NaCC COMPETITION NEWS

Volume 4 No. 3 2014

THE OFFICIAL NEWSLETTER OF THE
NAMIBIAN COMPETITION COMMISSION

FAIR COMPETITION, PROSPEROUS ECONOMY

Namibian Competition Commission

MISSION

To safeguard and promote competition in the Namibian economy

VISION

Fair market competition

BRAND PROMISE

Fair competition, prosperous economy

VALUES

National economic interests come first

Our priority and commitment is to put National Economic interests, towards attainment of Vision 2030 ahead of any other considerations

Impartiality

We shall be fair and equitable living our purpose and uphold principles of impartiality and confidentiality regardless of the circumstances

Consistency

We are consistent in our approach in every instance, regardless of the circumstances and pressure that may be brought to bear

Accountability for our role

We accept our responsibilities and are accountable for all our decisions and actions

We uphold and respect decisions taken by the Commission, whether an individual was party to a decision or not

Integrity

We act with integrity in matters of substance and procedure insofar as executing the mandate of the Commission

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01 Editorial Note

By Dina Gowases
Editor

Dear Readers,

The Commission is appreciative of its stakeholders, who through various communication modes, step through its doors to either gain more knowledge on the mandate of the Commission, or partner with us on how best we can serve the nation and bring the Commission to the people. The Commission has a mandate to ensure that businesses compete fairly, entry barriers are not limiting for new businesses and that the consumer has the right to choose products and services from a variety of goods and service providers.

This edition has a strong focus on how the market, and market forces at play, can influence consumer welfare and how this fits into the scope of the Commission in its implementation of the Competition Act No.2 of 2003. Our economist, Mr Paulus Hangula, puts into perspective the conditions and causes affecting the conduct of businesses that could either harm or benefit consumers; as well as the importance of economic analysis in the enforcement of competition law, in his article on "The Importance of Economics in Competition Law".

Our senior colleagues from the Mergers and Acquisitions division, who on a daily basis deal with the economic and legal scrutiny of mergers and acquisition cases brought before the Commission, provides a write-up on SME protection in relation to merger control.

Can the Commission assist in reducing income inequality? The Chief Executive Officer to the Commission, Mr Mihe Gaomab II, throws an eagle eye on that subject, focusing on the issue of inequality and how that relates to competition regulation. He interrogates the book of the author Thomas Piketty titled, *"Capital in the Twenty First Century" (2014, President & Fellows of Harvard College, USA)* which poses the question whether "... the balancing forces of growth, competition and technological progress lead in later stages of development, to reduced inequality and greater harmony among classes..."; to try and seek an answer to the Commission's scope in the matter of income inequality.

Mr Gaomab II also provides an assessment of the 35th edition of the World Economic Forum Report on Global Competitiveness. He defines the word competitiveness and highlights the countries' competitiveness rankings, looking also at issues of regional and continental comparison of the world economies. Mr Gaomab II notes that Namibia is improving. Find out why and how in the article titled: "Assessment Of The Global Competitiveness Report 2014-2015".

Our law officer in the Restrictive Business Practices division, Mr Bernhard Tjatjara, explores the meaning of unfair selling price and unfair trading conditions. He notes that the relationship between unfair trading condition and unfair selling price is that they all have to relate to price, quantity and quality. In addition to this, Mr Tjatjara defines what market power means and elaborates on why it matters in the enforcement of competition law.

In keeping you up-to-date with the mergers and acquisitions cases brought before the Commission, we have included the interview conducted by Consumer News magazine with our Technical Advisor, Ms Bridget Dundee, on the conditional exemption case granted to Tullow Kudu Limited, NAMCOR and CIECO E&P (Namibia) Co, Limited. Ms Dundee sheds some insight into what led to the decision made by the Commission regarding this exemption case.

The Commission undertook a voluntary peer review conducted by the United Nations Conference on Trade and Economic Development (UNCTAD) in 2013. This process was concluded with the successful review process before a UN Panel of Competition Experts. We would like to thank all our stakeholders who collaborated with us in completing questionnaires, attending various interviews and providing insight into the Commission's enforcement of the Competition Act No. 2 of 2003.

A summary of the findings and recommendations of the African Competition Forum (ACF) Poultry Project, which was part of the research programme on Competition Dynamics and Regional Trade Flows undertaken by Namibia, Botswana, Zambia, and South Africa through the ACF, is included in this edition for your perusal.

We would also like to share some of the questions posed by the media concerning competition-related matters, in the interest of the public. Therefore, our section on the Frequently Asked Questions is a response regarding the concerns on the rising basic commodity prices.

NB: *Do note that our mission statement has a slight amendment as we added another Value: "Integrity".*

Kind regards

02 Assessment of the Global Competitiveness Report 2014-2015

By Mihe Gaomab II
Chief Executive Officer: NaCC

The Report produced by the World Economic Forum assesses the competitiveness landscape of 144 economies, providing insight into the drivers of their productivity and prosperity. Competitiveness is defined as the set of institutions, policies and factors that determine the level of productivity of a country. The level of productivity, in turn, sets the level of prosperity that can be earned by an economy.

The different aspects of competitiveness are captured in 12 pillars, which compose the Global Competitiveness Index. This 35th edition of the Report emphasises innovation and skills as the key drivers of economic growth. While innovation and skills increasingly influence competitiveness and the global economy tentatively recovers from the economic crisis, significant risks remain, resulting from a strained geopolitical situation, rising income inequality and the potential tightening of financial conditions. It is therefore crucial to address these structural challenges to ensure more sustainable and inclusive growth. More than ever, cooperative leadership among business, government and civil society is needed to re-establish sustainable growth and raise living standards throughout the world.

Small States Top The List

For the sixth consecutive year, Switzerland leads the top 10, and again this year Singapore ranks as the second-most competitive economy in the world. Overall, the rankings at the top have remained rather stable, although it is worth noting the significant progress made by the United States, which climbs to 3rd place this year, and Japan, rising three ranks to 6th position.

Switzerland tops the performance and is remarkably consistent across the board: the country ranks in the top 10 of eight pillars. Switzerland's top-notch academic institutions, high spending on R&D, and strong cooperation between the academic and business worlds contribute to making it a top innovator. Switzerland boasts the highest number of Patent Cooperation Treaty applications per capita in the world. The sophistication of companies that operate at the highest end of the value chain constitutes another notable strength (2nd). Productivity is further enhanced by an excellent education system and a business sector that offers excellent on-the-job-training opportunities. The labour market balances employee protection with flexibility and the country's business needs (1st). Public institutions are among the most effective and transparent in the world (7th), ensuring a level playing field and enhancing business confidence.

"The labour market balances employee protection with flexibility and the country's business needs."

Competitiveness is also buttressed by excellent infrastructure and connectivity (5th) and highly developed financial markets (11th). Finally, Switzerland's macroeconomic environment is among the most stable in the world (12th) at a time when many European countries continue to struggle in this area. A potential threat to Switzerland's competitive edge might be the increasing difficulties faced by businesses and research institutions in finding the talent they need to preserve their outstanding capacity to innovate. Since 2012, the country has dropped from 14th to 24th on the indicator measuring the availability of engineers and scientists.

Singapore ranks 2nd overall for the fourth consecutive year, owing to an outstanding and stable performance across all the dimensions of the GCI. Again this year, Singapore is the only economy to feature in the top 3 in seven out of the 12 pillars; it also appears in the top 10 of two other pillars.

Singapore tops the goods market efficiency pillar and places 2nd in the labour market efficiency and financial market development pillars. Furthermore, the city-state boasts one of the world's best institutional frameworks and Singapore possesses worldclass infrastructure (2nd), with excellent roads, ports and air transport facilities.

Its economy can also rely on a sound macroeconomic environment and fiscal management (15th) – its budget

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surplus amounted to 6.9 percent of GDP in 2013. Singapore's competitiveness is further enhanced by its strong focus on education and training pillar, where it comes 2nd. Singapore's private sector is also fairly sophisticated (19th) and becoming more innovative (9th), although room for improvement exists in both areas, especially as these are the keys to Singapore's future prosperity.

Regional and Continental Comparison

It is also important to assess Namibia's competitiveness in relation to the region and the continent. Amid the economic turmoil that affected advanced economies in recent years, the sub-Saharan African region provided something of a silver lining in an otherwise broadly felt economic downturn. As growth is now modestly returning in advanced economies, sub-Saharan economies carry on registering impressive growth rates of close to 5 percent in 2013 – with rising projections for the next two years – below only emerging and developing Asia.

"More importantly, more than a decade of consistent high growth has not yet trickled down to all segments of the population."

