monopoly was abusing its market power in general, and whether the price increase was excessive. The sub-committee produced an 80-page investigation report.

Later on, the TCC decided that since the cable television service is a regulated service, the de facto regulatory body, the MCOT, should handle the matter, which is responsible for tariff approval and ensuring licensees' compliance to the terms of the licence. The case was therefore transferred after which it was never heard of again.

Source: Cable Television Monopoly Case Study: An Investigation by the Thai Trade Competition Commission: Deunden Nikomborirak, Research Director, Thailand Development Research Institute

Box 26: *Pick 'n* Pay move on *Fruit & Veg* blocked

South Africa's Competition Commission has recommended that 'Pick 'n Pay's' bid to buy 'Fruit & Veg City' retail chain be blocked because the transaction would limit competition in the market. The commission has referred its recommendations to the Competition Tribunal, where the matter will be decided after a public hearing. Pick 'n Pay and Fruit & Veg City are competitors in the retail market for fresh food. The Commission analysed this market from both national and a local perspectives. At the national level, the combined market share of the parties in the retail fruit and vegetable market is 58%. The parties have significant market shares in various local markets. For example, their combined market shares exceed 75 percent in Newcastle, Richards Bay, Bloemfontein, Lenasia, Mafikeng, and Knysna.

The Commission is of the view that the proposed acquisition would result in the removal of an effective competitor. Fruit & Veg City has grown from its first store opened in Cape Town in 1993 to approximately 80 stores country-wide. It has recently embarked on diversifying its product ranges by including other fresh food departments such as butchery, a dairy section, bakery etc. Fruit & Veg City is an increasingly effective competitor to Pick n Pay and the other major retailers; and its growing product offering will result in it being even more effective on a wider product range in future. The acquisition of Fruit & Veg by Pick n Pay will therefore not just limit the current competition in the market, but will weaken future competition in this market.

The Commission has concluded that the proposed acquisition is likely to substantially prevent or lessen competition in the market for fresh food. The Commission has highlighted the importance of vigorous competition in the retail market to ensure product choice and competitively priced food products for consumers.

Source: South African Competition Commission, January 2007
http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202007/MR02_2007.doc

The content of pre-merger notifications is generally defined by the law or regulation. Required information typically includes:

- identity of the firms involved in the proposed transaction;
- description of the nature and commercial terms of the transaction;
- timing of the transaction;
- financial information on the involved (including revenue, assets and copies of annual or other financial reports);
- identification of related ownership interests and the organisation structure of the firms involved; and
- description of the relevant product and service markets in which the firms operate.

The initial information filing typically triggers a waiting period, during which the reviewing authority will be entitled to request further information pursuant to Section 45 (1) (a,b,c) and (2). This process concludes with a determination by the reviewing authority whether to proceed with a more detailed investigation.

If the competition authority decides to proceed with a further investigation, it will obtain more information from the merger participants. Additional information is usually gathered from third parities such as competitors and customers. Commercially sensitive information is also generally protected from public disclosure. The NaCC may in this context, if it considers appropriate, determine that a conference be held pursuant to Section 46 (1) in relation to proposed merger.

During a more detailed review, a competition authority will normally seek information about matters such as the following:

- products, customers, suppliers, market shares, financial performance;
- activity of competitors and competitors' market shares;
- availability of substitute products;
- influence of potential competition (including foreign competition);
- pace of technological or other change in the relevant markets, and its impact on competition;
- nature and degree of regulation in the relevant markets; and
- quality of a merger review will depend heavily on the quality and range of information available to the reviewing authority.

6.7 Determination of a Proposed Merger

Pursuant to 47 (1) the Commission may in making a determination in relation to a proposed merger either:

- give approval for the implementation of the merger; or
- decline to give approval for the implementation of the merger.

Given beneficial as well as anticompetitive effects of mergers, merger control regime needs to embrace a mechanism for considering benefits likely to arise from a merger and asserting whether these effectively outweigh any anti-competitive effect. Subsection 2 of the above-mentioned Section allow the Commission base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including:

- the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
- the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;

- the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
- the extent to which the proposed merger would be likely to affect employment;
- the extent to which the proposed merger would be likely to affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market;
- the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets;
- any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.

These considerations aim at predicting market behaviour of the merged undertaking and to assess the likely impact on the competition. Importantly, the determinations must be made in the context of a well-defined relevant market.

6.8 Merger Remedies

The goal of merger control laws is to prevent or remove anti-competitive effects of mergers. Three types of remedies are typically used to achieve this goal.

Prohibition or Dissolution: The first remedy involves preventing the merger in its entirety, or if the merger has been previously consummated, requiring dissolution of the merged entity.

Partial Divestiture: A second remedy is partial divestiture. The merged firm might be required to divest assets or operations sufficient to eliminate identified anticompetitive effects, with permission to proceed with the merger in other respect.

Regulation/Conditional Approval: A third remedy is regulation or modification of the behaviour of the merged firm in order to prevent or reduce anticompetitive effects. This can be achieved through a variety of one-time conditions and ongoing requirements.

The first two remedies are structural, and the third remedy is behavioural. Behavioural remedies require ongoing regulatory oversight and intervention. Structural remedies are often more likely to be effective in the long run and require less ongoing government intervention.

Box 27: South African Pharma Mergers: Conditions for Aspen

Aspen Pharmacare (Pty) Limited, a generic drugs firm was a protagonist of two merger cases, both conditionally approved by the Competition Commission in South Africa. In the first case it acquired one of its smaller direct competitors, Triomed. Based on an internationally accepted criterion of defining relevant markets of pharmaceutical products, it was found that there were 26 product overlaps between the two firms. The divestiture of Tetracycline products by Aspen was stipulated as the condition of authorising the merger.

In the second Aspen case, the South African subsidiary of the multinational pharmaceutical firm GlaxoSmithKline expressed its interest in acquiring the company. The merger took place in a fast changing market environment, at a time when a new market regulation was being introduced for pharmaceutical products. This new regulation eliminated a significant part of the sales margins charged by wholesale firms, it created an incentive system for replacing innovative drugs with generic ones and, in general, it introduced a so-called transparent pricing system. It may be supposed that the merger was, at least in part, initiated by the multinational firm in order to get a better competitive position on the domestic market of generic drugs. The conditional authorisation of the merger affected only the sales of one specific product (Lanoxin). It stipulated no divestiture as such but just the condition that this product may not be part of the transaction.

Source: Adam Torok (2005), Competition Policy Reform in South Africa – Towards the Mainstream CP Model for "Transition" Economies in the Third World, Budapest, p. 39

Partial divestiture or behavioural constraints are less intrusive into the operation of market than preventing a merger from proceeding or requiring dissolution of a previously completed merger. Partial divesture can reduce or eliminate anticompetitive effects while preserving some of the commercial advantages of a merger. Partial divestiture is emerging as a preferred remedy in many jurisdictions.

In Namibia, if a merger is being, or has been, implemented in contravention of the Act, the Commission may make application to the Court for:

- an interdict restraining the parties involved from implementing the merger;
- an order directing any party to the merger to sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger;
- declaring void any agreement or provision of an agreement to which the merger was subject;
- the imposition of a pecuniary penalty.

Further details about remedies recommended for use by competition authorities can be found at the website of the ICN.[61]

Box 28: The Rothmans of Pall Mall/ British American Tobacco Merger in Zimbabwe

In January 1999, British American Tobacco Plc of the United Kingdom announced that it had reached an agreement with the shareholders of Rothmans International, Compagnie Financiere Richemont AG of Switzerland and Rembrandt Group Limited of South Africa to merge their international tobacco businesses. Subsequent to the completion of the international merger between British American Tobacco Plc and Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited in September 1999 applied to the Competition Commission of Zimbabwe for authorisation to acquire the entire issued share capital of British American Tobacco Zimbabwe Limited.

The merging parties gave as one of the reasons to merge the declining market for cigarettes in Zimbabwe. It was presented that the Zimbabwean manufactured cigarette market had declined to such an extent that it was no longer big enough for the continued viability of two manufacturers as evidenced by the poor performance of British American Tobacco Zimbabwe Limited in its financial year ended December 31, 1998.

The case was evaluated as a horizontal merger as defined in section 2 of the Competition Act.

The Commission noted that although the merger would result in a creation of a monopoly situation in the relevant market (i.e. the manufactured cigarette market), it had other public interest benefits provided for in the Competition Act. The failing firm defence put forward by the merging parties was also considered a strong point in support of the merger.

The Commission therefore authorised the merger with certain conditions aimed at alleviating the adverse effects of the monopoly situation created. The conditions related to the disposal of surplus cigarette making equipment to third parties interested in entering the Zimbabwean cigarette making industry, and surveillance by the Competition Commission of future cigarette price increases while the monopoly situation created remains in existence, with any price rises being justified to the Commission before being effected.

Source: Alexander J Kububa, Issues In Market Dominance: Merger Control In Zimbabwe, paper presented at the World Bank's Regional Conference on Competition Policy, Competitiveness, and Investment in A Global Economy, Dar-es-Salaam, Tanzania: 10–12 May 2004

6.9 Joint Ventures

In some cases, existing competitors in a market may decide to enter into a joint venture. The competition analysis of joint ventures generally raises similar issues to those discussed under the section of restrictive agreements, and therefore would normally violate *per se* competition rules. The process and information requirements for review of a joint venture, however, should resemble those discussed earlier in this section on M&As.

The reasons for this recognition may be important to understand. Joint ventures create less economic concentration than mergers, therefore there is some economic policy reason to prefer or at least not discriminate against lesser concentrations of economic power. While that seems logical, competition laws did not develop that way because joint ventures are commonly horizontal agreements between competitors that eliminate competition between them. Mergers of course do the same thing but it was assumed that mergers always contain some efficiencies. Thus, in the beginning, joint ventures are allowed only if they were *necessary* to create the venture, which means neither company alone could undertake the new project. Over time, however, the focus shifted from the need for cooperation between the competitors to the question of whether there are economic savings from the joint venture and, if there were, then the joint venture would be held lawful if it would be allowed as a merger (meaning if the combination of the two companies would leave enough companies in the market to maintain competition).

Box 29: Joint Distribution of Polyethylene Covers

A Request for Exemption from Court Approval for Agreement to Establish Poligar was made to the Antitrust Authority of Israel in 1994 to approve a marketing joint venture between the only two Israeli producers of polyethelene covers.

