

**Capacity Building on Competition Policy in Select
Countries of Eastern and Southern Africa (7Up3
Project)**

Preliminary Country Paper on Competition Regime: Namibia

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THE NAMIBIAN MAP

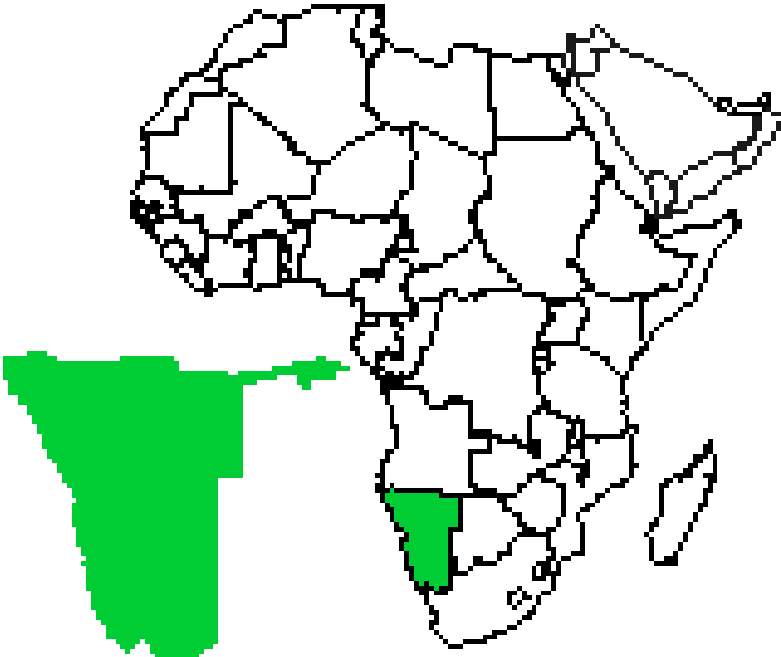


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List of abbreviations

ACP	African, Caribbean and Pacific
BLNS	Botswana, Lesotho, Namibia and Swaziland
CMA	Common Monetary Area
ECB	Electricity Control Board
EPZ	Export Processing Zone
ESI	Electricity Supply Industry
EU	European Union
FNB	First National Bank
FTA	Free Trade Area
GDP	Gross Domestic Product
ILO	International Labour Organisation
LDC	Least Developed Country
MFRC	Micro Finance Regulatory Council
MME	Ministry of Mines and Energy
MTI	Ministry of trade and Industry
N\$	Namibian Dollar
NABTA	Namibia Buses and Taxi's Association
NAMFISA	Namibia Financial Institutions Supervisory Authority
NamPort	Namibia Ports Authority
NCC	Namibia Communications Commission
NaCC	Namibia Competition Commission
NCL	Namibia Consumer Lobby
NDP	National Development Plan
NPC	National Planning Commission
NEPRU	Namibia Economic Policy Research Unit
PWHC	PriceWaterHouseCoopers
RED	Regional Electricity Distributor
RTP	Restricted Trade Practice
SACU	Southern African Customs Union
SADCC	Southern African Development Coordinating Conference
SADC	Southern African Development Community
SME	Small and Medium Enterprise
SWAPO	South West Africa People's Organisation
TDP	Transitional Development Plan
UNCTAD	United Nations Conference on Trade and Development
US\$	United States Dollar
VAT	Value Added Tax
WTO	World Trade Organisation

1. Background

Namibia is situated on the south western coast of the Africa, along side the Atlantic Ocean, while also share borders with Angola in the north, with Zambia, Zimbabwe and Botswana to the north east and east and with South Africa in the south. Namibia is one of the sparsely populated countries in Africa, if not in the world, with a population of over 1.97 million people on the surface area of approximately 824,116 km², deriving a population density of just 2.4 persons per km².