Most economic activity takes place in the informal sector, accounting for more than half of GDP and employing more than 80 percent of the population; only one in two young Africans participates in wage-earning jobs thus having implications on economic inclusion. Going forward, the main challenge will therefore be to turn high growth into inclusive growth, touching more of the population. This will require focusing on efforts to transition from still largely agriculture-based economies to higher-value-added activities in order to move the workforce out of agriculture into more productive sectors. The urgency of this transition is highlighted by the region's high population growth. By 2020 more than half of the continent's population will be below the age of 25, hence youth empowerment and economic inclusion is key.
Against this backdrop, much remains to be done to lay the foundations for sustainable long-term growth, requiring efforts across many areas. Indeed, more than half of the 20 lowest ranked countries in the GCI are sub-Saharan, and overall, the region continues to underperform in many areas of the basic requirements of competitiveness: the infrastructure deficit remains profound and despite gradual improvements in recent years, health and basic education remains low.

Only a handful of sub-Saharan economies—the island states of Mauritius and Seychelles, in addition to Cape Verde, have noteworthy health and education systems. Higher education and training also need to be further developed to provide the skills required for higher-value-added employment growth. These efforts will need to emphasise closing the infrastructure deficit and providing the region's (young) population with the necessary skills to carry out higher-value-added employment.

Mauritius continues its steady upward trend this year, moving up six positions to 39th place and consolidating its lead in the region. Progress is driven by gradual improvements across seven out of the 12 pillars. Overall, the country benefits from relatively strong judicial independence and an efficient government (26th). Private institutions are rated as highly accountable (14th), with effective auditing and accounting standards and strong investor protection (12th). The country's transport infrastructure is well developed by regional standards (42nd), especially in terms of ports, air transport and roads. In addition, the country this year also recorded improvements in its electricity and telephony infrastructure (44th).

Furthermore, the country's wide-ranging structural reforms that have taken place since 2006 are bearing fruit, as evidenced by its continuous improvements in the areas of market efficiency: financial markets are comparatively deep (26th), its efficient goods market (25th) is characterised by enabling conditions for both domestic and foreign competition, and its labour market efficiency (52nd) has been improving thanks to increased flexibility (18th). As income per capita rises and Mauritius moves up the value chain, more effort will be needed to develop its human capital. Although rising enrolment rates, particularly tertiary enrolment, are laudable (40.32 percent in 2012). Improving competitiveness will require additional efforts not only to improve higher education and training (54th) but also to mobilise the country's talent more efficiently (101st), as evidenced by the low share of women in the labour force (115th).

South Africa continues its downward trend and falls to 56th place this year, third among the BRICS economies.

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South Africa does well on measures of the quality of its institutions (36th), including intellectual property protection (22nd), property rights (20th), the efficiency of its legal framework in challenging and settling disputes (9th and 15th, respectively) and its top-notch accountability of private institutions (2nd). Furthermore, South Africa's financial market development remains impressive although financial inclusion is a challenge. The country also has an efficient market for goods and services (32nd) and it does reasonably well in more complex areas such as business sophistication (31st) and innovation (43rd), benefitting from good scientific research institutions (34th) and strong collaboration between universities and the business sector in innovation (31st). South Africa's transport infrastructure (32nd) is good by regional standards, although its electricity supply does suffer disruptions (99th).

But the country's strong ties to advanced economies, notably the euro area, has made it more vulnerable to the economic slowdown of those economies, thus leading to the deterioration of fiscal indicators and its macroeconomic environment remains at 89th. Low scores for the diversion of public funds (96th), the perceived wastefulness of government spending (89th), and a more general lack of public trust in politicians (90th) remain worrisome, while security and crime (95th) continues to be a major area of concern for doing business. Building a skilled labour force and creating sufficient employment also present considerable challenges. The health of the workforce is ranked 132nd out of 144 economies – as a result of high rates of communicable diseases and poor health indicators more generally. Higher education and training remains insufficient (86th) and labour market efficiency (113th) is affected by extremely rigid hiring and firing practices (143rd), wage inflexibly (139th) and continuing significant tensions in labour-employer relations (144th). Raising education standards and making its labour market more efficient will thus be critical in view of the country's high unemployment rate of over 20 percent, with its youth unemployment rate estimated at over 50 percent.

Botswana remains stable this year at 74th place, the fourth spot in the region. Among the country's strengths are its relatively reliable and transparent institutions (39th), with efficient government spending and low levels of corruption, as well as its sound macroeconomic environment (13th), based on balanced fiscal budgets. However, the country's heavy reliance on diamond mining (which accounts for one-third of GDP and government revenues) renders it vulnerable to fluctuations in demand as seen during the global crisis. Botswana's education system presents another area of concern, particularly for a middle-income country in transition to becoming an efficiency-driven economy.

Education enrolment rates at all levels remain low by international standards, and the quality of the education system receives mediocre marks. Yet it is clear that by far the biggest obstacle facing Botswana in its efforts to improve its competitiveness remains its health situation: the country registers one of the highest rates of HIV and one of the lowest life expectancies in the world. Furthermore, its goods market must become more efficient (97th) and its infrastructure must be upgraded (101st), as evidenced by the recent electricity shortages. Combined efforts across all areas will be needed if the country is to reduce its heavy dependence on the mining sector and to set its economy on a more diversified growth path.

Namibia is improving!

Namibia moves up by two places to 88th position. The country continues to benefit from a relatively well functioning institutional environment (50th), with well-protected property rights, an independent judiciary and a fairly efficient government. The country's transport infrastructure is also good by regional standards (52nd) and financial markets continue to be reasonably developed (46th). In order to improve its competitiveness, as in much of the region, Namibia must improve its health and education systems. The country ranks a low 118th on the health sub-pillar, with high infant mortality and low life expectancy – the result, in large part, of its high rates of communicable diseases, although the data point to an improvement this year.

However, to move up the value chain and diversify its economy, efforts to build its human resource base will be critical: school enrolment rates remain low compared with other sub-Saharan upper-middle-income countries, and the quality of its education system remains poor (119th). In addition, Namibia could do more to harness new technologies to improve its productivity levels (89th). Namibia is Top Twenty by 2030

The above shows Namibia has potential to improve its ranking and is on the right path to be among the Top Twenty by the visionary year 2030. There are however lingering concerns in that economic exclusion, income inequality, and social service delivery in areas of education and health are constraints for Namibia's path to rank higher on competitiveness index.

The economic inclusion, or Geingonomics as an economic

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strategy for Namibia, is increasingly coming to the forefront of ensuring inclusive and broad-based growth for the country. There is also need to increase competitiveness, having high levels of productivity and producing goods and service that the region and the world can buy. The Growth at Home Strategy, as an industrialisation anchor by the Minister of Trade, Calle Schlettwein, is a step in the right direction.

“There is also need for deliberative intervention to effect reduced income inequality and the policy measures on black economic empowerment.”

The new economic empowerment framework is important to be legislated and is gaining ground. Aspects on public procurement for small business preferential treatment, in terms of competitive bidding, are key to addressing high levels of income inequality. Deliberate market intervention though competition regulation to correct market deficiencies and distortions to ensure broad based business and commercial expansion is key through reduced over-concentrations and breaking up market dominance.

In areas of service delivery, fiscal support on health and education is welcoming. The key concern is not about the quantity of spending in these areas, but quality of spending. The sectors require qualitative improvement in service delivery and deliberate expenditure switching from consumption driven components of health and education to productive investments in those sectors.

“Namibia can emulate the likes of Switzerland, Singapore and Mauritius as they are all in effect small state nations with small sized populations.”

Important competitiveness factors such as innovation in areas of standards, research and intellectual property are key. Business sophistication in professionalism of approach on institution building and institutional effectiveness are also important as cornerstone for Geingonomics.

Equally, technological readiness on infusing latest technologies into production and financial processes should be encouraged. The small business development and entrepreneurial spirit instead of wage employment in areas of youth empowerment and businesses readiness should be vigorously pursued.

Overall, there is need for economic reforms and fiscal stimulus to productive sectors in Namibia. The structural reforms of Mauritius are useful lessons and the implementation drive by the incoming Geingob Presidency on economic policies such as on State-Owned Enterprise reforms remain a fundamental game changer to push Namibia from a maintenance economy to an expansionist economy with growth levels from three percent at current levels to doubling to six or seven per cent.

03 Importance of Economics in Competition Law

By Paulus Hangula
Economist: Restrictive Business Practices

Introduction

Competition law is essentially concerned with the anatomy of markets, of which its objective is, inter alia, to ensure that there is healthy competition between suppliers in any market and that this competition benefits the consumers. Applying competition law involves identifying markets and assessing whether or not competition is working well in those markets. Furthermore, it involves economic issues such as assessing how the actions of firms will affect competition and consumers.

Economics in itself involves studying how markets work, and how markets allocate goods and services to different consumers. As economists we are interested in how consumers fare and why firms behave in certain ways, such as: Under what conditions will firms behave in ways that benefit consumers, and when will they behave in ways that harm consumers? Economists attempt to provide answers to these and other questions.