In analysing the effects of the proposed venture, the General Director stressed the disciplining effects of potential and existing imports, on the market power of the domestic firms. He approved the venture since it would enable the domestic firms to reduce their costs and thus compete more effectively with foreign importers, without harming the Israeli consumer.

This reasoning differs significantly from that on which past decisions to approve joint ventures was based. Whereas, in the past, emphasis was placed on the ability of the parties to the venture to reduce their costs without a real analysis of total welfare effects, the decision in Poligar approves the venture based on the need of the parties to act more efficiently in order to meet foreign competition.

The analysis ensures that the Israeli consumer, as well as the Israeli firms, will enjoy the benefits of the venture. This sort of analysis, which gives much weight to competitive considerations, based on market conditions, and evaluates the effects of the conduct on all market players, characterises most of the decisions from the 90's onwards.

Source: Gal & Israeli (2006), Israel, Competition Regimes in the World – A Civil Society Report, CUTS

7. CROSS-BORDER ISSUES

With the opening up of domestic markets to foreign competition, countries have become increasingly susceptible to anticompetitive practices that originate outside their own territory.[62] The types of cross-border anticompetitive practices are quite similar to that of those perpetrated within national borders. The only difference lies in the cross-border (international) dimensions of the anticompetitive behaviour. A number of areas where these behaviours are perceived to give rise to competition concerns with international dimensions are discussed here. Though there is no single way by which one can estimate the damage that these cross-border anticompetitive practices are causing. However, one can have a fair understanding of the nature and dimensions of the problems through the analysis of anecdotal evidence. These issues can broadly be classified into four groups:[63]

- market power in global or export markets;
- barriers to import competition;
- foreign investment related; and
- IPRs related.

7.1 Market Power in Global or Export Markets

International cartels, export cartels and related arrangements can be included under this category, together with multi-jurisdictional M&As, abuse of dominance in overseas markets, cross-border predatory pricing and price discrimination.

Several international cartels, most of which were constituted by producers from industrialised countries, were uncovered in the 1990s. These cartels were found to have severely affected the international trade flows during this period, significantly raised the prices of goods traded, including imports into low-income countries. Developing countries' imports of cartelised goods in 1997, for example, amounted to US$81.1bn, which represents 6.7 percent of these countries' imports and 1.2 percent of their national incomes.

Cartelisation, however, is not only about loss in consumer welfare; it also hampers the development of poor countries, and growth of their firms, in several ways.

Cartelisation, however, is not only about loss in consumer welfare; it also hampers the development of poor countries, and growth of their firms, in several ways. Various techniques, ranging from the threat of retaliatory price wars, use of common sales or distribution agency, to patent pooling, were used by international cartels to block developing-country competitors' entry into the relevant markets.

Box 30: The Graphite Electrodes Cartel and its Effects on Developing Country Steel Producers

Graphite electrodes are used primarily in the production of steel in electric arc furnaces. In a highly concentrated world market, two firms (one German and one American) had a combined market share of roughly two-thirds at the beginning of the 1990s. Japanese producers supply a considerable part of the remainder, with modest contributions from a number of smaller producers based in certain developing countries, principally India and China. All of the major producers in this market operate production facilities in a number of countries, including developing countries such as Brazil, Mexico, South Africa, Russia, and Poland, and sell their products throughout the world.

The OECD estimates that, "the cartel affected US$5-7bn in sales world-wide. Throughout the world, the cartel resulted in price increases from roughly US$2000 per metric tonne to US$3200-US$3500 in various markets".

The only direct estimate of pecuniary harm caused to purchasers in developing countries comes from the KFTC, which in March 2002 convicted six graphite electrode manufactures from the US, Germany, and Japan. According to KFTC, Korean steel manufactures "imported graphite electrodes amounting to US$553mn from the six companies from May 1992 to February 1998, and during the period the import price increased from an average of US$2,225 per ton in 1992 to an average of US$3,356 in 1997 (about 48.9 percent price increase). The damage incurred by the companies importing graphite electrodes is estimated at approximately US$139mn. Korea's major industries such as automobile and shipbuilding that consume much steel were also influenced by this international cartel".

Source: Evenett, Simon J. (2003), Study on issues relating to a possible multilateral framework on competition policy, WTO Document No. WT/WGTCP/W/228

Also a type of collusive agreements by producers to exercise market power in foreign markets, export cartels, however, are 'restraints on trade' officially sanctioned by many governments who follow a 'beggar-thy-neighbour' policy by permitting their private firms to cartelise, as long as affected markets are outside the country.[64]

Large companies merge in the developed world and consequently their subsidiaries and associates in developing countries too end up in new combinations. This can create position of dominance for merging firms, having a potential of subsequent abuse. Moreover, developing countries may also be affected by M&A activities that take place outside their territory, and affect their local subsidiaries. The Zimbabwe tobacco merger case presented in Box 26 provides a good example in this regard. The Boeing-McDonnell case study

Box 31: The Boeing-McDonnell Merger

The challenge by the European Commission (EC) to the merger of the world's largest and third-largest manufacturers of large commercial aircraft, the US firms Boeing and McDonnell Douglas, illustrates the growing trend of transnational regulation.

Although the US Federal Trade Commission (FTC) cleared the deal in 1997, the EC threatened to oppose it, despite a 416-2 vote in the US House of Representatives warning the Europeans against *"an unwarranted and unprecedented interference in a US business transaction"*. The EC said the merger would allow Boeing to increase its share of the world market for large commercial jet aircraft from 64 percent to 70 percent. European Union merger laws can be applied to any business transaction that "constitutes a strengthening of a dominant position", the EC said in a July 1997 statement.

The EC authorised the deal in July 1997 only after extracting concessions from Boeing to increase competition. The EC had no jurisdiction over the merger of the two US aircraft makers, but it was in a position to level crippling fees on sales of Boeing aircraft to European airlines. According to the EC, European airlines are forecast to account for almost one-third of future demand for new aircraft orders until 2007, and Boeing and McDonnell Douglas are positioned to capture two-thirds of the business, in the European market.

Boeing's purchase of McDonnell Douglas has left the four-nation European consortium Airbus Industrie the lone rival to Boeing in an industry that virtually excludes new participants because of the enormous start-up costs.

In order to gain the EC's approval for the merger, Boeing had to address a number of European concerns. The EC contended that:

- The merger would give Boeing enhanced opportunity to enter into long-term exclusive supply deals, similar to the 20-year arrangements Boeing had with American, Delta, and Continental airlines.
- The merger would broaden Boeing's customer base from 60 percent to 84 percent, allowing it to sell its products to McDonnell Douglas clients.
- Boeing's acquisition of McDonnell Douglas, the world's number two defense manufacturer and leading maker of military aircraft, would enhance Boeing's access to publicly funded research and development and intellectual property.
- Boeing's acquisition of McDonnell Douglas's patent portfolio would be a further element strengthening Boeing's dominant position.
- The combination of the civil, defense, and space activities of the two companies would increase Boeing's bargaining power with suppliers.

Boeing convinced the EC to declare the merger compatible with the common market after making concessions that were not demanded by the FTC:

- Boeing committed to keep the Douglas Aircraft Company, the civil aircraft division of McDonnell Douglas, a separate company for 10 years, until 2007, and to supply the EC with reports on the company's performance.
- Boeing committed not to link the sale of Boeing aircraft to its access to the Douglas fleet in service.
- Boeing canceled its exclusive supplier contracts with American, Delta, and Continental and promised to refrain from entering into such deals until 2007.
- Boeing offered its competitors nonexclusive licenses for patents arising from publicly financed research and development.
- Boeing gave assurances that it would not use its relationships with suppliers to obtain preferential treatment.
- Boeing agreed to provide the EC with annual reports for 10 years on its non-classified aeronautical projects that receive public funding. The EC said the reports were needed to clarify the links between Boeing's civil and military activities.

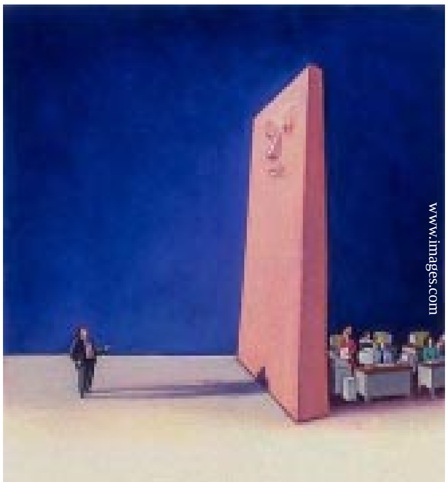
With this package of concessions, the EC signed off on the merger, saying its competition concerns had been adequately addressed.

Source: http://usinfo.state.gov/journals/ites/0299/ijee/boeing.htm

below shows how the European Commission intervened in order to protect the EU's common market.

Other than collusion or combinations, the size and scope of transnational companies (TNCs) make it possible for them to engage in a variety of anti-competitive practices. Take the example of Microsoft. The company has been hauled up for indulging in anticompetitive practices time and again in the US and the EU. By and large, it has not faced such action in other jurisdictions, especially in the developing world, where the effects of Microsoft's conduct have been increasing at the same pace as its business.

7.2 Barriers to Import Competition



Import cartels, vertical market restraints creating import barriers, private standard setting activities, abuse of monopsonistic dominance, etc, may fall under this category. Import cartels formed by domestic importers or buyers, and similar arrangements may be a threat to maintaining competition in a market. In principle, a national competition law may normally be able to tackle such market-access barriers to foreign supplies and suppliers, though in practice those barriers have been very much deliberately tolerated. In some cases, import cartels were allowed to counter export cartels.

A well-known example in this regard is the trade dispute between Japan and the US where it was alleged that Fuji effectively prevented Kodak's exports to the Japanese market by controlling the distribution channel. In the early 1990s, such concerns prompted a revision of US guidelines regarding international enforcement to permit application of the US antitrust laws to foreign-based activities such as import cartels that restrict US producers' access to foreign markets.

7.3 Foreign Investment-related Competition Issues

Foreign investment has always been recognised as having complex effects on host countries' market structure and competition. M&As, in particular, can be used to reduce competition via "monopolising M&As", which can occur when:

- The acquiring firm was exporting substantially to a market before it buys a competing firm there;
- A foreign firm with an affiliate, already in the market, acquires another, thereby acquiring a dominant or monopolistic market share;
- The investing TNC acquires a market leader with which it had previously competed; and
- The acquisition is intended to suppress rather than develop the competitive potential of the acquired firm.