The country is surrounded by two deserts, Kalahari in the east and Namib in the east, making it one of the most arid countries in the Sub-Saharan Africa. Annual rainfall ranges between 300 mm to 700 mm. Despite low rainfall figures, many Namibians are still dependent on the agrarian activities (mostly subsistence farming) for their livelihood. Namibia is endowed with a lot of natural resources, making it an important exporter of diamonds, uranium, copper, other minerals, fish and fish products, beef, grapes, and benefits enormously from its tourism industry. The diamond mining sub-sector forms the core of the economy, accounting for about 10% of GDP and it provides raw materials for further processing, enhancing the country's value adding activities. With per capita income of about US\$1,960, Namibia is classified as low middle income country.

Table 1: Socio-economic indicators: Namibia

Indicator	Value
Current GDP level (2003, National Accounts)	US\$5.0 million
Average GDP growth (1990 – 2003)	3.1%
Per capita income (US\$ p.a.)	1,870
Inflation (2002-2004, December 2001 = 100)	0.5%
Gini coefficient (1994 census)	0.70
Unemployment rate ¹ (2000 census)	33.8%
Population (2005 estimate)	2.0 million
Population growth rate (1991 – 2001)	2.6%
Literacy rate (2002)	83.3%
Life expectancy (2002)	41.5 years

Germany occupied Namibia from the late 19th century (1883), until the end of World War I, following the Versailles treaty of 1919 in Paris. South Africa, acting on behalf of the British Empire, then took over the occupation of Namibia and administered it as a C-mandate² until after World War II, when it annexed the territory. In 1966 the South West Africa People's Organisation (SWAPO) launched a guerrilla war for

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

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

independence of Namibia, setting up its military wing, the People's Liberation Army of Namibia (PLAN). The war was prolonged until in 1988, South Africa agreed to end its administration in accordance with a UN peace plan for the entire country. Independence came in 1990 following multi-party elections and the establishment of a constitution. Since then, the country has experienced political stability, which came about through establishment of an independent judiciary, a representative parliament, a free press and a representative labour system among other ingredients of democracy.

2. National policies affecting competition

2.1. Development policy

After independence in 1990, Namibia devised its development strategy by formulating and implementing three consecutive development plans to date. These plans set out short-term to medium-term objectives and strategies for reaching such objectives. These development plans are the Transitional Development Plan (TDP), a three year plan that covered the period of 1991/92 to 1993/94; the First National Development Plan (NDP1), a medium-term plan that covered the period of 1995/96 to 1999/2000; and the Second National Development Plan (NDP2), another medium-term plan that has been formulated to cover the period of 2001/02 to 2005/06. More recently, a long term development plan named Vision 2030 has been formulated. This long-term plan captures inspirations and commitments of Namibians to strive for achieving growth sufficient to reduce maladies of poverty and underdevelopment, and ultimately to attain a developed country status by the year 2030. Latest analyses are however less optimistic about the attainment of goals enshrined in the vision. For instance, the economy needs to grow at over 12% per year for the next 25 years compared to the recorded 3% annual growth since independence. The first two development plans set four development objectives, which are to stimulate and sustain economic growth, creating employment; reducing inequalities in income distribution; and reducing poverty. Given the increasing importance of gender issues, the need to fight diseases (mainly the spread of HIV/AIDS) and other issues, the second national development plan increased the these objectives to nine. The country is now pursuing the following development objectives (NPC 2002:50):

- To reduce poverty
- To create employment
- To promote economic empowerment
- To stimulate and sustain economic growth
- To reduce inequalities in income distribution
- To reduce regional development inequalities
- To promote gender equality and equity
- To enhance environmental and ecological sustainability, and
- To combat the further spread of HIV/AIDS

2.2. Industrial and Investment policies

At independence in 1990, the new Namibian Government started with an economy whose manufacturing sector's contribution to GDP was mere 4.3% (average annual contribution for 1980 –1988). This obviously needed to be changed. The first move towards enhancing manufacturing or value adding activity came in the form industrial strategy as set out in "White Paper on Industrial Development" of August 1992. The Government is also in the process of finalising a new industrial development policy.