The Growth of Economic Integration into Competition Law

In the early days of competition law, the role of economics in many jurisdictions, including the United States of America (USA) and the European Union (EU), was insufficiently recognised at a time when the politics of market integration were in ascendancy. Today, that position has changed substantially and competition lawyers regularly work together on complex cases with economists who specialise in matters such as market power and the analysis of a particular type of business behaviour. There has been a rapprochement of different schools of thought and there is a strong reliance on the rule of reason (the effects-based approach) analysis in which economic analysis is fundamental, as opposed to the per se rule which has been widely criticised and has been described by leading anti-trust scholars Phillip Areeda and Herbert Hovenkamp as a rule that "condemns conduct without proof of power, effect, or purpose and without hearing claims of legitimate objectives".

It is widely known that the role of economics in competition law has grown significantly over the years. The integration of economics in competition law started in the merger field and later on spread to other competition law instruments. International convergence has also enabled more consensuses on the use of economics in competition analysis. Economics assist in formulating direction and provides a route map to assess a particular competition law case. But arguably it's most important function lies in dealing with the vast array of factual information which today is at the heart of any competition analysis.

Economics is also being recognised as an essential tool to assess market power and to determine the boundaries of the market in which such market power is to be analysed. In competition law cases, be it horizontal or vertical restraints, abuse of dominance or merger applications, the determination of the correct relevant market is the first step in any assessment which includes in it the determination of entry barriers in such market which may, inter alia, be created by behaviour of certain firms with market power.

The importance of economics today is well recognised by competition authorities all over the world.

"One cannot divorce competition law from economics."

Competition law is about economics and economic behaviour, and it is important for anyone involved, be it a lawyer, civil servant or in any other capacity, to have some knowledge of the economic concepts concerned.

In the US, being the hallmark of the "Free Market Economy", the Structure-Conduct-Performance paradigm was the first school of thought which prevailed in the 1930s. According to this paradigm, the structure of the market determines the conduct and that conduct determines performance. At the time, the focus of attention was thus on concentrated industries where barriers of entries were widespread. This school of thought remained popular until the 60s and had led to an extremely interventionist antitrust enforcement policy in the US. The change came in the form of "Chicago School of Thought" which gave birth to the antitrust

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revolution in the US. The "Chicago School of Thought" suggests that antitrust law should focus on the benefit of consumers and overall efficiency. Allocative efficiency, which is the cornerstone of this, is based on the concept of total welfare.

In perfect competition, the consumer and producer both have equal surplus, also called social welfare in economics. This unquestionably would require an application of economics. In the EU on the other hand, achievement of efficiency was also moderately considered important in competition policy, but not until, particularly after appointing an economist, Mario Ponti, as Commissioner responsible for competition in 1999, the promotion of efficiency was declared to be of great value. But nevertheless, the main goal of European competition law is to protect consumers and the focus is on consumers as the direct beneficiaries of the application of competition law. One can thus clearly see that, with some level of distinction in terms of competition policy objectives, in both these jurisdictions, there is equal reliance on economic analysis.

Market Definition

Defining the market is an essential and initial element in competition law case analyses. It helps define the boundaries of competition between firms and the relationship between firms and consumers. History has shown that defining the market improperly could result in court case losses for competition authorities. One such example occurred in the 70s when a legal test for market definition was led out in Continental Can Co. Inc (1973). In this case, the applicant sought an annulment of the decision of the European Commission (EC) of 09 December 1971, relating to a procedure in the application of Article 86 of the Treaty. After consideration, the European Court of Justice (ECJ) indicated that "goods and services that are interchangeable can be regarded as being in the same product market". The ECJ held that the decision of the EC has not, as a matter of law, sufficiently shown the facts and the (economic) assessments on which it is based. Thus, the decision was annulled.

Another landmark case is United Brands v. Commission (1978), where the applicant sought annulment of the EC's decision after it declared (on 17 December 1975) that United Brands Company (UBC) has infringed Article 86 of the Treaty. In this instance, the applicant challenged the Commission's argument that there is a banana market which includes bananas sold under a brand name as well as those to which no label is affixed. The applicant maintained that the banana market is part of the fresh fruit market since bananas are reasonably interchangeable by consumers with other kinds of fruits, e.g. apples, oranges, grapes, peaches, etc. the EC maintained that the banana market is a separate market, however, it never contested that banana and other fruits are never or almost never interchangeable.

"Goods and services that are interchangeable can be regarded as being in the same product market."

The substitutability of products is almost never total, but practically always a matter of degree. Subsequently, UBC successfully convinced the Commission that banana was included in the common market of fruits. However, the ECJ, relying upon economic analysis to determine the degree of substitution and interchangeability, held that because of the special characteristics of bananas (the high dependency on bananas by people without teeth either too old or small children), banana cannot be included in the common market of fruits. The fallacy in the EC's decision in this case is popularly known within the competition law fraternity as the toothless fallacy.

Both these mammoth cases illustrate the importance of economic analysis in determining of the correct relevant market and have resulted in the emergence of economic concepts of "Demand Side Substitutability", "Supply Side Substitutability" and the "Small but Significant Non-Transitory Increase in Price" (SSNIP) test to determine both the demand and supply side substitutability. The SSNIP test, also known as the Hypothetical Monopolist Test, was first deployed in the US for merger cases but nevertheless, it does have its own limitations in the form of what came to be popularly known as cellophane fallacy which was noticed for the first time in the United States v. El du Pont de Nemour and Co case. Cellophane fallacy is the failure to recognise that a monopolist always prices where demand is elastic, finding competitive substitutes that restrict a further price rise, and thereby broadening the market. However, this fallacy will only be experienced

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if the market is not properly defined. In other words, the SSNIP test is useful as long as the competitive price of the product is correctly determined.

Establishing Dominance

The definition of dominance is highlighted in the United Brands case by the ECJ as the "*position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately the consumers*". The notion of dominance has been widely addressed in economics literature and is analysed as the theories dealing with market leadership in oligopolistic market structures.

"For a firm to be dominant, it must have significant market power."

In general, there are three major proxies for evaluating market power: (1) the Lerner Index, (2) the Herfindahl-Hirschman Index (HHI) of Market Concentration and, the market share of the n largest firms l_n e.g., l_6; all of which are economic tools. Furthermore, in probing whether an allegedly dominant firm is indeed dominant, an economic analysis is required, to assess particularly its market position and that of its competitors, as well as barriers to entry. Measuring the ability of a firm to exert power and impose exclusionary/exploitative conduct on other market participants clearly requires an economic approach.

Per Se Rule vs. Rule of Reason

There is a growing realisation to move away from the per se rule also known as the formalistic approach of inferring the anticompetitive character of the conduct simply by the fact that it matches one of the contraventions of competition law. Controversy has surrounded this approach in the past, particularly in the 2003 case rulings involving Michelin (Michelin II) and British Airways (British Airways) where the Court of First Instance (CFI) applied the per se rule. The CFI declared the discounts schemes of the two dominant firms as having exclusionary effects and infringing Article 82 of the European Commission (EC) Treaty. These rulings drew criticism from several commentators at the time, who argued that an effects-based approach centred on economics analysis would have been a more appropriate assessment.

However, it should be emphasised that the formalistic approach is still very useful in competition law cases concerning bid rigging, price fixing and market sharing. On the other hand, the effects-based approach which is an economics-based approach, proposes an inverted route towards analyses that are strongly supported by economic tools.

The approach set out implies that competition authorities will need to identify competitive harm, and assess the extent to which such a negative effect on consumers is potentially outweighed by efficiency gains. The identification of competitive harm requires spelling out consistent business behaviour based on sound economics and supported by empirical evidence.

An economics-based approach will naturally lend itself to a rule of reason approach to competition law, since careful consideration of the specifics of each case is required, and this will likely be difficult under the per se rule. Thus, an economics-based approach ensures that competition authorities do not thwart pro-competitive strategies of competing firms. It will also ensure analysis of competition law cases with a focus on their real effect to consumer welfare and total efficiency gain while providing objective and correct analysis.

Conclusion

Economics is one of the most important assessments of cases in competition law and there is a wide array of economic tools that can be used. Correctly applied within the definition of the relevant market and in other areas of competition law, economic analysis can have an outstanding success rate in court. This article was intended at exploring the importance of economics in competition law in general and not to deliberate on its practical application. However, it is important to highlight how economics is applied to competition law.

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04 SME Protection and Merger Regulation

By Jowetha Andima
M&A Senior Economist

By Melissa Hanmer
M&A Senior Economist

Introduction

Governments worldwide increasingly recognise the growing role of Small and Medium Enterprises (SMEs) and entrepreneurship as drivers of growth and job creation, and as effective tools for poverty alleviation. SMEs all over the world play an important role in economic development and face unique challenges which hamper their development and prevent them from realising their full potential.