In India, for instance, in 1994, Hindustan Lever Limited (HLL), the Indian subsidiary of Unilever, acquired its main local rival, Tata Oil Mills Company (TOMCO), to assume a dominant position in the toilet soap (75 percent) and detergent (35 percent) markets.[65] The proposed merger had been challenged by the HLL Employees' Union on various grounds, including that the merger would result in a large share of the market being controlled by a TNC, and that consumers' interests might be adversely affected. However, no measures have been undertaken since the 1991 amendment of India's then competition law, the MRTP Act 1969, had unfortunately removed the need for approval of mergers, acquisitions and takeovers involving "large" and/or "dominant" firms.[66] After that, HLL also acquired several local companies in other markets, such as the ice cream makers Dollops, Kwality and Milkfood. This raised its market share in the ice cream market from zero in 1992-1993 to 69 percent in 1996-1997 and over 74 percent in 1997-1998.[67]

While these monopolising M&As' adverse effects on a host country's market structure and competition can be tackled if the host country has an adequate legal framework to impose some remedies, as what happened in many cases in the developed world, evidence in this line remains anecdotal in developing countries.

7.4 IPRs-related Competition Issues

Without a suitable and strong legal framework in place to check the anticompetitive behaviour of IPR holders, the possibility that TNCs will be tempted to abuse their market power cannot be ruled out. To make matters worse, though the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement enables the broad framework for countries to take necessary action if an IPR is abused, leading to anticompetitive outcomes, it does not 'empower' every country to do so. For example, in cases where there are disparities in the bargaining power between the exploiter – which is often giant TNCs, and the 'law-enforcer' – when they are developing countries with weak enforcement capacity and small markets, it would be hard to discipline IPR abuses. In another case, the suggested remedy of compulsory licensing would not be available to a country that does not have domestic production capacity, except in the case of pharmaceutical products.

Box 32: International Patent Laws Hurt Developing Countries

In South Africa in 1998, approximately one in five adults is living with HIV/AIDS. Since 1996, the world has known that "cocktails" of antiretroviral drugs save lives. They are not a cure for AIDS, but here they have turned it into an almost chronic disease, akin to diabetes. The rate of AIDS deaths in the US was plummeting, but in South Africa, no one except the exceedingly rich could afford the drugs. In the US, taxpayers subsidise the cost of the drugs, which cost around US$15,000 per year. In South Africa, making treatment universally available at such prices would have bankrupted the government. But it was not the drugs themselves that were expensive – it was the patents.

The South African government was in a bind. South Africa has a strong patent system - the legacy of apartheid, but also the result of pressure from countries like the US. Affordable drugs existed, but not for them. So, in 1998, they did what any responsible government would do: They passed a law that would give them the power to bring drug prices down. The law would have allowed them to "parallel import" cheaper medicines, which is completely legal under the TRIPs Agreement, to take advantage of the fact that patented drugs are sold at different prices in different countries.

Faced with a potential public health crisis, the US Congress recognised what many other countries have been arguing all along: that patents are not "rights" but rather privileges – and that they do not come before the rights to health and life. But that is not how they – or the drug industry – approached the issue when it came to South Africa. The possibility that South Africa – a tiny percentage of the world's drug market – might start using generic drugs was treated as a colossal threat to the interests of the US pharmaceutical industry. It did not matter that the US had signed the TRIPs agreement in 1994, recognising that developing country governments have the ability to do just what the US could do and had done in similar cases. And it didn't matter that literally millions of lives were at stake. According to Charlene Barshefsky, the US Trade Representative at the time: "We all missed it.... I didn't appreciate at all the extent to which our interpretation of South Africa's international property obligations was draconian".

Activists around the world realised it, and mobilised against the lawsuit with slogans like "Patient Rights over Patent Rights", and "Stop Medical Apartheid". In March 2001, when the case finally reached the courtroom, the drug companies, fearing the public relations backlash, withdrew their suit.

Source: Kapczynski (2002), Strict international patent laws hurt developing countries, YaleGlobal Online at http://yaleglobal.yale.edu/display.article?id=562

7.5 Dealing with Cross-border Issues under the Competition Act of Namibia

Whether it is to deal with anticompetitive practices that occur at national level, or those that have international dimensions, having a strong and well-oiled competition regime is an essential prerequisite. Even so, a strong competition regime, at national levels, may not be enough to tackle cross-border anti-competitive practices. It is recommended that provisions for extra-territorial jurisdiction be adopted to legally empower competition authorities in developing countries to deal with such cases.

Box 33: Effect Doctrine in the European Economic Community

The territorial scope of the European Economic Community Merger Regulation (Regulation No. 4064/89) and its justification under international law was reviewed in the **Gencor case**[69] concerning a merger of two South African companies.

The Court of First Instance of the European Community observed that "according to Wood Pulp case, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter. Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community."

The Court further observed that the "application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community" and then after having applied the three criteria of immediate, substantial, and foreseeable effect to the case held that "the application of the Regulation to the proposed concentration was consistent with public international law." In the above decision, although the Wood Pulp cases were referred to and the "implementation" test was applied in connection with the territorial scope of the E.E.C. Merger Regulation, the effects doctrine (not the objective territorial principle applied in the Wood Pulp cases) was applied for the justification of jurisdiction under public international law.

Source: International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy, Takaaki Kojima1, Weatherhead Center for International Affairs, 2001-2002 http://www.wcfia.harvard.edu/fellows/papers/2001-02/kojima.pdf

The Competition Act of Namibia does not explicitly deal with the cross-border issues mentioned above. However, it important to stress that the Act applies to all economic activity within Namibia or having effect in Namibia (Section 3 sub. 1 of the Act). Thus, the Act opens up to cross-border issues, as the "effects doctrine" is embodied in this provision.

Nevertheless, it is advisable that Namibia go slow on extra-territorial jurisdiction for the present as the Act is new and the NaCC has to gain experience. At the fledgling stage of the competition regime the extra-territorial authority should not become priority. In this respect, collaboration with other competition authorities, in particular, the South African Competition Authority can play an important role in building the capacity of the Competition Commission and enhancing the quality of regulatory oversight.

According to the effects doctrine, domestic competition laws are applicable to foreign firms - but also to domestic firms located outside the state's territory, when their behaviour or transactions produce an "effect" within the domestic territory. The "nationality" of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality. The "effects doctrine" was embraced by the Court of First Instance (EU) in Gencor case when stating that the application of the Merger Regulation to a merger between companies located outside EU territory "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community".[68]

In global competition cases, which have serious consequences on trade, economies, and consumers all over the globe (such as those of international cartels, or cross-border M&As etc), Namibia as a country and Namibian consumers will be able to assert their legitimate rights and interests and redeem any damage done on them.

With the physical borders increasingly tumbling down due to globalisation and international integration, business transactions are no longer bound within the territory of a certain country. Numerous global and regional deals are being concluded everywhere. In this context, not only the foreign counterparts can count on their national or regional (for instance, in the case of EU) competition authorities, but also Namibian enterprises will not be left without shelter in any antitrust case, if the deal or transaction is concluded outside the territory of Namibia, or if their counterpart does not have a physical presence in the country. Moreover, in global competition cases, which have serious consequences on trade, economies, and consumers all over the globe (such as those of international cartels, or cross-border M&As etc), Namibia as a country and Namibian consumers will be able to assert their legitimate rights and interests and redeem any damage done on them.

In this regard, it is important to note that the competition regime of Namibia is still very young and under severe resource and capacity constraints, which would make it impossible at this stage for them to discipline huge multinational companies or investigate/enforce cases with cross-border elements. However, having extra-territorial jurisdiction enables this young competition authority to challenge conduct, which may have an effect in the domestic market. In the case of Namibia, especially the role of South African firms in the Namibian economy poses important challenges for effective competition regulatory oversight. In this regard collaboration with the South African Competition Authority may facilitate more effective response to any anticompetitive practices by such firms, and to effective merger control involving such firms. Given that South Africa is not a member of Common Market for Eastern and Southern Africa (COMESA), and Southern African Development Community (SADC) has yet to consider a regional competition policy, this collaboration is particularly important for the promotion of competition in Namibian markets.[70] That's why it would be useful for Namibia to enter into cooperation, understanding or agreements with their counterpart agencies to garner information of such conduct.

8. COMPETITION VS INTELLECTUAL PROPERTY LAW

IPRs protection is a policy tool meant to fostering innovation; which benefits consumers through the development of new and improved goods and services, and spurs sustaining economic growth. It bestows on innovators the right to legitimately exclude, for a limited amount of time, other parties from the benefits arising from new knowledge, and more specifically, from the commercial use of innovative products and processes based on that new knowledge. In other words, innovators or IPR holders are rewarded with a temporary monopoly by the law to recoup the costs incurred in the research and innovation process and earn rightful and reasonable profits, so that they have incentives to invest in further research and innovation.

Competition law, on the other hand, has always been regarded by most as essential in curbing market distortions, disciplining anticompetitive practices, preventing monopoly and abuse of monopoly, inducing optimum allocation of resources and benefiting consumers with fair prices, wider choice and better qualities. It, therefore, ensures that the monopolistic power associated with IPRs is not excessively compounded or leveraged and extended to the detriment of competition. Further, while seeking to protect competition and the competitive process, which in turn prod innovators to be the first in the market with a new product or service at a price and quality that consumers want, competition law underscores the importance of stimulating innovation as competitive inputs, and thus also works to enhance consumer welfare.

In view of current status of the Namibian Competition Act, which is not dealing with the intellectual property rights in explicit manner, the considerations de lege lata could serve as a starting point for future improvements of the Act in this regard.

Thus, it is now generally recognised that the goals of competition law and IP law are rather complementary and mutually reinforcing. They share the common purpose of promoting innovation, enhancing and benefiting customer welfare as well as allocating efficient economic resources. Moreover, they are also different levels of market regulation. Errors or systematic biases in the interpretation or application of one policy's rules can harm the other policy's effectiveness. A challenge for both policies is to find the proper balance of competition and innovation protection.

The following sections will set out the important issues, which stem from the controversial relation between competition law and IPRs. In view of current status of the Namibian Competition Act, which is not dealing with the intellectual property rights in explicit manner, the considerations de lege lata could serve as a starting point for future improvements of the Act in this regard.