The industrial policy as enshrined in the White paper embraces the following concepts (GRN 1992):

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

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

The Namibian EPZ regime has attracted significant local and international interest, but the practical picture on the ground has been disappointing in terms of a number of companies which have set up operations of economic significance. The positive aspect of this is that many firms to whom the EPZ status has been granted did not withdraw their investment out of the economy, but rather moved out of the EPZ to the main stream of the economy. This can be attributed to regional restrictions on importation (into regional countries) of products produced under the EPZ regime. It is often argued that Namibia provides too generous investment incentives, while the resulting quantity and quality of investment is far below expectations, or too low to justify incentives given. The Foreign Investment Act (Act no. 27 of 1990, amended

in 1993) forms the foundation of Namibia's policy on foreign investment. This Act established the Namibian Investment Centre (part of the Ministry of Trade and Industry), which together with the Offshore Development Company are the official promoters and facilitators of investment in Namibia. The two are also key promoters of the EPZ regime and the general export-based industrialisation strategy of Namibia. They provide investor information, evaluate investment projects administer numerous investment incentives.

Manufacturing incentives are applicable to both existing and new manufacturers, in all sectors. Manufacturing activities include local value-addition in the form of processing of Namibia's minerals, fish and agricultural products. Some of the incentives given to entrepreneurs who invest in manufacturing activities are listed below (NCCI 2005):

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

2.3. Trade policy

Namibia's trade policy is anchored on four key elements:

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

As a member of the WTO, Namibia is committed to facilitate global trade through progressive reductions in all kinds of trade-restricting practices. In this context, the Government has undertaken to minimise domestic support by privatising support services such as tractor and seed provisions. Furthermore, the functions of Namibia's agricultural boards which used to set prices and procure agricultural products, are now limited to market development, collection of statistics and administrative functions.

The Southern African Customs Union (SACU) groups Botswana, Lesotho, Namibia, Swaziland and South Africa, with a common external tariff. SACU Agreement has recently been renegotiated, with key elements being revised and given new focus, in light of the need to allow BLNS countries greater say in the determination and

administration of SACU tariffs. It is through SACU that Namibia has secured its major market i.e. South African market, which allows Namibian industrial planners and business to plan for the wider regional market.

SADC Trade Protocol calls for the removal of all intra-regional tariffs, but does not cover the liberalisation of trade with non-SADC countries. The protocol significantly allows for special treatment for "sensitive products" (in agriculture and manufacturing), by allowing tariff reductions in these sectors to move at a slower pace. In a sense, this means that some products would be excluded altogether from the trade liberalisation.

Under the accord, SADC countries would phase out tariffs on all "non-sensitive" products by 2008, and by 2012 the grouping expects fully liberalised trade. Implementation of the SADC agreement had been delayed since the year 2000 while negotiators continued to discuss the thorny issue of market access to South African markets, the regional economic powerhouse.

Namibian products benefit from preferential access under the Cotonou Agreement. As a result of the preferences under this trade pact, Namibian exports enter the EU market duty free. These include an annual beef quota of 13,000 tonnes under the Cotonou agreement. According to the Meat Board of Namibia, the country annual production of beef amounts to some 100,000 tonnes, of which approximately eighty percent is exported (Meat Board of Namibia 2005). Another restrictive quota is for seeded grapes, whereby Namibia is allowed to export seeded grapes to EU market up to 900 tonnes per annum, and which is also below the country's annual grape exports capacity.

Namibia employs various barriers to trade. Trade barriers refer to measures undertaken by governments to impact positively on local production capacity, especially manufacturing, increase government revenue and improve the balance of payments. One can say that in most cases, trade restrictive measures are introduced to restrict competing imports, thereby increasing local manufacturing capacity. The other two effects (on government revenue and balance of payments) are consequences, and not the primary purpose for which such measures are taken in the first instance. The famous infant-industry argument is both the theoretical and policy rational for trade barriers.

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

2.3.1. Tariffs on imports

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

2.3.2. Namibia Agronomic Board

Namibia Agronomic Board issues import licences as per Agronomic Industry Act (Act no. 20 of 1992). There is a number of quantitative restrictions, amongst them; milk and milk products, wheat and maize. In the case of milk and milk products, quantitative restrictions are applied as a way to protect an infant industry in Namibia. Quantitative restrictions on wheat and white maize on the other hand, are basically to protect Namibian producers. The Board tries to ensure that local millers or processors use up Namibian produce before reverting to importing, when necessary.