According to the OECD , SMEs worldwide account for over 90% of the business population and generate 60-70% of total employment while micro-enterprises (enterprises having less than 10 employees) represent more than 90% of all business in many OECD countries.

In Namibia, the SME sector has significant potential in employment creation due to its labour-intensive nature as well as to contribute to economic growth. According to a paper by Christoph Stork entitled 'The State of SME development in Namibia', SME contribution to the Gross Domestic Product (GDP) in Namibia in 2003 was about 12% and the employment share in 2004 was about 20%. SMEs also feature prominently in Namibian Development Plans (NDP) as well as Government's long-term development document, Vision 2030.

However, in the era of globalisation and technological changes, SMEs face several obstacles to maintain and expand their business operations. These include: intensified global competition, low productivity, lack of market access, lack of financing and lack of management skills. Most SMEs are reliant on the domestic market due to high export barriers and require support or assistance from their government, especially to be competitive in the global business environment.

Governments globally have formulated policies and established institutions to support the growth of SMEs. In Namibia, this included the introduction of a national competition law, the Competition Act No. 2 of 2003 ("The Competition Act"). The Competition Act forms part of Government's policy to provide a level playing field for big and small firms to compete in the market.

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Merger Regulation

The purpose of the Competition Act, as set out in its preamble, is to safeguard and promote competition in the Namibian market. However, this is not its only objective. It is also aimed at, inter alia, ensuring that small undertakings have an equitable opportunity to participate in the Namibian economy.

The Act tasks the Commission with regulating mergers and acquisitions that have an effect in Namibia. Parties to a proposed merger that meet the merger thresholds must file a notification with the Commission and may not implement the transaction before it is approved by the Commission. The Commission may approve, conditionally approve or prohibit the merger.

When assessing a merger, the Commission may take into account public interest factors, including 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.

"When assessing a merger, the Commission may take into account public interest factors."

Cases where the Commission considered the effect of the mergers on small undertakings:

1. Wal-Mart Incorporated // Massmart Holdings Limited

During November 2010, the Commission received a merger notification for the proposed acquisition of more than 50% of the shares in Massmart Holdings Limited by Wal-Mart Incorporated. In 2011, Massmart was the third largest distributor of consumer goods in Africa, and the largest retailer of general merchandise, liquor and home improvement equipment, and wholesaler of basic foods. Although the merger did not raise any competition concerns, it raised several public interest concerns. One concern was that the strengthening of the merged undertaking through its access to the global purchasing power of Wal-Mart would result in the accelerated decline of small retailers and/or wholesalers in Namibia. The Commission approved the merger subject to conditions. One of the conditions being that the merger should not create harmful effects on competition that may give rise to the risk of markets becoming foreclosed to competitors, especially small and medium enterprises.

The merging parties made application to the High Court to have the decision of the Commission reviewed. The Commission opposed the application on the basis that the merging parties had to make application to the Minister of Trade & Industry in terms of section 49 of the Act to review the Commission's decision before making application to the High Court. The merging parties' review was successful (i.e. the High Court found that the merging parties did not have to make application to the Minister and that the conditions imposed were invalid). The Commission appealed to the Supreme Court. The Commission's appeal was upheld on the basis that the merging parties should have awaited the outcome of the review application to the Minister of Trade and Industry before approaching the High Court.

The Minister of Trade and Industry reviewed the matter. The Minister amended the conditions imposed by the Commission. Regarding the condition aimed at protecting small undertakings, the Minister directed that Wal-Mart establish a domestic supply development programme. The condition was aimed at promoting the products of SMEs in Namibia, specifically in the sectors of manufacturing, processing and packaging.

2. Agra Limited // A. Rosenthal (Pty) Ltd and Kalahari Arms & Ammunition (Pty) Ltd t/a Safari Guns & Outfitters

During March 2013, the Commission received merger notifications for the proposed acquisition of A. Rosenthal (Pty) Ltd ("Rosenthal") and Kalahari Arms & Ammunition (Pty) Ltd t/a Safari Guns & Outfitters ("Kalahari") by Agra Limited ("Agra").

Agra is the largest livestock organisation and multi-purpose agricultural company in Namibia with branches throughout the country providing farming inputs and equipment as well as other goods and services. Through one of its divisions, Safari Den, it imports, wholesales and retails firearms, ammunition and related products. Rosenthal and Kalahari are primarily involved in the importing, wholesaling and retailing of firearms, ammunition and related products.

As there are no manufacturers of firearms and ammunition in Namibia, all these products are imported from abroad and sold to the end consumer through Namibian wholesalers and retailers. There are only 5 dealers importing significant amounts of these products from abroad. Other players in

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these markets are smaller dealers situated in towns across the country, most of which do not have the capacity to import their products from abroad and primarily buy their stock from the Namibian importers.

One of the concerns was that post merger the merging parties would raise their wholesale prices and/or supply their products to Agra's retail branches situated across the country at lower prices than they charge the smaller dealers resulting in the smaller dealers being unable to compete and eventually exiting the market.

In order to address this concern, the Commission approved the proposed transactions subject to conditions, including that Agra does not acquire any other dealer or open any additional dealerships in Namibia for a period of 5 years, that Agra continues to supply the smaller dealerships with products through Safari Den, Rosenthal and Kalahari on a wholesale basis and at the same wholesale prices as it sells to Agra's retail branches and that Safari Den does not supply Agra's retail branches with products sourced from Rosenthal or Kalahari.

3. Guinea Fowl Investments Seventeen (Pty) Ltd // Colas South Africa (Pty) Ltd & the Roads Contractor Company Ltd

During July 2013, the Commission received a notification on the proposed acquisition of shares in a new entity, Guinea Fowl Investments Seventeen (Pty) Ltd ("Guinea Fowl Investments") by Colas South Africa Pty Ltd ("Colas South Africa") and the Roads Contractor Company Ltd ("RCC"). The transaction entailed Colas South Africa and the RCC acquiring equal shareholding in Guinea Fowl Investments, which would be renamed Oryx Surfacing (Pty) Ltd ("Oryx Surfacing") and thereafter transferring their road surfacing businesses and leasing and/or transferring their road surfacing assets to Oryx Surfacing.

Colas South Africa is a South African company wholly owned by a French company called Colas S.A. which owns over a hundred other subsidiaries worldwide. The Colas Group operates in the field of road construction and maintenance of roads and it is a specialist manufacturer, supplier and applicator of bituminous binders and slurries for road surfacing. Colas South Africa is involved in road surfacing and road maintenance and supplies bituminous binders and slurry for the purpose of road surfacing in Namibia, through its Namibian subsidiary, Colas Namibia.
The RCC is a Namibian State-Owned Enterprise wholly owned by the Government of the Republic of Namibia. It conducts the business of road construction, road maintenance, railway construction, plant hire and civil engineering throughout Namibia.

The RCC is awarded work/tenders by the Roads Authority on a negotiated basis in terms of a Memorandum of Agreement entered into between the parties and not on competitive bidding. In terms of the shareholders agreement between the merging parties, they agree not to conduct any of the activities by themselves or through an affiliate other than Oryx Surfacing.

Apart from the fact that the Commission found that the merger was likely to prevent and lessen competition and result in Colas strengthening its dominant position, the Commission also found that the merger was likely to result in SMEs, which comprise of small subcontractors largely owned by local persons, being restricted from gaining access to or continuing to operate in the relevant markets as subcontractors to the RCC. As a result the Commission resolved to prohibit the merger.

Conclusion

The abovementioned cases are illustrations of the Commission meeting one of the objectives of the Competition Act; that being to ensure that small undertakings have an equitable opportunity to participate in the Namibian economy. Even in the absence of major competition concerns arising from the implementation of a proposed merger, the Commission may, in terms of section 47(2) of the Act, base its decision on public interest factors such as the extent to which the proposed merger would likely 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 or any other public interest factors.

05 Unfair Selling Price vis-à-vis Unfair Trading Conditions under the Competition Act

By Bernhard Tjatjara
Law Officer: Restrictive Business Practices

The Competition Act No.2 of 2003 has hatched new grounds for competition enforcement in Namibia. The Act has, and will continually, due to its eclectic nature, pose many challenges. One such potential is the fog that can be created with regard to the meaning of unfair selling price or unfair trading conditions. It is a firmly established principle of Namibian competition law that a dominant undertaking may not impose a unfair selling price or unfair trading condition. If this is the case, the conduct amounts to abuse of its dominant position in the market, which is prohibited by the Act.

A precise definition as to what a unfair selling price or unfair trading condition entails is less sure. The uncertainty arises from what can be regarded as lack of definition of the terminology in the Act. It is compounded by the fact that to date, the courts in Namibia have not enunciated and pronounced themselves on the issues.

This article attempts to shed light on the meaning of the concepts unfair selling price and unfair trading conditions. These concepts are underpinned in Section 26(2)(a) of the Act, which prohibits abuse of dominance by "directly or indirectly imposing a unfair purchase or selling price or other unfair trading conditions".