8.1 IPRs Standards as Competition Regulation

IPRs policy acts as an institutional framework regulation for the proper operation of markets for intangible subject matter, and is therefore exempt from antitrust control. Competition law of most countries, therefore, expressly or implicitly exempt from their application the exclusive rights inherent in intellectual property protection granted by the state, which are considered to justify restrictions that would otherwise be subject to competition scrutiny.

8.2 Regulation of the Exercise of IPRs through Competition Law

As a piece of individual property, IPRs are fully subject to general competition principles, when they are exercised or put into commercial use in the market. Competition law, thus, while having no impact on the very existence of IPRs, operates to contain the exercise of the property rights within the proper bounds and limits which are inherent in the exclusivity conferred by the ownership of intellectual rights. In other words, when the exercise of IPRs gives rise to some competition concerns, competition law will have a role to play.

However, in Namibia the Act provides the possibility of exemption in respect of intellectual property rights. Pursuant to 30 (1) The Commission may, upon application, and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights. Otherwise, the Act does not deal with competition restraints caused due to the exercise of IPRs in an explicit manner.

8.3 Competition Concerns in Licensing Agreements

As already stated, licensing constitutes an important part of the IPRs regime, or to be more specific, industrial property rights. Far from restricting competition, in principle, it extends the opportunities for traders to stimulate the market, by facilitating the wider dissemination of the protected technologies/knowledge as well as products and services using the protected patent as input. Indeed, what may give a licensing agreement its business-restrictive character are the specific contractual agreements and market conditions, which create more or less essential restrictions if the agreement is to have any value. Some of these dimensions:

- Territorial restraint;
- Exclusive dealing;
- Tie-in; and
- Grant-back.

8.4 IPRs and the Abuse of a Dominant Position

IPRs, by their very nature, create a form of monopoly or, in other words, a degree of economic exclusivity. The creation of that legitimate exclusivity, however, does not necessarily establish the ability to exercise market power or even in case it does confer market power (as already discussed in the previous part), that dominant position on the market does not by itself constitute an infringement of the rules on competition law; nor does it impose on the IPRs holders the obligation to license that property to others. Besides, competition authorities are normally concerned with the abuse of the dominant position, whatever the source of such dominance, rather than with any abuse of IPRs. Much, however, also depends on the facts of each case involved.

Other cases of IPRs-related abuse of dominance include, some cases can be identified such as:

- *Monopoly Pricing*: This is rarely a serious competition concern in developed countries due to the abundance of market substitutes. Meanwhile in developing countries, because the number of available substitutes may be more limited and because most IPR-protected products are owned by foreign interests, monitoring to discipline monopoly pricing practices by IPR holders is of greater significance.
- *Restrictions on End Users*: One very interesting case in point worthwhile mentioning to shed some light on restrictions on end users as abuse of dominant position is the Microsoft case, which also embodies a monopoly-pricing dimension. (See Box 35)
- *Exclusive Dealing:* Competition aspects of the limitations on a licensee's ability to deal in competiting technologies will be analysed on the basis of (i) the duration, (ii) rationale, and (iii) degree of foreclosure caused by restrictions to rival licensors.
- *Tied Sales*: Tie-in is generally deemed per se illegal if (i) it involves two separate products or services that are tied together, (ii) the seller has market power in the tying product and has the ability to extend this market power in the tied product, due to favourable market conditions (high entry barriers etc); (iii) the arrangement has an adverse effect on competition in the relevant market for the tied product; and (iv) efficiency justifications for the arrangements do not outweigh the anticompetitive effects.

Box 34: Microsoft's Abuse of Dominance

Microsoft is the legitimate owner of the IPRs over the personal computer operating system (PC/OS), which is the company's original creation. The PC/OS is an essential facility both for users to be able to perform applications such as word processing, spreadsheet, etc; and for the application software developers to be able to offer a marketable product for users. This enabled Microsoft to enjoy a monopoly power over licensing the operating systems for PCs (with a 90-percent-plus market share and a substantial applications barrier to entry). Restriction on end-users and monopoly pricing are found among the various abusive conducts committed by the software giant.

Microsoft does not sell its software to anyone. Instead, it parcels out different bundles of rights with respect to its software. These rights, which are bundled together as a "license," are the only "products" that Microsoft conveys. Microsoft retains the title and all rights to its software except for those rights, which Microsoft expressly conveys through one of these licenses.

Microsoft enters one type of license with the original equipment manufacturers (OEMs). The specified purposes of the license with OEMs permit them 'to pre-install [the software] on PCs sold to end users'.

On the other hand, Microsoft provides a wholly different license, known as the end-user license agreement (EULA), to consumers. Microsoft grants the right to 'use the software on the PCs' to and only to end-users. Microsoft's end-user license is a take-it-or-leave-it proposition and not a product of negotiation. The end users choose to enter the EULA license with Microsoft only when they first begin to use the OS, not at the times of purchase, payment, or other incidents of the transaction.

As a direct result of Microsoft's restrictive and exclusionary practices, end users were caused to suffer unique injury. They were deprived of the benefits of competition, including but not limited to technological innovation, market choice, product variety, and substitutable supply.

Over time, Microsoft coupled these restrictions with other anticompetitive steps. These included Microsoft's nearly two-fold increase during 1998 of its prices for licenses of its old and dated (but not obsolete) PC/OS to the same level of prices charged for licenses of its new PC/OS (from US$49.00 to US$89.00).

Source: Opinion on the Microsoft Corp. Antitrust Litigation, for the United States District Court of Maryland, MDL No. 1332, January 2001, by J. Frederick Motz, US District Judge, US District Judge, Opinion on the Microsoft Corp. Antitrust Litigation, for the United States District Court of Maryland, MDL No. 1332, January 2001.

8.5 Refusal to Deal

A widely accepted premise of IP laws is that IP holders are under no obligation to license subject matters protected to others. This principle is generally held to be true even when a firm is in possession of a monopolistic position in a market as a result of its ownership of intellectual property. An early non-antitrust decision by the US Supreme Court stated that the ability to exclude competitors from the use of a new patent 'may be said to have been of the very essence of the rights conferred by the patent, as it is the privilege of any owner of property to use or not use without question of motive.'[71] On the other hand, from the perspective of IPR/competition law interface, there may be the question of whether such duty exists.

Courts in the EU and the US have at times held that refusals to license a patent violate competition law. However, in neither jurisdiction, though they are among the most advanced jurisdictions in terms of IP and competition law, have they provided clear direction as to whether a refusal to deal is anticompetitive where it involves intellectual property. Slightly different was the case of Brazil, where Article 21 of the Antitrust Law enlists the "non-exploitation or the inadequate use of intellectual property rights and technology of a company" as a strong indication that the free competition rules have been violated.

8.6 Compulsory Licensing

A compulsory license is an involuntary contract between a willing buyer and an unwilling seller imposed and enforced by the state. The three most prevalent compulsory licensing provisions are applicable where a dependent patent is being blocked, where a patent is not being worked, or where an invention relates to food or medicine. Additionally, compulsory licensing may be implemented as a remedy in antitrust or misuse situations, where the

invention is important to national defence or where the entity acquiring the compulsory license is the sovereign. In these cases, the public interest in broader access to the patented invention is considered more important than the private interest of the right holder to fully exploit his exclusive rights. The designated third party should generally compensate the patent holder through payment of remuneration. Compulsory licenses do not deny patent holders the right to act against non-licensed parties.

With regard to the IPR/competition interface, compulsory licensing can be granted on the grounds of the existence of: (i) a refusal to license and (ii) anticompetitive exercises of IPRs by patent holders.

The Competition Act of Namibia does not impose an obligation on dominant firms to supply or licence, but the Section 26 provides that:

1. Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or a part of Namibia, is prohibited.
2. Without prejudice to the generality of subsection (1), abuse of a dominant position includes:
   - directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
   - limiting or restricting production, market outlets or market access, investment, technical development or technological progress;
   - applying dissimilar conditions to equivalent transactions with other trading parties; and
   - making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.

The abuse of dominant position has been analyses above. To conclude, in the absence of any express provision, the Commission may follow the practice of US and EC courts, who developed a duty in exceptional circumstances for dominant firms to supply or license.

8.7 Parallel Imports

Parallel imports are goods brought into a country without the authorisation of the patent, trademark or copyright holders after those goods were placed legitimately into the market elsewhere.

Another issue of the most controversial areas of direct and significant interface between the exercise of IPRs and competition law not yet mentioned above is parallel import.

Parallel imports are goods brought into a country without the authorisation of the patent, trademark or copyright holders after those goods were placed legitimately into the market elsewhere. Unlike pirated copyright goods or counterfeit trademark goods, parallel imports are legitimate products, as argued by some, since the IPR holders have agreed to put them into market and thus implicitly authorised their subsequent use, be it being imported by an unauthorised distributor.

Policies regulating parallel imports stem from specification of the exhaustion of IPRs. The term “exhaustion” refers to the territorial rights of IPR holders after the first legitimate sale of their intellectual property-protected products. There are three variants of exhaustion doctrines, namely:

- *National exhaustion*: IPRs end upon first authorised sale within a nation but IPR owners may prevent parallel trade with other countries.
- *Regional exhaustion*: IPRs are exhausted upon first authorised sale in a particular region only.
- *International exhaustion*: IPRs are exhausted upon first sale anywhere and parallel imports are permitted (also referred to as the “doctrine of first sale”).

Treatment and opinions on parallel imports vary widely. For example, Japan permits parallel imports in patented and trademarked goods unless contract provisions explicitly bar them or unless their original sale was subject to foreign price regulation. The US policy on parallel imports is mixed, by which restrictions on parallel imports exist only for certain types of goods.

Box 35: Chile Allows Parallel Import to Promote Competition

Many matters of parallel imports have been brought up before the Preventative Commission of Chile, most of which originated as complaints from private parties. Generally, importers have asked the Commission about the legality of importing original products, which are already in the market by virtue of a previous distribution agreement. The Preventative Commission established the criteria that the parallel imports of original products promote competition in markets, authorising them.

Source: Gesner Oliviera, Chile, in Competition Regimes in the World – A Civil Society Report, CUTS (2006), p.565

No multilateral binding agreements have ever directly addressed the issue of parallel imports; neither the TRIPs Agreement nor the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty; leaving countries to deal with the issue in the manner they feel appropriate. Article 6 of the TRIPs specifically states that: “nothing in this Agreement shall be used to address the issue of the exhaustion of IPRs”.