2.3.3. Meat Board of Namibia

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

2.3.4. Some equivalence to export subsidies

Both developed and developing countries use export subsidies as a way to promote exports. In the case of Namibia, there are no direct export subsidies. What would be equivalent to export subsidies are manufacturing incentives for industrial development, especially in the EPZ regime.

2.3.5. Exchange controls

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

In Namibia, the Ministry of Finance has delegated all exchange control powers, functions and duties to the Bank of Namibia, which in turn, delegated some of the exchange control functions and powers to authorised dealers, which are the country's four commercial banks (i.e. Bank Windhoek, Nedbank, First National Bank and Standard Bank). Exchange Control in Namibia is used both to discipline the local demand for foreign currency in order to protect the official foreign currency of the country and to allocate available foreign currency in the best interest of the country as a whole (BON 2005). This is however restrictive, because travelling

nationals are sometimes forced to buy goods and services according to amounts of foreign currency they are allowed to buy.

In the mean time, the Government is committed to gradually relax and eventually abolish exchange controls. The Bank of Namibia can be approached on a case-by-case basis through authorised dealers where the transaction, or its amount, does not fall within the general mandate given by Bank of Namibia to the authorised dealers (PWHC 2005).

2.3.6. Import/Export Licensing

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

In the case of exports, the following specific groups of products require export permits, and are also not automatically granted; medical and related substances, live animals and genetic materials, all ostrich breeding materials (eggs, chickens and birds), meat and game products, protected species (fauna and flora), plants and plant products, propagating materials, firearms, explosives, diamonds, gold and other minerals, coins and bank notes, works of art which had been in Namibia for more than 50 years, national monuments and archaeological findings.

2.4. SME policy

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

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

The policy was reviewed in 2004 and is in the process of being revised to address current challenges within the SME sector. The Small Business Credit Guarantee scheme is in place, while the National Chamber of Commerce and Industry, together

with the Ministry of Trade and Industry provide advice and other necessary services to SME's. The prevalence of SMEs means that there are more participants in the market and consumers are presented with wider product choices, especially in instances where SMEs are involved in manufacturing activities. The small size of SMEs is usually compensated by public infrastructural facilities (at affordable terms in most cases), training and advance services provided in order to make them competitive. In practice, it is almost impossible to boost competition in technical sectors like financial services and telecommunication through SME policy.

2.5. Labour policy

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

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

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

2.5.1. The Labour Act

The Labour Act of 1992 established a Labour Advisory Council, labour courts and set out basic conditions of employment (including maximum working hours, overtime, annual, sick, and maternity leave).

It regulates the termination of contracts, unfair disciplinary actions, trade unions, employers' organisations and collective agreements. Though information about its actual coverage is not available, it can be assumed that it is limited to regulating employment in the formal sector. The ability of the ministry to enforce the act is also limited due to a small number of Labour inspectors (Nielsen and Hansohm 2003).

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

2.5.2. The Social Security Act

The Social Security Act of 1994 provides that every employer and employee has to be registered. Every employer registered is a member of the Maternity Leave, Sick Leave, and Death Benefit Fund. Every employee registered becomes a member of the National Medical Benefit Fund and the National Pension Fund, except if s/he is a member of any other respective fund approved by the Minister on recommendation of the Social Security Commission. All members make monthly contributions of up to N\$27 to the fund.

2.5.3. Employment policy

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

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

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

2.5.4. Affirmative action

The Affirmative Action ([Employment] Act, 1998) was enacted with the aim of achieving equal opportunity in employment in accordance with Articles 10 and 23 of the Namibian constitution. The main focus of the Act is to enforce equality and fair treatment of all persons when it comes to employment issues. It requires that previously disadvantaged persons, persons with disabilities and women enjoy equal employment opportunities and conditions.

The Act established the Employment Equity Commission to enforce affirmative action plan. In fact, preferential treatment has to be given to suitably qualified nationals.