The meaning of a unfair selling price is difficult and controversial in competition law. In EC treaty jurisprudence, "unfair prices" is difficult to define. It has been said the subsection will come into play if a dominant firm charges unfairly high prices to its customers, or alternatively, it pays low prices to its suppliers.

It has been acknowledged that there is no accepted universal scientific formula in analysing whether prices are predatory or excessive. In Media24 Ltd and Another v Competition Commission of South Africa and Others Case No 18/X/APR10, at p. 5, the South African Competition Tribunal reaffirmed that no binding rule exists in competition economics for analysing such cases, since most instances involve intricate issues of both economic and accounting judgment. It was further stated that therefore, comparisons are often made of the sale of the same or similar product in other geographic markets.

In the case of Nationwide Airlines and Others v South

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African Airways (Pty) Ltd and Others Case No: 92/IR/Oct00, at p, 11, the South African Competition Tribunal enunciated a two-fold test as a correct approach to predatory pricing in the following manner:

> "First is, that the complainant must establish that the respondent is pricing below cost for a sustainable period. Secondly, there must be some additional evidence of predation. We do not wish to be prescriptive as to what this should be, but evidence of recoupment would meet this second test".

In order to consider what an unfair trading condition is, we look at how the South African Competition Tribunal has defined its meaning. In Patensie Sitrus Behernd Bpk v Competition Commission and Others Case 37/CR/Jun01, the Tribunal had to decide whether the practice that required citrus farmers to only deliver their crop to Patensie for packaging through the Articles of Association was a trading condition which could be scrutinised under section 4(1)(b) of the Competition Act. In dismissing that the practice did not fall under the trading condition contemplated in Section 4(1)(b) of the Act, the Competition Tribunal cautioned that one cannot read "any other trading condition" as a catch-all, which comprises a host of undefined range of practices.

The Tribunal adopted a contextual (or purposive) approach by reading together the words price fixing and "fixing of any other trading condition":

> "In our view the range of trading conditions hit by this subsection is limited by the contextual gobbling together of price fixing and the fixing of 'any other trading condition', which in our view, points to aspects of a particular trade/transaction that are intimately related to the price, i.e. quantity and quality."

The Tribunal continued that: "for a trading condition to be hit by this Section of the Act it should be part of the price-quantity-quality nexus of the concerned transactions/ trade. This naturally includes an agreement that seeks to limit output but it would also likely include the fixing of a discount structure or repayment condition."

In dismissing that the conduct did not fall under Section 4(1)(b) of the Act, the Tribunal reasoned that the sort of practice alleged was not vulnerable to attack under that Section and that, even if assumption was made of an existence of a horizontal agreement, such would not fall under Section 4(1)(b) of the Act.
In National Association of Pharmaceutical Wholesalers and Others/Glaxo Welcome (Pty) Ltd and Others, Case 68/ IR/Jul01, the Competition Tribunal confirmed the view put forward in Patensie decision by noting that:
"We have previously determined that the "trading condition" referred to in this section must relate to the price-quantity nexus and would certainly not cover delivery schedules".

In common parlance, a unfair trading condition entails a conduct that is hinged on price, quality and quantity. Thus, it cannot be considered in vacuum as any condition broadly stated. It will therefore not suffice that a complaint be filed on the basis of the subjective view of the person filing a complaint that it is an unfair trading condition. It has to relate to the triad that comprise of the price, quantity or quality.

To sum up, the relationship between unfair trading condition and unfair selling price is that they all have to relate to price, quantity and quality. Unfair selling price has been equated to predatory pricing, in which a firm prices its goods below costs.

06 Rising Inequality versus Competition Regulation

By Mihe Gaomab II
Chief Executive Officer: NaCC

Whilst reminiscing about developmental efforts at a recent Board meeting of the African Development Bank, I had some time to catch up on my reading and purchased the latest economic thriller, "*Capital in the Twenty First Century*" by Thomas Piketty.

I pondered on my economic passion of how competition regulation in a small economy such as Namibia can assist in reducing income inequality and poverty reduction. His book talks rightfully about rising inequality in the world and emphasises the widening disparity between the small sized population of "haves" and the bigger sized population of "have nots" of income and wealth.

Piketty also writes about how the world has grown in terms of GDP, but such growth has benefitted the small minority of the world population at the top for the past forty years. He alludes that such growth stimulated competition for goods and services such as real estate and luxury items that the rich can afford and marginalised the majority from any opportunity to share in buying such goods and services. Such increase in wealth has however not translated to productive capital to assist in creating a multiplier effect of trickling down incomes to those who don't have it, thereby to increase the measured wealth of the nations thus aiding in reduced income inequality.

"It is no secret that the Namibian economy has also one of the most unequal incomes in the world measured by what economists call the Gini Co-efficient."

Piketty actually raises one fundamental point and it is that the wealth-output ratio has increased overtime for the global economy. This means that the minority of the population in the world has actually been getting wealthier and has not translated such wealth for productive investments, but

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rather for the consumption of goods. Such is the current stark reality of capitalism that it has lost a human face of growing the wealth only to consume material goods and not for the benefit of its population, hence keeping the income inequality not only higher, but also pervasive in the world.

As a competition economist, I therefore ask: How did economies grow at the expense of people relying on what Piketty calls positional goods? Well, wealth must have been contained only in those sectors and goods where the wealthy competed amongst themselves to grow such luxury goods. This can only be evident where in today's dollar currency a watch can be sold for a million Namibia Dollars or a luxury golf shirt can fetch over twenty Namibia Dollars.

This untenable situation has the habit of concentrating wealth and by extension, competition only in those sectors and goods whereby money exchanges hands amongst the rich and elite. Hereby, it keeps monopoly power going and businesses only for the wealthy thriving, at the detriment of the poor, of which the majority ought also to partake as consumers.

This leads to, as Piketty calls it, the diminution or the devaluation of human capital, which ought to be the majority of people who yearn to partaking in the economies. That is why I understand the call for additional policy measures such as Black Economic Empowerment in Namibia, Affirmative Action Employment in the USA and welfare state schemes in Europe to try and bring more people into the mainstream of economies.
Piketty's analysis of income inequality tells us one crucial thing, namely that the market economy as we know it, and business competition as we attach value to it, does not work. Therefore, there is a shift in orientation needed. Not just to leave the market to its "invisible hand", but to also have the "visible hand" of competition regulation to effect behaviours and structure of world markets.

We, as competition regulators, come in where there is a need to affect the market economy for ensured reduced income inequality and for getting more people on board economically. It is an undeniable fact that competition authorities can have a role to play in structuring the economy, thereby structuring the incomes and wealth of its people. In our part of the world, Namibia and South Africa, you do not need to be a rocket scientist to understand this.

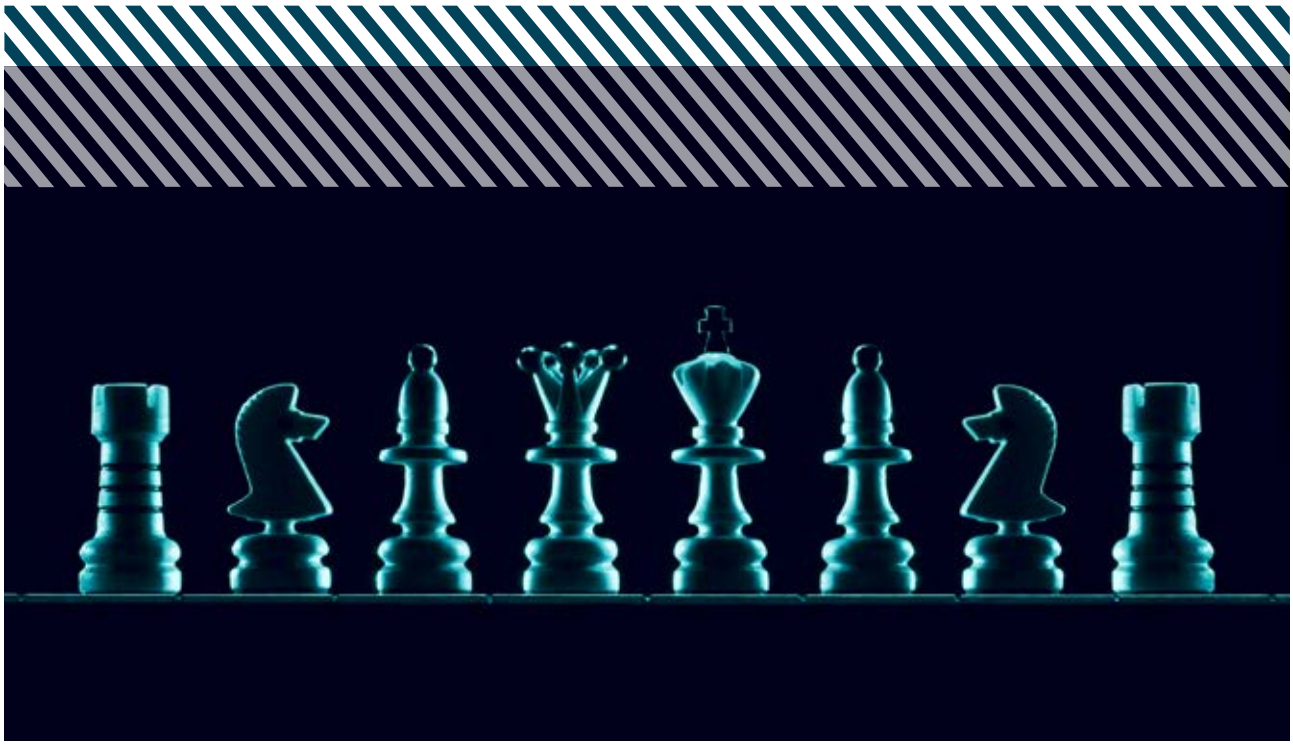
"We can play our role as competition regulators not only to sustain the right behaviour of firms and businesses, but to also structure their market conduct and to correct distortions through competition rules."