Box 36: Importation and Retailing of Compact Discs

The Australian Competition & Consumer Commission (ACCC) alleged the defendants Universal Music, Sony Music and Warner Music and others had taken unlawful action (threatening to withdraw significant trading benefits from retailers and cutting off supply to retailers who stocked parallel imports of compact discs) in order to discourage or prevent Australian businesses from selling competitively priced parallel imports of compact discs.

The conduct was alleged to constitute a misuse of market power and exclusive dealing prohibited by the Trade Practices Act of Australia. Senior executives were alleged to have been involved in the conduct.

The Full Court of the Federal Court upheld an appeal by Universal and Warner that their conduct did not breach the misuse of market power provision but confirmed that the conduct did breach the exclusive dealing provisions.

The Full Court also upheld the ACCC's appeal on penalty increasing the total penalties from about US$760,231.59 to over US$1,520,786.52mn.

Source: Proceedings instituted in September1999 – For summary of allegations see http://www.accc.gov.au/content/index.phtml/itemId/322787

9. ESSENTIAL ELEMENTS FOR SUCCESS

Building an effective competition regime in the context of developing countries is no easy job. The dearth of expertise on competition issues as well as the newness of the same makes the mere task of drafting a good and appropriate legislation a huge challenge. Furthermore, even after the law has been drafted with much thought and caution, there is still no guarantee that it will meet its aims.

Nowadays, Namibia faces considerable challenges in the implementation of competition policy, including:

- creating adequate institutional capacity
- ensuring the independence of the competition authority
- regulating the activities of South African firms in the Namibian economy
- developing a complementary relationship with sector-specific regulators, for example, electricity and telecommunications[72]

9.1 Sequencing the Competition Law Implementation

Toward such success, one of the useful suggestions made so far is to establish a competition authority with a phased approach, which may be appropriate to the design and implementation of a competition law.[73] The sequencing illustrated below is a refined version based upon a presentation made by Gesner Oliviera (former chairman of the Brazilian Competition Agency) at a CUTS meeting in 2002. He developed this on a simple idea inspired by World Bank's Shyam Khemani and Mark Dutz.[74]

Given its limited resources and novelty, a competition authority should start with actions, which will most likely benefit the market and build its own acceptability. Gradually it would introduce measures, which require more sophisticated cost/benefit analysis. Merger review comes after conduct control due to the fact that the welfare effect of a merger might be less clear than that of price fixing or collusion, the latter being positively welfare diminishing and easily identifiable by the polity and public.

Development is a continuum, and the stages will never be all this clear, and in some cases different priorities will be appropriate. In some economies, especially those that have a legacy of state-owned or other dominant firms like Namibia, abuse of dominance/monopolisation might also require a priority similar to that given to horizontal restraints.[75] However, in exercising its powers to tame public sector monopolies, the authority has to do it slowly rather than

Table 1: Different Stages of Institutional Development of National Competition Regimes			
I. Start	**II. Enhancement**	**III. Advancement**	**IV. Maturity**
1. Competition advocacy and public education	6. Merger control	9. Regulation	11. Second-generation international arrangements
2. Control of horizontal restraints	7. Vertical restraints	10. International cooperation arrangements	12. Pro-active competition advocacy
3. Checking abuse of dominance	8. Development of the effects doctrine		
4. Exceptions and exemptions, including on public interest grounds			
5. Technical assistance			

Source: Pradeep S. Mehta (2003), Friends of Competition – How to Build an Effective Competition Regime in Developing and Transition Economies, CUTS, India, p.20

follow the rulebook. This is because, while people as consumers would like some restraint on public sector's anticompetitive and anti-consumer behaviour, the establishment feels subconsciously threatened when action is taken against them. This is often reflected in public support, often orchestrated by politicians and trade unions, that it is people who are being penalised when public sector firms are upbraided.

The stages suggested are organised according to the degree of difficulty a competition authority might face in doing a cost-benefit analysis of the impact of competition measures on social welfare. However, it might be argued that legally sound prosecution of price collusion turns out to be more difficult than a merger review. In fact, it is generally easy to establish the ill effects of a collusive behaviour but often difficult to prove in a court of law, due to lack of legally-sound and solid evidence. Therefore, the actual plan should take into account the damage caused to the economy and consumers of a particular anti-competitive act, but also the chances of success and the expected return on the money spent in pursuing the case, given the relative probabilities of success through other lines of action or public policies.

9.2 Building a Healthy Competition Culture

The second, though no less important, key to successful implementation of a competition law is to build up a healthy competition culture. Creating a healthy competition culture depends on effective implementation of the competition law and a supportive policy environment. There are a number of factors that contribute to (though also have the potential to undermine) the successful enforcement of a competition law, which include:[76]

> **Creating a healthy competition culture depends on effective implementation of the competition law and a supportive policy environment.**

- power conferred on the competition authority;
- independence from political interference;
- political support for competition goals; and
- availability of resources.

9.2.1 Power Conferred on the Competition Authority Institutional Framework: For the competition authority to function properly, it is important that it has the right powers, which include investigative and adjudicative ones. The investigative power, naturally, is always bestowed with the competition authority.

In cases where the competition authority also has adjudicative power, then it can give out orders and decisions on cases based on their investigation and analysis results. The competition law enforcement system, thus, is completed within one single agency. For reasons of accountability though, such decisions of the competition authority are usually subject to appeal, which can be taken up by the firms involved at a court of higher authority within the judiciary system of the country. In this model, private right of action is usually limited. The EU follows this system with decisions and orders given out by the European Commission being subject to appeals.

There are also other systems, where the adjudicative power is separated from the investigative arm, which is the competition authority. One of such systems is when the competition authority (being in charge of investigating restrictive trade practices as well as M&A cases) may bring competition cases before a court of law for adjudication. In the meanwhile, private parties also have a parallel right to bring their own case directly before the court. This is the case in the US. In addition to this, consumers and their organisations too can bring action. This system helps to keep a check on the investigative and prosecutorial arm of the agency to be vigilant and active.

Alternatively, adjudication may be undertaken by a specialised competition tribunal, which belongs to the overall judicial system of a country. This is meant to take care of the dearth of special expertise amongst judges adjudicating all sorts of civil and criminal matters at the same time. On the other hand, it helps to avoid the problem of the all too great concentration of power in a fully integrated competition authority. One such model, which has proven to be very successful so far, is that of South Africa, where the enforcement system is bifurcated between the Competition Commission and the Competition Tribunal. This is called a 'self-contained' system and is strongly recommended in the OECD-World Bank Model Law.

In the case of Namibia, the investigative power rests solely with the NaCC. The NaCC is an independent body subject only to the Namibian Constitution. However, this independence may be limited as political approval is required in most decisions that Commission would make. The Minister of Trade and industry reviews decisions of Commission on mergers and pursuant to Section 21 (3) the Commission must, if the Minister at any time so requires, furnish to the Minister a report and particulars relating to the performance of the functions of the Commission in relation to any matter as the Minister may require. This is reason why pursuant to Section 38 after investigation and consideration of any written representations made in terms of section 36(2)(c)(i) and of any matters raised at a conference, the Commission may institute proceedings in the Court against the undertaking or undertakings concerned to obtain an order:

In the case of Namibia, the investigative power rests solely with the NaCC. The NaCC is an independent body subject only to the Namibian Constitution. However, this independence may be limited as political approval is required in most decisions that Commission would make.

- declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the Part I or the Part II prohibition;
- restraining the undertaking or undertakings from engaging in that conduct;
- directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
- imposing a pecuniary penalty; or
- granting any other appropriate relief.

This separation of powers is expected to help to establish trust in the fairness of competition law enforcement, especially in view that the competition authority is located within the Ministry of Trade and Industry. On the other hand, establishing a specialised body would help develop knowledge and expertise and avoid the trouble of having to go to the courts in every case, which is time and resource intensive, thus might limit the number of cases that a split-power competition structure is able to handle.

Box 37: Protection of Free Competition in Peru

Peruvian legislation allows the Administering Authority to investigate and ban those acts by which government officials interfere with free competition. In a recent case, the Minister for Economics and Finance was summoned to inform about an agreement between the Ministry and various transport associations by which urban transportation tariffs were settled at uniform level. The Multi-sectoral Free Competition Commission considered the agreement as anti competitive and decided that, in future, the Minister should refrain from promoting similar agreements

Source: UNCTAD, Model Law on Competition, 2004, p.74, point 42 (Information submitted by the Peruvian Government).

Advocacy power: An important set of powers for a developing country competition authority is the power of advocacy. In order to create a competition culture, awareness of competition issues and how they affect various groups needs to be created among businesses, consumers, policymakers and the media. This would help to increase compliance and deterrent effects, foster recognition and acceptance of competition mechanism within the society, as well as generate support for competition law enforcement. The authority will need to allocate resources for these activities. Besides, in order to conduct these activities effectively, advocacy should be specifically included in the mandate of the authority. In many countries including India, such a power is granted to the competition authority.

Similarly, in Namibia pursuant to Section 16 of the Act the Commission is not only responsible for the administration and enforcement the Act, but in addition it has also powers and functions:

- to disseminate information to persons engaged in trade or commerce and the public with respect to the provisions of this Act and the functions of the Commission;
- to implement measures to increase market transparency.

Legal enforcement tools: There are several legal provisions that affect the institutional competence of the competition authorities.

To begin with, the provisions of the law, especially those that determine the institutional structure and powers of the competition authority, should be compatible with general legal principles and constitutional values.

Secondly, the investigative powers vested with the competition authority should be broad. Competition authorities need to ably monitor markets and obtain information on the conduct of market participants if they are to be effective. To perform such tasks, the authorities must be equipped with investigative tools that enable it to obtain the relevant information. For example, they should be empowered to enter into business premises to collect information, to investigate managers and employees of firms and to demand information from business entities, where there is suspicion of violation. There should also be a high penalty for failing to comply with investigative efforts.

Last but not least, the authorities should be able to impose high penalties for anticompetitive conduct. The level of deterrence of a law is largely determined by the probability of detection of a violation and the height of sanction imposed upon the violator. If sanctions were not sufficiently high, then it would still be rational for market players to engage in anticompetitive conduct, and then willingly pay fine if caught. This is particularly true in the case of large multinational companies, or serious violations where economic rents earned are enormous. Accordingly, the law should provide the enforcing bodies with sanctions that are high enough to act as a disincentive to engage in anticompetitive conduct, when taking into account enforcement levels.