3. Nature of Namibian markets

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

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

Namibia has a small open economy, heavily dependent on trade (with a trade-GDP ratio over 45%). Despite having low population, Namibia offers significant market opportunities because of high per capita income, when compared with the rest of the region or continent. Most of markets are fairly competitive, for instance the retail industry has attracted a lot of big retailers with shops in major towns. In most instances, competition is limited to those big firms, while most of local retailers are just surviving as most of them also get their supplies from South Africa, but in smaller quantities. This does not allow them to benefit from any economies of scale enjoyed by bulk buyers. In the financial sector, there are at least two dominant commercial banks, but again, oligopolistic competition is still prevalent in the sector.

Namibia has several monopolies, some of which are considered to be natural monopolies based on the necessity of products they produce and supply to the nation. These include the main three regulated monopolies (widely believed to be natural monopolies), which are the telecommunications company (Telecom Namibia), the Power Utility company (NamPower) and the Water utility company (NamWater). Plans have been in place to liberalise the telecommunication industry (not much has been said about other sectors) and it looks like it will take a long time before it can happen. One major barrier to entry is a natural one, which is also common for many developing economies - the shortage of necessary skills. The banking sector is for instance alleged to charge high handling fees especially when compared to those in a more advanced South African economy. The limit to local skills however makes it impossible for the creation of new competitors for any of

existing firms in these technical industries such as finance, telecommunications, power etc.

4. The Competition policy in the global context

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

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

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

The abridged set of these principles and rules are as below (adopted from UNCTAD 2000):

- 1. Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of those countries;*
- 2. Collaboration between Government at bilateral and multilateral levels should be established, and where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices;*

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

Since the adoption in 1980, this set of principles and rules has been reviewed three times under the auspices of UNCTAD – in 1985, 1990 and in 2000. The last review (25-29 September 2000) adopted a resolution reaffirming the validity of this set principles and rules, called on the UN General Assembly to subtitle the set for reference as “UN Set of Principles and Rules on Competition”, and called on all member states to implement the provisions of the Set.

5. The competition policy and law in Namibia

5.1. The Namibian competition Act

Before independence in 1990, competition issues in Namibia have been regulated by the Regulation of Monopolistic Conditions Amendment Act, 1958 (Act 14 of 1958). This was a South African Act, which was never applied after independence. The first competition bill for the country was drafted in 1996 and a Steering Advisory Committee on competition was established, to discuss the bill with all stakeholders. This led to the enactment of the competition Act, 2003 (Act no. 2 of 2003) by parliament on 24th April 2003. This Act made provisions for the establishment of the competition institution (The Namibian Competition Commission), to safeguard the promotion of competition in the Namibian market and for incidental matters regarding competition in Namibia.

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

- To promote the efficiency, adaptability and development of the Namibian economy;
- To provide consumers with competitive prices and product choices;
- To promote employment and advance the social and economic welfare of Namibians;

- To expand opportunities for Namibian participation in world markets while recognising the role of foreign competition in Namibia;
- To ensure that small undertakings have an equitable opportunity to participate in the Namibian economy;
- To promote greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

Namibia Competition Act, 2003 (Act no. 2 of 2003, section 2)

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

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

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

5.2. Independence, capacity and powers of the Namibia Competition Commission (NaCC)

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

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 power 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.

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

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

One would feel that the NaCC is not that independent from political influence. This is due to several reasons:

- appointment, re-appointment of members and their remunerations are decisions of the minister (s);
- most of their decisions require the approval of the minister

Again, the staff of the NaCC may be too small to be regarded as having the general overview of the public interest. The minister may have more assisting staff and his/her decision may be more acceptable. Do competition authorities really need political independence, and to what degree? If NaCC members happen to serve only for three years without re-appointment, the period is likely to be too short for one to acquire necessary experience and knowledge of the market. It will really make sense if not all members are replaced after a given term of office. Of course given they meet performance expectations.