Thus, Piketty forecasts that widened income inequality provides cold comfort for competition authorities. Their role is not just to enforce fair competition through the implementation of competition acts, but to also embrace the unequivocal need to be developmentally conscious to enforce competition law for a broader common good. Through this, we can correct market imperfections that entrenches not only high levels of income inequality, but also high levels of poverty.

As competition authorities, we need to be mindful of developmental outcomes that would not only reduce inequality, but will increase economic opportunities for consumers, producers and the broader population.

The main preoccupation that Piketty is advising policy makers and regulators on is that political democracies may not rule the future for economies to thrive. It would be the economic democratisation of people, especially the consumers, that means we can contribute to capitalism with a smiling human face. We owe it to our economies and certainly to our citizens as a whole.

07 What is Market Power and Why Does It Matter?



By Bernhard Tjatjara
Law Officer: Restrictive Business Practices

The Competition Act 2 of 2003 heralds a major shift in Namibian competition law. From an old testament regime regulated by the gothic repealed South African Competition Act titled 'Regulation of Monopolistic Conditions Act 24 of 1955', the Namibian Competition Act brings with it ornate concepts such as market power.

Market power is used extensively by the Namibian Competition Commission in its application of competition law, especially in abuse of dominance cases. The purpose of this article is to investigate the definition of market power and why it matters in Namibian competition law. We look at the perception of market power through a legal eye, rather than the economic definition thereof.

The phrase 'market power' only appears thrice in the Act in Rule 36 of the Rules made under the Act. Nevertheless, the concept of market power is far-reaching. Starting with the conceptual framework, market power is defined in Rule 36(2) as "the power of an undertaking or undertakings to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

From the above definition, three elements can be derived namely the power to control prices, the power to exclude competition and the power to behave independently of competitors, customers or suppliers.

The definition adopted in Rule 36(2) of the Rules under the Act was regurgitated from the locus classicus (classic case) judgment of Hoffmann-La Roche v The Commission Case No 85/76, (1976) ECR (at paragraph 41). The Hoffman-La Roche case was the first major case to define dominance in the pretext of competition law in the European Union law. The case came before the European Court of Justice in 1976. The Court expressed itself as follows in defining dominance: "it is the power to behave to an appreciable extent independently of competitors, customers and consumers."

The definition of market power is akin to the definition of dominance enunciated by the European Court of Justice. There can be no doubt that the decision in the Hoffmann-La Roche case has broken new ground which has set the precedent in most countries in relation to competition law. The question that arises is whether it is instructive for the Commission to follow the explanations adopted in EU competition law on market power or dominance.

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Market power under the Rules made under Namibian competition law is symmetry to the dominance definition in the Hoffmann La Roche case. Against this background, it can readily be appreciated that the European Court of Justice cases are instructive to the Commission. Since Rule 36(2) of the Rules made under the Act is not elaborate on market power, it suffices to discern the explanation from Hoffmann-La Roche v The Commission (supra).

The European Court of Justice in Hoffmann La Roche v The Commission, in paragraph 41 articulate that when it is said that the firm has the power to behave to an appreciable extent, it means "that a dominant firm is not 'absolutely' free from other market participants. But is freer from them than they are from it. Appreciable power means that the freedom is significant, not absolute. When competitors challenge the dominant firm it is able to contain them, they are not able to deploy the same tactics as it".

The court also underscored that when it is said that a dominant firm behaves independently of its competitors or consumers, it means "it has certain commercial advantages that competitors lack. The dominant firm is independent of customers; it can bind them by rebates when it is their unavoidable trading partner" (paragraph 41).

In Hoffmann-La Roche v The Commission (supra), the court used the words "economic strength" with reference to the power to prevent effective competition by harming the competition process, thus having an influence under which competition develops (paragraph 139).

In the United Brands and United Brands Continental BV v The Commission of the European Communities (1978) EUECJ C-27/76; (1978) 1 CMLR 429, (paragraph 38), the European Court of Justice did not formulate a new definition of dominance, but merely reaffirmed and adopted the definition of dominance in Hoffmann- La Roche v The Commission (supra). In that case, the court was concerned with commercial power. In the court's view, United Brands' vertical integration was evidence of dominance because it had certain advantages which none of its competitors enjoyed. It owned several plantations, a fleet of ships to transport the bananas so it was always able to make shipments to Europe, which guaranteed its "commercial stability and well-being".

Market power matters because it is used as an indicator of economic strength and is used in the presumptions of dominance test created under Rule 36(1) of the Act. It is a jurisdictional factor for the Commission in order to investigate allegations of abuse of dominance under the Restrictive Business Practices proscribed in Chapter 3 of the Act. It is trite law that an undertaking must hold a dominant position for the "abuse of dominance prohibition" in Section 26(1) of the Act to apply. In parallel, to hold a dominant position is not in itself an infringement of the Act. It is the abuse thereof.

Looking at the presumption of dominance laid down under the Rules made under the Act, in Rule 36(1), three situations can be distinguished which are equated to market power. The first is if it has at least 45% of that market. Secondly is if it has or they have at least 35%, but less than 45% of that market but have market power. Lastly, if it has or they have less than 35% of that market, but have market power.

The presumption created in Rule 36(1)(b) of the Rules made under the Act is that, if an undertaking or a firm in the market is having a market share between 35% to 45% of that market, it can be presumed to be dominant. It means that for the purposes of competition law, a firm can be presumed to be dominant even if it does not have more than 50% share of the market.

The presumption places reverse onus on the undertaking or a firm which has at least 35% and not more than 45% to rebut the presumption. The presumption can be rebutted by the undertaking or a firm if it can show it does not have market power, regarding where the share of the market is 35% or less. In common parlance, it means that if the firm can show that it does not have the ability to act independently of its competitors (in other words, it is not more free from its competitors than they are from it), thus in terms of controlling prices, harming the competition processes by containing competition. The firm also needs to show that it cannot act independently of its customers (i.e. binding them by rebates) or of its suppliers.

The second presumption created in Rule 36(1)(c) is that a firm having less than 35% of market share can still be presumed to be dominant. By implication this means if a firm has 34% or even less of market shares in the relevant market, the Commission can presume it to be dominant. Again the firm (or an undertaking) can rebut the presumption by showing to the Commission that it does not have the market power. In this regard, it needs to show that it does not have the power to exclude competition or control prices, or to behave independently of its competitors and suppliers in that concerned relevant market.

08 Commercial Poultry Meat Industry Cross-country Research Concluded

By NaCC Economics
& Sector Research Division

The competition authorities of Botswana, Namibia, South Africa and Zambia undertook cross-country research studies into the commercial poultry meat industry through the research programme on Competition Dynamics and Regional Trade Flows conducted under the African Competition Forum ("ACF"). The study was conducted by representatives of the four countries, comprising Ernest Bagopi, Emmanuel Chokwe, Pamela Halse, Josef Hausiku, Wesley Kalapula, Michael Humavindu and Simon Roberts.

Background

Studies have revealed that there is a link between competition and development. Growth and development through regional integration initiatives depend on the decisions of companies to increase productive capacity and make long-term investment decisions across the region. However, if a few large companies dominate an industry and are able to extract supra-competitive profits, then this will be at the expense of growth. Where consumers are downstream industries, any anti-competitive conduct raises costs and undermines the competitiveness of downstream firms.

The existence of supra-competitive profits (or rents) from, for example, collusive conduct, further imply that the incumbent firms will lobby political interests to create barriers to entrants including through regulations.
The importance of disciplining the power of large firms, ensuring more inclusive growth, and tackling limitations on access to economic activity, have been highlighted in recent contributions on growth and development. Regional integration provides scope for greater competitive rivalry in a larger market, but this will not be realised if it means smaller economies simply become subsumed by the largest regional economy.