The Competition Act of Namibia does not meet the above-mentioned conditions. The Namibian competition authority, which has been established, but it is still not operational has the powers to entry and search premises, undertake, premise raids and individual searches, but the it does not have power to declare the conduct constituting infringement of the Act or to restrain the undertaking from engaging from that. In such cases the Commission must institute proceedings in the Court against the undertaking for obtaining an order. The same rule applies interim orders restraining the undertaking from engaging in anticompetitive conduct.

As regards sanctions for anticompetitive practices, the penalties for failure to comply with order of Court include both pecuniary and criminal nature. Pursuant to Section 62 a person commits an offence who contravenes or fails to comply with an interim or final order of the Court given in terms of the Competition Act. If the person is convicted, he or she is liable to a fine not exceeding N$500 000 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment. However, even the maximum pecuniary penalty may sometimes be disproportionate with regard to profit gained from engaging in anticompetitive practices. In many jurisdictions, instead of fixing a certain amount of fines, the relevant agencies have right to impose fines up to 10 percent of total turnover earned by the violating undertaking in the previous fiscal year.

On the other hand, an introduction of criminal sanctions against individuals who engage in anticompetitive practices has a strong deterrent effect, especially in cases of hard-core cartels. The individuals who set up and maintain cartels, and also senior executives or directors who either condone or encourage the arrangement can be thus directly sanctioned. One US study indicates that more than half of firms convicted of price-fixing would go into liquidation if required to pay the optimal fine. This would not be fair, because in many cases, the cartel will only have covered one aspect of the firm's business and the real participants will have been the few executives involved. Very large fines would damage innocent employees, shareholders and creditors who have done nothing to harm consumers or break the law.[77]

9.2.2 Independence from Political Interference ***Autonomy:*** Competition authorities may take one of a number of different structures. The most independent institutions are not only administratively separate from the government, but they are also staffed by competition professionals and do not rely on the government for budget allocation. The least independent authorities are those that form part of a government Ministry and are also therefore subject to civil service restrictions on recruitment and on central budget allocations for the administrative personnel.

In some circumstances, however, the politicisation of the antitrust authority need not be rejected. Russia provides a fascinating example. Russia has adopted an Antimonopoly Law as an integral part of wide-scale economic reforms to move from a centralised, communist government to a market-oriented economy. In the beginning, a minister, who is an active member of government, headed the Russian Antimonopoly Ministry. This proved to be beneficial: the antitrust principles were so different from the embedded ones that to be effective, the head of the antitrust authority had to be a strong political figure that took part in the ministerial discussions on the adoption of economic policy. Although some decisions were based on political considerations, others could not have been reached or implemented without strong political power. Once the new economic order matures, however, it might be wise to change the institutional organisation and create a more autonomous agency.[1] The Russian system was changed in 2004, when the authority was turned from a Ministry to a Federal Antimonopoly Service, after gaining some experience. How, the head of the Korean Fair Trade Commission is also a member of the ministerial cabinet. Political interference, therefore, clearly cannot be determined by looking only at the structure of the relevant institutions.

This is also the case in Namibia, where the competition authority is lacking sufficient autonomy due to fact that the Minister of Trade and industry has a large power over number of its activities. However, it is also recognised that the Ministry of Trade and Industry is the only place where knowledge and expertise on competition issues is available. Perhaps this should be the optimal model at the moment, but the authority should gradually evolve into a completely independent body.

Good leadership: Experience from many countries shows that the effectiveness of a competition authority fluctuates with the quality of the authority's leadership. In reality, the head of the agency largely determines the authority's priorities and the outcomes of its decisions. Even if (s)he is not legally empowered to authorise certain types of conduct, (s)he may nonetheless decide whether or not to conduct an inquiry of certain markets. It is thus crucial that (s)he not be politically oriented towards any specific group of interests. Although political pressures on the nomination process cannot be totally eliminated, it is important to minimise such pressures.

Besides, as already touched upon in the examples of Russia and Korea above, it is extremely helpful if the leader of a new competition authority has personal prestige, as this will give the institution itself higher standing in the political arena and also in the eyes of the public. It is also helpful if the leader has good political contacts that can assist him in taking up more controversial cases.

9.2.3 Political support

Political support and dealing with various interest groups: As an extension of the point above, political support is crucial to the success of competition law. This will enable the passage of legislation and probably provide more independence and resources for the authority that will implement the policy. Wide publicity about the competition authority and its support from key politicians will make it more difficult for the politicians to backtrack on their commitment under pressure from special interest groups. Political backing will raise the profile of competition issues and create public awareness through the media.

In the course of its work, the competition authority will have to take on entrenched domestic interest groups. Many of these groups will have benefited from protection from competition in the past from domestic or foreign sources and continue to be very influential in the political system. High-level political backing will be necessary to ensure that there is no political interference in the work of the competition authority and its decisions are carried out.

Interface with other regulators: As mentioned above, competition law is just one element of competition policy. The effectiveness of the competition law will depend on the extent to which it is coordinated with other regulatory policies and, consequently, the most direct overlap will be with sectoral regulators governing key utility sectors, which are mandated to create and promote competition in the regulated sector. The boundaries and roles of the sectoral regulators and the competition authority are difficult to define and in many countries the overlap issues remain unresolved. Ideally, the sectoral regulators would concentrate on the structure of the sector, trying to create a competitive market so that the regulator's day-to-day role in setting prices would diminish over time.

The role of the competition authority would be to deal with cases of anti-competitive practices when they arise.

The role of the competition authority would be to deal with cases of anti-competitive practices when they arise. However, it is likely that sectoral regulators will continue to play a hands-on role for the foreseeable future. To prevent potential conflict and confusion, the competition law and the sectoral laws should specify clearly the circumstances under which the competition authority could investigate the behaviour of companies in the regulated sector. The legislation should also define a consultative role for the competition authority in the implementation and development of sector regulatory policies.

Section 67 of the Act deals with relationship with other authorities. If a regulatory authority, in terms of any public regulation, has jurisdiction in respect of any conduct regulated in terms of Chapter 3 (Restrictive business practices) or Chapter 4 (Mergers) within a particular sector, the Commission and that authority:

- must negotiate an agreement to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
- in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

In addition, an agreement in terms of that subsection must:

- identify and establish procedures for the management of areas of concurrent jurisdiction;
- promote co-operation between the regulatory authority and the Commission;
- provide for the exchange of information and the protection of confidential information.

Pursuant to Section 67 (3), such agreement must be published in the *Gazette*.

Support of an active consumer movement: An active consumer movement has been long recognised as making a significant difference to the effectiveness of competition law specifically and reforms generally. Empowered consumers and representative organisations will bring anti-competition cases, including abuse of dominance and collusion, to the attention of the competition authority. They will also act as a positive pressure to counteract the opposition of inefficient businesses to the successful implementation of the law.

Many consumers are not aware of the relevance of competition law. Therefore, consumer organisations have an important role in demonstrating the importance of competition law by connecting the law with people's everyday experiences and products with which they are familiar.

Box 38: Importance of Active Consumer Movement

The *Conseil* (French competition authority) has fined the three mobile telephony operators, Orange France, SFR and Bouygues Télécom, for engaging in two kinds of anticompetitive agreements that distorted market competition. The practices were revealed as part of an investigation carried out following the *Conseil*'s decision to begin proceedings *ex officio* on August 28, 2001, and a referral handed down by the consumer association UFC Que Choisir on February 22, 2002. The fines amounted to a total of €534mn: Orange France: €256mn; SFR: €220mn; and Bouygues Télécom: €58mn.

Source: Conseil de la Concurrence http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=502

Namibian Consumer's Association (NCA)

The Namibian Consumer's Association is an autonomous Non-Governmental Organisation, which is registered as a company limited by guarantee (not for profit) under section 21 of the Companies Act 61 of 1973.

The NCA aims to empower consumers to have their voices heeded, by demanding ethical business practices in general and the provision of quality products and services in particular, thus enabling them to participate meaningfully in economic life and to exercise their rights.

The NCA's programme is to represent consumers of Namibia according to its mission.

- educate consumers about their rights;
- give information about a business or service provider if there has been a history of complaints against it;
- call on all public and private institutions to include consumer representatives in their policy and decision making;
- conduct research to advance consumer interests; andbe a advocacy and lobby group for consumers.[2]

9.2.4 Availability of Resources

In order for the competition authorities to function effectively, they clearly need adequate resources. The level of financial support available and the way it is used is important, but equally important are human resources.

Human resources: The best law cannot be applied without adequate human resources, i.e. a staff of sufficient size with adequate technical competence. The last condition is especially important in the area of competition law, which often involves a high-level economic analysis that complements a legal one in order to detect and to analyse the effects of business conduct.

Competition authorities thus need to employ lawyers, economists and investigators familiar with competition issues. In addition, several attorneys with litigation experience and a sound knowledge of administrative law and civil procedure should be hired. Particularly in its early years, the competition agency might be required to convince the courts that its cases are procedurally sound and have substantive merit.

Financial resources: Financial resources are a necessary complement for human resources. These expenses encompass the salaries of professional and administrative staff and the creation of an infrastructure to support the work of such staff.

Since competition law cases often consume large sums in investigation and trial costs, it is also vital that enforcement decisions be taken on a rational basis and cases should only be tried where enforcement costs are lower than the harm prevented in the specific case or by the possible deterrence effects that would prevent similar cases. This is especially true for small economies, which naturally have lower enforcement budgets.

10. A SUGGESTED FRAMEWORK FOR NAMIBIA

A competition regime includes competition policy, law and institutions. The absence of functioning competition law means that there is no legal basis for verifying and taking action against ACPs. Also, without competition institutions the country cannot safeguard its economy especially in terms of preventing unfair trade practices that seek to deter competition and exploit consumers once competitors are out of the way.[80]

The competition law of a country has to strike a proper balance between freedom to do business and regulation of business activity, because its purpose is to ensure that healthy competition prevails in the market.

The competition law of a country has to strike a proper balance between freedom to do business and regulation of business activity, because its purpose is to ensure that healthy competition prevails in the market. Unfortunately, despite the urgent need for functional competition regime, the Competition Act has been waiting for being enforced since its adoption in 2003.