5.3. Restrictive Business Practices

The rationale for the competition law derives from the need to achieve the best possible efficient allocation of resources in the economy. That is, the resource allocation that is most beneficial to both producers and consumers taken together. The underlying objective of the Namibian competition policy is to restrict distortionary effects resulting from:

- collusive practices
- abuse of Dominant position
- mergers

5.3.1. Prohibited collusive practices

The theory of competition policy argues that some form of policy intervention is needed to monitor monopolistic behaviour when buyers are numerous and sellers are few due to economies of scale (Ashipala 2004:2). The Namibian competition Act prohibits practices and arrangements between undertakings that are considered

anti-competitive, and thereby detrimental to public interest. The Act prohibits the following conducts:

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

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

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

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

Other exemptions are based on intellectual property rights and on professional rules. The Commission may, however, revoke the exemption if it found out that the exemption was granted on materially incorrect information, that there has been significant change of circumstances since the exemption was granted or if the condition upon which it was granted has not been complied with (*Namibia Competition Act, 2003 (Act no. 2 of 2003, sections 29)*).

5.3.2. Abuse of dominant position

The Act left the definition of the dominant position to the NaCC to define. Dominance can be defined as the ability of firms to raise price without losing customers while the abuse of dominant position occurs when firms raise price above long-run marginal cost (Ashipala 2004:3). Under the Namibian competition Act, 2003, the minister is allowed or tasked to determine a threshold of annual turnover or value of assets below which an undertaking is not considered to be in a position of dominance.

The Act defines abuse of dominant position to include:

- direct or indirect imposition of selling or purchase prices, or other unfair trading conditions;
- restricting production, market outlets, market access, investments and technical development or technological progress;
- applying dissimilar conditions to equivalent transactions with other trading parties; and
- making the conclusion of a contract subject to acceptance by other parties, of supplementary conditions, which have no connection with the subject matter of the contract.

5.3.3. Dealing with Mergers

The Namibian Competition Act defines “a merger to occur when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking (*Competition Act, 2003 (Act no. 2 of 2003, section 40)*). Thus, merger entails an acquisition of, control through purchase of shares, or assets of other undertaking and through amalgamation with other undertakings. This Act prohibits all mergers which are believed to substantially prevent or lessen competition or which are contrary to public interests.

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

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

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

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

- Whether the flow of benefits from the proposed merger in the form of enhanced technical efficiency, increased production, efficient distribution of goods and access to markets outweigh the negative effects of the merger;
- The extent to which the proposed merger would lessen competition or restrict trade;
- The extent to which the proposed merger would lead to any undertaking (either involved in the merger or not) acquiring a dominant position;

- The extent to which the merger would affect a particular industry or region;
- The extent to which the proposed merger would affect employment;
- The extent to which the proposed merger will affect the ability of SMEs, especially those owned by historically disadvantaged persons;
- The extent to which the proposed merger will affect the ability of national industries to compete in international markets.

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

In the regional context, the Namibian competition law is applicable to issues within the Namibian borders as well as cross-border issues that have effects on the Namibian market. The NaCC is also allowed and tasked with the duty to liaise and exchange information, knowledge and expertise with authorities of other countries entrusted with functions similar to those of the NaCC (*Competition Act, 2003 (Act no. 2 of 2003, section 16 (b))*).

It is very important for Namibia to have a competition law that takes into account, regional business activities because most of big firms in Namibia are multinationals, mainly with their bases in South Africa. Even if the country can not directly regulate a foreign business, whose have negative effects on the domestic economy, it can at least regulate its business activities, say restrict imports if they are found to constitute an unfair trade practice. Allowing the national competition authority to collaborate with their foreign counterparts can as well mean that we are a step closer to reaching a formal agreement on how to collaborate on cross-border competition matters. Such collaboration can be bilateral or multilateral (say a SACU or SADC-wide collaboration).

5.4. Implementation

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

Chapter 9 of the Namibian competition Act makes provision for the transitional period, between the promulgation of the Act (24 April 2003) and enforcement of the Act. According to this chapter, if a merger is effected during this transitional period, such a merger is regarded for a period of 12 months from the date of commencement of the Act, to be a merger implemented in contravention of chapter 4 of this Act. This presents some investment problems, at least for the time-being. Investors are very cautious and hesitant to implement any joint ventures of significant magnitudes due to uncertainties as to whether such ventures will be allowed to continue or abolished upon the commencement of the NaCC.