Summary of findings and recommendations

The studies have found that the poultry industry is a very important one, it involves substantial value-add to agricultural production and employment creation across the four countries and requires significant capital investment in the key facilities, and access to essential intellectual property in terms of the leading breeds, coupled with the necessary production facilities at each level of the value chain through to processing and packaging.

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Critical to the industry in any country is access to the breeds, and competitive feed, as the two key inputs to broiler production. Industry requirements, namely the licences for the breeds and the production facilities required for production and processing mean that there are relatively few producers.

The industry is thus oligopolistic in nature (except for Namibia which exhibits a monopoly structure), and the same firms operate across the countries in the study. This suggests that competition needs to be understood at a regional, as well as national level.

Competitive outcomes are very important to ensure consumers have competitively priced poultry products as the main source of protein, and in having growing local production (given competition from imports from outside the region).

All four countries in the study have adopted policies to protect and support their poultry industries. While the policies may be required to incentivise the investment in large scale and competitive facilities, this implies the protection and support should be temporary in nature. There is a danger if there is a lack of competition within a country that the benefits of these measures are captured by the large firms and their shareholders.

However if these policies attract the desired investment, this will lead to increased productivity with time. A wider question relates to how each country within the region can stimulate investment more broadly and strengthen the ability for neighbouring countries to trade in products where they have the cost advantage.

Following is a summary of government policies in each of the four countries.

TRADE POLICY AND TRADE RESTRICTION

Botswana

- No importation of broiler day old chicks
- Quantitative restriction on import of fertilised eggs (to be completely banned in 2014)
- Regulated or controlled imports of chicken meat
- Ban on the importation of live birds
- Individuals are only allowed to bring in up to 5 kg of chicken meat
- Restriction on the importation of poultry feed, only 30 per cent of feed should be imported after sourcing 70 per cent locally

Namibia

- Quantitative restrictions on imports of chicken meat
- Only 600 tonnes of chicken is allowed to be imported per month
- 1 900 tonnes is thus to be sourced from local industry per month
- Import permits system in place
- The Competition Authority will develop a price monitoring mechanism
- Final IIP process and implementation design for the industry still to be finalised

South Africa

- The import tariff on whole birds has increased from the previous 27% to 82% (the maximum bound rate under the WTO rules)
- The import tariff on carcasses has increased from 27% to 31%
- The import tariff on boneless cuts increased from 5% to 12%
- The import tariff on offal increased from 27% to 30%
- The import tariff on bone-in portions increased from a specific duty of 220c/kg (roughly 17%) to an ad valorem duty of 37%
- Poultry meat being imported from the EU can enter duty free
- The import tariff on bone-in portions increased from a specific duty of 220c/kg (roughly 17%) to an ad valorem duty of 37%
- Poultry meat being imported from the EU can enter duty free

Zambia

- Restriction on the importation of day old chicks, live birds and feed
- Importation of poultry products is controlled
- There is adequate stock for local production
- Agricultural policies impact on prices of grains which are inputs to feed, such as a maize floor price

Despite other concerns, critics of brining argue that it is a cheap way of adding weight to a product that is sold by weight. In Namibia, the Bio-Safety Bill has not yet been enacted so there are various levels of brine in poultry products up until recently; Namibia relied largely on imported poultry from South Africa that is brined at levels of about 30%.

It is rather recommended that brining should be kept at

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minimum levels. Excessive brining can again pose a serious health risk to consumers due to the high salt content of it.

Namibia's feed costs are higher, accounting to about 60-70 percent, given that the inputs to feed production are imported. Poultry feed costs are largely driven by the cost of the two main inputs being soya and maize, both imported from South Africa.

The following cost build up table for each of the four countries was constructed to reflect the costs associated with the various levels of the value chain. Ideally, this will illustrate at a very basic level the differences in costs across the countries and potential areas of competitive advantages. The figures were obtained by aggregating the various producers' and industry body figures and then converting them to dollars.

Cost build-up: US$, 2012:

	ZAMBIA	SOUTH AFRICA	BOTSWANA	NAMIBIA
Feed cost, kg	0.58	0.54	0.57	0.57
Conversion ratio	1.67	1.67	1.80	1.67
Size of bird	1.80	1.80	1.80	1.80
Feed cost per broiler	1.74	1.61	1.85	2.00
DoC	0.85	0.37	0.6	0.50
Other costs in broiler prod	0.25	0.24	0.53	0.3
*Live chicken (1.8 kg) cost	2.84	2.22	2.98	2.80
*Live chicken (1.8 kg) price	3.90	2.64	3.39	2.84
Live chicken cost per kg	1.58	1.23	1.66	1.53
Abattoir cost / processing per kg	0.30	0.29	0.34	0.36
Processed chicken, per kg, cost	1.88	1.52	2	1.89
Processed chicken, per kg, producer price	3.01	1.64	3.15	2.23
Brining levels	0%	30%	Less than 5%	30%
Producer price, per kg adjusted for brining	3.01	2.13	3.15	2.89
Fresh poultry producer price (portions)		2.88		
Processed chicken, per kg, retail price (frozen portions)	3.20	2.93		3.66

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The competition concern is associated with the nature of the poultry industry as described as oligopolistic, with the large firms operating in a variety of countries in the regions, which by nature are characterised by limited competition. In addition, the industry is also fairly transparent providing an ideal environment for tacit collusion.

In Namibia, the poultry industry is still at its early stages of development, thus there has not been any case dealt with by the Namibian Competition Commission, nor has it undertaken a study to uncover any anti-competitive arrangements. However, there have already, in the short life of NPI, been various consumer complaints about the quality and the price of its products.

"Further research will be necessary to uncover if there are any anti-competitive arrangements in dealing with the market players along the value chain."

The research question would need to focus on whether the IIP protects a monopolist at the consumers' expense. This dovetails with the evolving idea of empowering the Competition Authority to monitor both the production and retail prices of the protected industries to guard against any abuse of protection which could adversely affect both consumer welfare and the overall country's competitiveness. Namibia does not have a Poultry Association; it however has an association for importers which lobbies government against infant industry protection. The monopoly player sits on the committee that determines import restrictions. This raises competition concerns as the company has vested interest in limiting imports.

Recommendations

The assessment here suggests a number of implications for steps to improve regional integration and links to competition, including:

i. National Governments through SADC and COMESA should work towards standardising and harmonising poultry sector standards such as Sanitary and Phytosanitary (SPS) and brining, and promote trade in the region subject to full compliance to the set standards;

ii. National Governments should develop robust monitoring and testing systems at border entry points to effectively enforce compliance to the set standards;

iii. National Governments should consider relaxing in stages the protectionist policies that are currently being implemented. Some of the benefits that could be realised from relaxing protectionist policies include cheaper feed costs as well as greater price competition for end products which would benefit end consumers. However, there is need to assist local producers to become more efficient in order to allow them to compete more effectively with increased imports;

iv. Given the nature of the industry in terms of access to international franchises, entry is very difficult and therefore regional competition authorities should devise a mechanism to coordinate their oversight in this market in order to address any competition concerns arising from concentrations of economic power in this sector; and

v. National competition authorities should continue monitoring developments in this sector and cooperate in their effort to address various competition concerns.

09 Commission Grants Conditional Exemption To Tullow Kudu Limited, NAMCOR, Cieco E&P (Namibia) Co, Ltd

Bridget Dundee
Technical Advisor to the CEO, NaCC

The Consumer News Magazine conducted an interview with the Namibian Competition Commission to get more insight into the Commission's decision to grant a conditional exemption to Tullow Kudu Limited, NAMCOR and CIECO E&P (NAMIBIA) CO, LIMITED. The Technical Advisor to the CEO, Ms Bridget Dundee provides the following responses to the pressing questions posed by the publication:

Consumer News (CN): Give us a brief background of the Competition Commission's exemption provisions and the reasons for such provisions.

Bridget Dundee (BD): The Act recognises that certain practices that harm competition may be justifiable or may have economic benefits that outweigh the anticompetitive effects. As such, the Act allows undertakings involved in such practices to apply for exemption from the restrictive business practices and abuse of dominance provision of the Act. In addition, a professional association whose rules contain a restriction that has an effect on competition in a market may apply to the Commission for an exemption. In essence, any business or association of businesses or professional association may apply to the Commission to be exempted from the provisions of the Act.

CN: What are the areas that the Commission consider when analysing such exemption applications?

BD: For an exemption that relates to restrictive business practise to be approved, it must be established that such conduct would lead to maintenance or promotion of exports, enable small undertakings owned or controlled by historically disadvantaged persons to become competitive; improve or prevent a decline in production or distribution of goods or the provision of services; promote technical or economic progress or stability in any industry designated by the Minister (after consultation with the Minister responsible for that industry); and/or lead to benefits for the public which outweighs the resultant lessening of competition.