In order to create an effective competition policy, implemented by a credible, independent competition authority, the following are recommended:

- the capacity to effectively implement competition law and policy needs to be developed for credible regulatory oversight of markets, through training and exchange programmes for the competition authority staff;
- the Competition Commission should be kept free from interference from the Ministry of Trade and Industry and it should be directly accountable to the Legislature (for example budget demands could be directly submitted to the Legislature);
- precise and workable agreements between the Competition Commission and sector-specific regulators should be developed, specifying respective areas of jurisdiction and clear-cut cooperation mechanism;
- public interest objectives have to be clearly articulated to avoid ad hoc and arbitrary decisions;
- there should be collaboration with other competition authorities, in particular, the South African Competition Authority.[81] Collaboration with other competition authorities can play an important role in building the capacity of the Competition Commission and enhancing the quality of regulatory oversight.[82]

In addition to the above-mentioned, and from the earlier discussion, some salient points are summarised below. They are addressing both legal and institutional issues, which should be kept in mind while building the competition regime of Namibia:

10.1 Legal Issues

10.1.1 Appropriate Revision of Certain Provisions of the Law

Certain provisions of the laws have the fault of being either too lax or too rigid, so they need to be revised more appropriately, to match with the human and financial resources available. This would help to save on enforcement costs for the young and resource-constrained Namibian competition authority. The rule of reason applied for such anticompetitive agreements in Namibia, for example, is too lax and might impose unnecessary enforcement burden.

On the other hand, the crucial definition of **undertaking**, which is an integral element of the Part I and Part II prohibition, is considered too restrictive, as it provides an exhaustive list of businesses carried on only for gain or reward. This excludes those engaging in commercial activities for non-profit reasons. Moreover, the definition does not include their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.

10.1.2 More Comprehensive Coverage of the Law

Several important issues have not been explicitly dealt with in the Competition Act of Namibia and should be inserted. Such issues are refusal to deal and especially issues related to intellectual property rights that give rise to specific competition problems. In view of the competition problems arising from the exercise of intellectual property rights the specific provisions or regulations, as well as guidelines should be envisaged in order to increase the legal certainty of those who need to predict whether the enforcement agencies will challenge a practice as anticompetitive.

10.1.3 Legal Definition of the Key Competition Terms

Clear legal definitions of the key concepts and terms facilitate the implementation of the Competition Act. Especially, following definitions are recommended as an integral part of the competition laws: relevant market, and the dominant position of market power. These terms should be defined in the standard way.

For further information the following website can be consulted: UNCTAD Model Law on Competition, United Nations New York and Geneva, 2004
http://www.unctad.org/Templates/webflyer.asp?docid=8370&intItemID=4108&lang=1&mode=downloads

10.1.4 Introduction of a "Leniency Programme" and revision of Section 33(3) of the Act

Procedures for obtaining information from enterprises including transnational corporations necessary for effective control of ACP should be instituted and improved. Firstly, the establishment of Leniency programme would facilitate the investigation, in particular in cartel cases, when retrieving evidence often depends solely on willingness of potential "whistleblowers" to cooperate with the competition authority. Secondly, in the same context, the Section 33(3) of the Act is suggested to be reviewed, because giving a written notice of the proposed investigation to every undertaking the conduct of which is to be investigated could seriously endanger the collection of relevant evidence.

10.1.5 Affording the possibility to appeal directly to the appropriate judicial authority

Pursuant to Section 49 of the Act, the Minister of Trade and Industry is empowered to review the Commission's decision on mergers. This appeal mechanism could, instead of guaranteeing the impartiality of the decision, enable the alignment of mergers decisions with the Trade policy. The provision of the Section 52 stipulating that the Court has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of the Act, do not provide sufficient remedy. For instance, the case may never go to court, if parties to the blocked merger succeed in overturning the Commission's decision by the Minister who is prone to promote "national champions" rather than "competition". As this framework undermines the independence of the NaCC and injects politics into competition cases, a direct appeal to the Judicial Courts from NaCC's decisions would have been appropriate.

10.1.6 Publication of Reader-friendly Implementation Guidelines

The adoption of the Competition Act 2003 of Namibia is a great step forward in promoting competition in the Namibia economy. However, implementation regulations that explain certain provisions of the Act are urgently needed. In this regard, reader-friendly guidelines on important features of the law, which has great significance on advocacy, public education as well as compliance, should be published and distributed widely. A live website should also be maintained to allow public access to information.

10.2 Institutional Issues

10.2.1 Building the Competition Authority's Human Resources

The quality of people manning the Competition Commission is very important. Attracting talents and experts is the key to making the institution work in an effective manner. However, it cannot be achieved until the selection process is made transparent and attractive compensation is offered. Otherwise competent personnel prefer joining private sector rather than the competition authority.

Considering the serious shortage of personnel with competence and specialised qualification in developing countries, the competition authorities should devise ways to overcome such obstacles. In the long run, low levels of professionalism can be countered by building links with universities. In the short run, staff training programmes in procedural, methodological and substantive matters should be considered a top most priority. Such training can be provided internally, but often there is an important role for external training. Internships or seconded staff from more mature authorities should be arranged to guide staff while gaining practical experience. As the NaCC is mostly an investigative agency on competition matters, a special attention should be given to the constant enhancement of investigative skills.

10.2.2 Legal Independence/Autonomy of the Competition Authority

Two salient features of an effective competition authority, as discussed in the preceding section, are that it is expert and it operates independently of pressures from both public and private sectors. This has a significant impact on the effectiveness of the overall competition regime in any country.

The Competition Commission shall be, in accordance with Section 4 of the Act, independent and subject only to the Namibian Constitution and the law, as well as it must be impartial and must perform its functions without fear, favour or prejudice. However, despite the Section 4 the Competition Commission is not truly independent in achieving objectives of the Competition Act, because many provisions are designed in such a way that they may impede the Commission’s independence. For instance, the current version of the Act do not guarantee the NaCC’s independence from political influence due to the facts that the appointment, re-appointment of members and their remunerations are decisions of the minister(s); and that the most of the Commission’s decisions require the approval of the minister.

Therefore, to enhance the independence of the Competition Commission the provisions related to selecting, appointing and removing its chairman and members by the Minister of the Trade and Industry needs to be improved. Otherwise they might erode Commission’s independence and thus credibility. In particular, when the term of the office is short (only three years) and the “survival” of the members could be subject to whims and fancies of the Ministry. Moreover, the three-year tenure is not only relatively short period to develop the necessary technical competence and expertise in competition issues to address more complicated cases, especially at an early stage, but also the members’ impartiality might be affected and performance might not be “without fear or prejudice”, if they depend every three years on the more or less political decision of the Minister.

For the time being, maybe a less independent structure is more suited for Namibia. However, in the future as the Commission will acquire sufficient expertise, such structure should be gradually changed and the authority should become fully independent. The financial autonomy could be for example underlined by submitting the Annual Report directly to the National Assembly.

10.2.3 Active Involvement of Consumer and other CSOs

There is a need for the competition authority to engage consumer groups and other civil society organisations in educating and helping the common man on competition issues, due to the latter’s credibility and neutrality.

The consumer movement in Namibia, as said, is still at a nascent stage. The individual consumers' awareness on competition issues is low, and so is their access to law and justice. The competition authority of Namibia should constantly search for such CSOs or consumer organisations with the same goals extend support to them and make them strong allies in building up a healthy competition culture in Namibia. The important information should be provided not only in official language but also in regional languages in order to reach wider groups of consumers.

10.2.4 Focused Publicity and Initial Awareness Campaign

The first few months of the life of the Competition Commission would best be devoted to an 'awareness campaign'. It can be expected that initially there would be little awareness or understanding in Namibia of the role and value of this new body. Hence it could only enhance the institution's effectiveness if it straightway took steps to communicate widely not just the fact that it now existed but also what it was trying to do and the benefits to businesses and to the economy that its activities could generate. There would be several targets for this awareness campaign:

- the business community in the formal sector;
- representatives of business in all the main towns, government departments and their dependent bodies; and
- representatives of civil society.

The aim would be that eventually all groups would come to feel that they had much to gain in an overall sense from cooperation with the competition body and that they could thereby contribute not only to faster economic progress for the economy as a whole but also to more prosperity for the sector or group they represented.

The awareness campaign would rely on two main methods, publicity events and written material providing guidance on the practical application of the policy. It would also be useful to ensure from the start that the competition body had an *information officer* available. His role would be both to help companies understand how competition policy applied to them and to take a pro-active role in keeping the media informed about the competition body's activities.[83]

10.2.5 Internet Website

As a part of the advocacy work and awareness campaign, the Competition Commission should establish a comprehensive Internet website providing relevant laws, legal documents, guidelines, manuals, links, case studies and other information on matters relating to competition issues. The website can be used for collection and periodical dissemination of studies, reports and research on ACPs related to the provision of the Act, with the view to promote competition and increase the understanding of all stakeholders. The website can also serve as a forum for consultations, discussion and exchange of views between Competition authority and different stakeholders