Finally, Namibian consumers appear to be under-represented. National institutions, formally representing consumer interests are at least weak, or non-existent. The Ministry of trade and Industry, including the NaCC are therefore expected to vigorously take consumer interests in consideration when dealing with competition issues.

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

6.1. The electricity sector

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

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

The Electricity Act, 2000 (Act no. 2 of 2000), which came into effect in July 2000 made provision for the establishment of the Electricity Control Board (ECB) to regulate Electricity Supply Industry (ESI) in Namibia. This Act requires electricity undertakings to be licensed by the ECB. The main objective of this Act is to foster competition in generation, transmission and distribution of electricity in Namibia.

Thus, the key functions of the ECB are licensing, electricity pricing, standard setting, consumer protection, mediation and dispute resolution, efficiency enforcement and electricity sector development planning (Ashipala 2004:6)

Round three of the ESI restructuring study carried out by government in 2000 found that there is a need to restructure the industry from a non-competitive vertically integrated system to a more competitive structure (SAD ELEC 2000). Thus the ECB embarked upon the restructuring of the ESI aimed at the creation of a Single Buyer market structure, creation of Regional Electricity Distributors (REDs) and introduction of a licensing system which was approved by cabinet in 2000 (Ashipala 2004:6). In addition to the provision for the establishment of the ECB, the Act also provided for the establishment of four REDs for the North, West, Central and Southern Namibia, which will be opened up for the private sector participation. However, the generation and transmission of electricity is still a monopoly of NamPower, the national electricity provider, while distribution is done by various players, including a number of regional and local authorities.

6.2. Communication and transport sectors

As part of the transition from the pre-independence institutions, the Department of Posts and Telecommunications was dissolved in 1992, and replaced by Telecom Namibia. Telecom Namibia, which is a state owned enterprise, was granted a full

monopoly over all basic telecommunications services. The telecommunication industry, which has long been scheduled to be fully liberalised by the year 2004, is regulated by the Namibia Communication Commission (NCC) created in 1992, as a quasi-independent regulatory body.

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

In realistic terms, telecommunications seem to constitute natural monopolies, being having fixed lines and having to provide some of their services based on social rather than economic reasons. For most of poor localities in rural areas where people's willingness to pay is too low, no private firm may be in the position to supply such necessary services on a competitive basis. This is in itself a market failure or a missing market situation. It is in that light, that Governments assume their responsibility of providing social goods. Due to fast changing technology, with increasing mobile telecommunication networks, it has now been realised that telecommunication products are not subject to the same cost conditions. This has created a number of close substitutes, which weaken the natural monopoly and increasing consumer choice, though mobile communication service providers are still using infrastructures of the Telecom Namibia.

In the transport sector, the white paper on transport policy (of June 1995) led to the commercialisation of a number of government activities. This led to the creation of Namibia Airport Company in 1999, Roads Contractor and Roads Authority and Namibia Ports Authority (NamPort). The rail network is owned by government and operated by TransNamib Limited. Probably the most important form of transport to the nation is road transport. Namibia has one fairly competitive, but regulated public transport. The taxi and bus transport are organised under an umbrella body - the Namibia Buses and Taxi's Association (NABTA), which consults with the Ministry of Works, Transport and Communications when setting or changing transportation prices.

6.3. The financial sector

The Bank of Namibia Act, 1997 (Act 15 of 1997) made provision for the establishment of the Bank of Namibia (the Central Bank) to serve as the state's principal instrument in performing the basic functions of the central bank, including the regulation of the commercial banking sector. The commercial banking sector in Namibia consists of four commercial banks, an investment bank and a savings bank. All big banks are branches of South African banks. One of the smaller banks (SWABOU Bank), which was fully Namibian owned, has recently merged with First National Bank (FNB). There are clear indications that there is no real price or product competition in the Namibia's banking sector. FNB and Standard bank

dominate the market holding about 62% of total assets and receiving 60% of total deposits and loans (Ashipala 2004:7).

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

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

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

7. Regional integration

Namibia became a member of the WTO in 1994. The goal of WTO is to try to ensure that member states conduct their business in a transparent and predictable manner. It is expected that all bilateral and multilateral trade agreements would be consistent with the requirements and principles of the WTO. Namibia is a member of the Southern African Customs Union (SACU), the Common Monetary Area (CMA), the Southern African Development Community (SADC), the EU-ACP agreement (known as Cotonou Agreement), the country is also having bilateral trade agreements with Zimbabwe and with Angola, other members of SADC, and it has recently dismembered from the Common Market for the Eastern and Southern African countries (COMESA) during 2002.

SACU consists of the regional economic powerhouse in the region – South Africa, and four small countries, namely, Botswana, Lesotho, Namibia and Swaziland, shortly referred to as the BLNS countries. Though there is no sufficient hard evidence to prove it, there are always outcries from firms based in these small

countries about unfair trade practices by, and dominance from South African companies. As it may be the case in most parts of the world, infant industry protection has been granted to a couple of emerging industries in these small countries, but they grossly fail to take advantage. For Namibia, infant industry status has been granted to two sub-industries within the Agricultural sector – in the Dairy and milling industries. There are opinions that smaller members of SACU should do something about South African firms instead of keeping complaining, but having the national competition policy should be a starting point before we talk about having a regional competition policy. Against this background, opinions are held that a regional competition policy will not help by much because competition laws are only enforceable at national levels.

Articles 40 and 41 of the 2002 SACU agreement are on competition policy and unfair trade practices respectively. The agreement encourages member states to implement competition policies and to co-operate with each other with respect to the enforcement of competition laws and regulations. The SACU council is also charged with the responsibility to develop policies and instruments to address unfair trade practices between member states.

SADC is another regional trading block to which Namibia, but SADC is not yet at an advanced stage like SACU. Of all the member states of SADC, only South Africa and Zimbabwe had fully-fledged competition policy and legislation by 2002 (Isaksen 2002).

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

8. Consumer protection

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

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

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

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

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

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

9. Conclusions

The prevalence of multinational corporations in the economy, particularly their dominance in developing economies calls for regional or international collaboration in competition issues in order to curb out cross-border anti-competition practices. The Namibian competition legislation makes room for such collaboration, by allowing the NaCC to collaborate with their counterparts outside the Namibian borders.

The Namibian competition Act is underway for implementation, probably by the year 2006. Under this Act, competition related developments that take place over the period of 12 months before the enforcement of this Act will be subjected to the scrutiny of the NaCC i.e. competition related developments over this period are required to comply with the provisions of the Act as well. All cases regarding Restricted Trade Practices (RTPs) will be recorded and dealt with once the NaCC comes into operation. What this means to hesitant investors is that there is more uncertainty when making some business decisions, which may involve acquisitions

or mergers because the competition law will basically come in place 12 months before the enforcement of the Act and the subsequent implementation of the NaCC.

The Act makes provision for the establishment of NaCC, as an independent body subjected only to the Namibian constitution and has jurisdiction throughout Namibia. This independence may however be limited as political approval is required in most of decisions the NaCC will make. Furthermore, at most two ministers determine the benefits of the NaCC members. The usual preference is that the benefits of the commissioners be determined by the parliament, and that the Competition Commission itself should be responsible to parliament and to the constitution of the republic.

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

Despite the fact that consumers are not a minority group in any sense, consumer interests are under-represented in Namibia. Namibia still does not have a consumer protection law in place, no effective consumer lobby at the moment and consumer care sections in regulatory institutions and in private businesses operates voluntarily with no really obligations. It is however the responsibility of the state (not only Government) to ensure that consumers are organised, empowered and be brought on board as key stakeholders in policy making.

In view of the fact that the Government had already embarked on an exercise to operationalise a Consumer Protection Act for Namibia, it is recommended that the government revives the process and rejuvenates its efforts for adopting a Consumer Protection Act for Namibia.

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