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

ENDNOTES

1 Available at www.cuts-international.org/7up3/7Up3.htm
2 Competition Regimes in the World – A Civil Society Report
3 Synthesis Report: Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa (7Up3 Project)
4 http://allafrica.com/stories/200708061301.html
5 Average compiled from published statistics from World Bank and World Fact Book
6 Index mundi statistics, www.indexmundi.com/namibia.html
7 http://imf.org/external/np/sec/pn/2006/pn0646.htm
8 http://allafrica.com/stories/200708061301.html
9 From Wikipedia, the free encyclopaedia, at <http://en.wikipedia.org/wiki/Market>, as on April 3, 2007
10 For the purpose of simple explanation, only two actors of the market are considered here, which are buyers and sellers, or producers and consumers, presumably in a single sector. The role of the government will be discussed later, as well as any other factors and actors.
11 Yingyi Qian (2000), *The Modern Market Economy and the Rule of Law*, available at http://www.oycf.org/Perspectives/5_043000/modern_market_economy_and_the_ru.htm
12 This is excluding the case where producers might have opportunistic, rent-seeking or strategic behaviours; which would be discussed in subsequent sections. For purpose of simplicity, from here onwards, competition would be largely explained in terms of prices.
13 Reckon LLP, Glossary, at <http://www.reckon.co.uk/open/Glossary>, as on April 3, 2007
14 Web-based definition from <media.pearsoncmg.com/intl/ema/ema_uk_he_lipczynski_indorg_2/0273688073_glossary.html>
15 Rai, Qureshi & Saroliya (2003), *Restrictive and Unfair Trade Practices – Where Stands the Consumer?*, CUTS, India, p.5
16 SEE: EC definition of the Relevant Market: http://ec.europa.eu/comm/competition/general_info/r_en.html#t86 and (OJ C 372, 9.12.1997, p.5)
17 Commission Notice on the definition of the relevant market for the purposes of Community competition law. Published in the Official Journal: OJ C 372 on 9/12/1997) *http://ec.europa.eu/comm/competition/antitrust/relevma_en.htm*
18 See: SSNIP Test http://en.wikipedia.org/wiki/Small_but_Significant_and_Non-transitory_Increase_in_Price
19 Based on Office of Fair Trading (2004), *Market Competition – Understanding Competition Law (Competition Law 2004)*, UK, p.20
20 Supra note 12, at <http://en.wikipedia.org/wiki/Market_share> as on April 3, 2007
21 Dennis Carlton & Jeffrey Perloff (2005), *Modern industrial organisation*, 4th Edition, The Addison – Weasley Series in Economics, p. 57
22 <www.econ100.com/eu5e/open/glossary.html>, as on April 3, 2007
23 The word is derived from the Greek language for few sellers.
24 Addison Wesley, *Student Resources – Glossary*, at <http://wps.aw.com/aw_rohlf_econreason_5/0,5759,11635-,00.html> as on April 3, 2007
25 The discussion in this section have been drawn from CUTS (2006), *Promoting Competition Policy and Law in Lao PDR* – A Civil Society Perspective, p.1-2.

26 For a further discussion on this, see, for example, Kenneth Davidson (2005), *Creating Effective Competition Institutions: Ideas for Transitional Economies*, Asian & Pacific Law & Policy Journal, Volume 6, Issue 1 (Winter 2005).

27 ADB (2005), Asian Development Outlook 2005, Chapter III: Promoting Competition for Long-term development, Asian Development Bank, at <http://www.adb.org/documents/books/ADO/2005/part030200.asp>

28 Mehta Pradeep S, Competition and Regulation in India, 2007, CUTS International, 2007 (The "Nine Principles" of Competition Policy. See also Chapter III of the Report of the High Level Committee on Competition Policy and Law of India deals with *Pre-Requisites ForA Competition Policy* which provides further reading dealing with incorporating competition principles in, *inter alia,* the areas of Industrial, Fiscal, Financial, Privatisation, Reforms, SME and Labour policy etc.

29 OECD Glossary of Statistical Terms, at <http://stats.oecd.org/glossary/detail.asp?ID=3256>

30 The discussion in this section has been drawn from Fruitman (2006), *Abuse of Dominance in Developing Economies – A Focus on the Issue in Cambodia, Laos and Vietnam*, CUTS, p.10

31 Supra note 12, at <http://en.wikipedia.org/wiki/Illegal_per_se> as on April 03, 2007

32 Section 31 (7) of the Competition Act of Namibia

33 http://www.unctad.org/Templates/WebFlyer.asp?intItemID=4108&lang=1

34 Part I, Section 23, Subsection 2 of the Competition Act

35 OECD: Hard Core Cartels: Meeting of the OECD Council at Ministerial Level, 2000.

36 Section 23, subsection 3(b) of the Competition Act 2003

37 CUTS (2001), *Competition Policy and Law Made Easy*, p.8

38 Supra note 17, p.14

39 Cartel behaviour: how to recognise it and take advantage of the ACCC's new immunity policy http://www.pwclegal.com.au/legal/pwclegal.nsf/pages/08C6A596822E2FFBCA25711B007F1362

40 Competition LawGram (3/2006), *Constructing the Olympics: Why Colluding for Contracts May Land You in Jail*, Lawrence Graham LLP, London, Vol I, p.2, available for further reading at <http://www.lawgram.com/servlet.cgi?page_id=resources/publications/CompetitionLawgram1.pdf;section=publications>

41 For further reading, see Verouden (2005), *Vertical Agreements: Motivation and Impacts*, forthcoming in *Directions in Competition Law and Policy*, (W.D. Collins, ed.), American Bar Association, 2006, available at <http://ec.europa.eu/dgs/competition/verouden.pdf>

42 Dobson & Waterson (1996), *Vertical Restraints and Competition Policy*, Office of Fair Trading Research Paper 12, v-vi

43 *Ibid.*

44 Section 23 (2) (b) of the Competition Act of the Republic of Namibia

45 For further reading, see OECD (1997), *Resale Price Maintenance*, Paris, OCDE/GD(97)229

46 Asker J. (2004), *Measuring Cost Advantages from Exclusive Dealing – An Empirical Study of Beer Distribution*, Harvard University, p.2

47 *Ibid.*

48 See *Continental T.V. Inc. vs. GTE Sylvania Inc., 433 US 36 (1977)*

49 See United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001)

50 Mehta, Pradeep S., Competition and Regulation in India 2007, CIRC, Jaipur, 2007
51 For further reading, see DiLorenzo (1992), *The Myth of Predatory Pricing*, Cato Policy Analysis No. 169, or <http://en.wikipedia.org/wiki/Predatory_pricing>
52 An essential facility may be defined as a facility or infrastructure, without access to which competitors cannot provide services to their customers. An essential facility may exist either at the manufacturing (upstream) or distribution (downstream) level. Examples of essential facilities include technical information, transport infrastructure (e.g., rail, port or airport) and pipelines/wire for the supply of water, gas, electricity or telecommunications services.
53 Section 16 (1) of the Competition Act of Namibia
54 The discussion in this section draws from International Competition Network (2006), *Anti-Cartel Enforcement Manual* (Chapter 2 – Drafting and Implementing an Effective Leniency Programme), Cartel Working Group – Subgroup 2: Enforcement Techniques
55 Based on definitions from Wikipedia, the free encyclopaedia, at <http://en.wikipedia.org/wiki/Merger> as on April 05, 2007
56 *Ibid.*
57 Section 42 (1) of the Competition Act of Namibia
58 http://en.wikipedia.org/wiki/Mergers_and_acquisitions#Acquisition
59 The discussion in this section draw from Washington State University, NetTel@Africa Off-Line Content (2004), *Mergers, Acquisitions and Other Corporate Combinations*, ICT Industry and Markets, p.53 of 73, available at <http://cbdd.wsu.edu/kewlcontent/cdoutput/TR503/page53.htm>
60 *Ibid.*
61 See: <http://www.internationalcompetitionnetwork.org/ICN_Remedies_StudyFINAL5-10.pdf>.
62 The discussion in this section draws from Mehta, Nanda & Pham (2005), *Multilateral Competition Framework: In Need of a Fresh Approach*, CUTS, India
63 This categorisation is borrowed from "Special Study on Trade and Competition Policy" as included in Chapter Four of WTO Annual Report for 1997.
64 It is important to note a particular case of (international) export cartel, which is not included for discussion hereby, despite their makeup – the Organisation of Petroleum Exporting Countries (OPEC). The oil cartel is supposedly outside the realm of antitrust action, as it is a sovereign activity of governments.
65 Mehta (1999), *Foreign direct investment, mega-mergers and strategic alliances: Is global competition accelerating development or heading towards world monopolies?*. UNCTAD, *The Role of Competition Policy for Development in Globalising World Markets*, UNCTAD Series on Issues in Competition Law and Policy, Geneva, United Nations
66 A section of the MRTP Act requiring government approval for acquisition or transfer of shares in excess of 25 percent of a firm's equity was simultaneously moved to the Companies Act and made applicable only to acquisition by "dominant" firms as defined in the MRTP Act (those with a market share of one-fourth or more). This, however, does not apply to mergers and acquisitions.
67 Nagesh Kumar (2000). *Multinational enterprises and M&As in India: pattern and implications*. Paper presented at the UNCTAD Seminar on Cross-border M&As and Sustained Competitiveness in Asia: Trends, Impacts and Policy Implications (Bangkok), mimeo.

68 http://ec.europa.eu/comm/competition/general_info/glossary_en.html
69 See: Judgment of the Court of First Instance of 25.3.1999 in case T-102/96, Gencor Ltd v Commission, (1999) E.C.R., page II-0753, at paras. 89-9269
70 The Namibian Economic Policy Research Unit (NEPRU), 2003, Competition Policy for Namibia Promoting Fair Competition and Economic Development, p.3
71 *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 429 (1908)
72 Competition policy for Namibia: promoting fair competition and economic development What are the challenges for creating and implementing an effective competition policy?
by Hartzenberg, T. Produced by: Namibian Economic Policy Research Unit (NEPRU), Namibia , 2003
73 This section is drawn from Pradeep S. Mehta (2003), *Friends of Competition – How to build an effective competition regime in developing and transition economies*, CUTS, India
74 Khemani, R. Shyam & M.A. Dutz, (196), *The Instruments of Competition Policy & Their Relevance for Economic Development*, PSD Occasional Paper No. 26 (Washington, World Bank)
75 Russell Damtoft, Federal Trade Commission, US in a personal communication to Pradeep S Mehta, CUTS Secretary General
76 CUTS (2003), *Towards a Healthy Competition Culture*, pp.40
77 A Strong Deterrent Effect: http://www.archive.official-documents.co.uk/document/cm52/5233/523310.htm
78 Michal Gal (2004), *The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries*, New York University Law and Economics Working Paper No. 10/2004, Berkeley Electronic Press <http://lsr.nellco.org/nyu/lewp/papers/10>
79 www.nangof.iway.na/pages/members/nca.htm
80 NEPRU Viewpoint No 62 /June 2007: http://nepru.traktiv.com/fileadmin/download/NEPRU_Viewpoints/QER_June07_Final.pdf
81 Competition policy for Namibia: promoting fair competition and economic development What are the challenges for creating and implementing an effective competition policy? by Hartzenberg, T. Produced by: Namibian Economic Policy Research Unit (NEPRU), Namibia , 2003
82 This is particularly important in the case of South Africa, in so far as South African firms play an extremely important role in many Namibian markets, and South Africa is not covered by the COMESA regional competition policy
83 Preparing for a Competition Law: An Economic "Mapping out" of Cambodia (Draft final report), EU MULTRAP Project, Geoffrey Sumner, Consultant

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