CN: When will an exemption be granted?

BD: An exemption will be granted if there are exceptional and compelling public policy justifications that the conduct

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that the parties will engage in during the period of exemption will contribute to the Namibian economy

CN: Give us some background on the decision of the Commission to grant a conditional exemption to Tullow – Kudu Limited – Namcor – Cieco E&P (Namibia) Co, Ltd.

BD: The Commission received an application for exemption from NAMCOR, Tullow Kudu and CIECO E&P (Namibia) CO, Ltd ("applicants"). The Applicants are joint-holders of a 25-year Production Licence 003 in terms of which they can explore for and produce natural gas within the licence area, inclusive of the Kudu Gas Field (Kudu). The applicants propose developing the Kudu natural gas field ("Kudu") where commercial quantities of natural gas have been discovered. The gas produced is proposed to be sold to the Kudu Power Company (Proprietary) Limited (Kudu Power).

CN: Why did they have to apply for exemption to the Commission?

BD: The joint operating agreement limits the ability of the Applicants to act independently. It results in the Applicants agreeing on a common selling price of natural gas, controlling production and market outlet and access as well as allocating customers and areas of trade, thus contravening the provisions of section 23 of the Competition Act.

CN: Explain the decision of the Commission

BD: The Commission granted a conditional exemption for 15 years, renewable at the discretion of the Commission. The Commission found that the market for the production and processing of gas, as well as the market for the transportation of gas via pipeline, is not likely to be one in which competition is effective in constraining the market power of a joint venture entity and this may be an unavoidable outcome in a situation where there are considerable costs associated with entering the market and establishing a viable and sustainable business. In particular, the Commission accepts that this project is not feasible without the joint arrangements envisaged.

CN: What are the conditions attached to the exemption?

BD: The Commission recognised the possibility of third party access to the pipeline in the future. It is therefore a condition of the exemption that the Applicants submit to the Commission, at the end of the second year of operation, criteria for granting third party access to the pipeline.

CN: What were the factors the Commission considered in granting the exemption with conditions?

BD: The Commission looked at the nature of the conduct of the applicants, the competitive effects of the conduct, the competitive gains as well as the public interest effects of granting such an exemption. An important outcome of the Commission's evaluation is recognition of the fact that there are considerable barriers to entry and substantial economies of scale in production and processing that limits significantly the extent to which competition can act as a constraint on the positions of incumbents. This is particularly so in the case of new developments where initial high setup costs and entry barriers must be overcome under conditions of risk (for example in exploration) and business uncertainty (e.g. regarding whether there will be sufficient demand for the gas product in downstream markets). Although the arrangements will control production, the rationale for the joint venture is to enable the establishment of an entity that will bring to the Namibian economy a product not previously available.

CN: What are the competitive benefits to the economy that may arise from this project?

BD: The Commission believe that the joint venture arrangement has enabled the establishment of an "anchor project", an important foundation for the development of an upstream gas production industry. This is made commercially feasible by the establishment of an anchor customer in the form of Kudu Power. The Kudu Gas project will result in an entity that will produce gas and that will enable a downstream electricity-producing sector. This constitutes an increase in productive activity hitherto unavailable to the Namibian economy. In addition, it is envisaged that there will be an increase in exports of electricity that represents a considerable pro-competitive benefit.

CN: What is the importance of an anchor project such as this one?

BD: The exploration, production and transmission of natural gas are a risky and expensive business activity usually undertaken through joint ventures and other partner-ships as opposed to individual companies. This is to ensure that the risks associated with the project are spread among a number of firms and that companies can pool their financial resources. Consistent with international best practices, the Commission envision the creation of an anchor project supported by an anchor customer on the basis of a joint venture arrangement that allows for sufficient funds to be

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raised and collaboration among appropriately experienced and skilled partners who are able to earn a sufficient return on their investments.

CN: What will the role of the Commission be now that the exemption was granted?

BD: It will be important for the Commission to monitor conditions in the market to ensure that the benefits of the Kudu Gas to Power project are not outweighed by any restrictions on competition that may arise in future. Another concern is with the extent of sharing of commercially sensitive information facilitated in the terms and conditions of the JOA. While this may be unavoidable at this early developmental stage it will be important to safeguard against any potential misuse of this information for purposes of restricting competition as the market develops in future.

CN: What will be the economy-wide impact of your decision and can we expect similar decisions in the future?

BD: It is a very important project for Namibia's development trajectory, promising to increase the country's electricity production capacity at a time when the demand for electricity outstrips available supply.

CN: Any other comments?

BD: The Commission encourages businesses to comply with the Competition law. Our strategic vision is to create a culture of competition in the market for the benefit of the economy. It is important for businesses to adhere to the competition law. The Commission welcomes your queries on competition related matters and encourage businesses to familiarise themselves with the Competition Act.

10 Mergers Update

Determinations made by Commission for the period of April 2014 to October 2014:

CASE NUMBER	PRIMARY ACQUIRING FIRM	PRIMARY TARGET	INITIAL DATE FILED	STATUS
2014APR0029MER	Gazania Investment Two Hundred and Fifty (Pty) Ltd	One Africa Television (Pty) Ltd and Downlink (Pty) Ltd	15/04/2014	Unconditional Approval
2014MAR0016MER	Atro Trading CC	Oshikango Initiative (Pty) Ltd	02/06/2014	Unconditional Approval
2014MAR0019MER	CA Sales Holdings (Pty) Ltd	A. Wutow Trading Company (Pty) Ltd	26/03/2014	Conditional Approval
2014JUNE0029MER	Trustco Group Holdings Limited	Fides Bank (Pty) Ltd	25/06/2014	Conditional Approval
2014JUL0035MER	Anand Radhakrishnan	Namibia Stationary Wholesale	11/06/2014	Unconditional Approval
2014JUL0034MER	Burma Plant Hire (Pty) Ltd	Prodev Plant Hire (Pty) Ltd	10/07/2014	Unconditional Approval
2014JUN0032MER	Lycopodium Limited	Alluvial Diamond Projects Namibia (Pty) Ltd	30/06/2014	Unconditional Approval
2014JUN0030MER	Ofuto Investments (Pty) Ltd	Prima Quarries Namibia (Pty) Ltd	27/06/2014	Unconditional Approval
2014JUL0036MER	Curzola Island Investment (Pty) Ltd	Etale Properties (Pty) Ltd	07/07/2014	Unconditional Approval
2014JUN0033MER	Robert Bosch GmbH ('Bosch')	Hytech Holdings (Pty) Ltd	30/07/2014	Unconditional Approval
2014JUL0039MER	BB Investment Company (Pty) Ltd	Adcock Ingram Holdings Ltd	29/07/2014	Unconditional Approval
2014AUG0044MER	MHG International Holding	Sands Hotels (Pty) Ltd	28/08/2014	Unconditional Approval
2014AUG0049MER	Trustco Property Holdings (Pty) Ltd	Farm Herboths (Pty) Ltd	12/10/2014	Unconditional Approval
2014SEP0052MER	Mincon Group Plc	Omina Supplies (Pty) Ltd	02/10/2014	Unconditional Approval
2014AUG0043MER	Frans Indongo Investment Trust	Brukarros Meat Processors (Pty) Ltd	13/08/2014	Unconditional Approval
2014AUG0044MER	Grohe Luxembourg Four S.A.	Main Street 1254 (Pty) Ltd ('Watertech Holdco')	31/07/2014	Unconditional Approval
2014AUG0045MER	The Preferred Land Development Holdings (Pty) Ltd ('PLDH')	Dr. Martin Wucher	29/08/2014	Unconditional Approval
2014JULY0038MER	Archie Graham	Garden Plaza Investment CC	19/08/2014	Unconditional Approval
2014AUG0050MER	Klaus Papendieck	Edmund Lafrenz Holdings (Pty) Ltd	01/10/2014	Unconditional Approval
2014AUG0048MER	Pointbreak Property Unit Trust Three	Lolopark (Pty) Ltd	28/08/2014	Unconditional Approval
2014AUG0041MER	Telkom SA Soc Limited	Business Connexion Namibia (Pty) Ltd	04/08/2014	Unconditional Approval
2014AUG0047MER	Paratus Telecommunications (Pty) Ltd	Vox Telecom (Pty) Ltd	28/08/2014	Unconditional Approval

11 Namibia Successfully Defended Its Peer Review before a UN Panel of Competition Experts

The Namibian Competition Commission informs that Namibia passed the Competition Law Peer Review Test by 193 countries. The Chief Executive Officer of the Commission, Mr Mihe Gaomab II, indicated that since Namibia's review process has been completed, the country is now internationally certified as a Competition Authority. The Peer review is great for any young and fledgling competition authority as it needs to show that it has fulfilled the required standard of institutional development and proper administration and implementation of the Competition Law. The peer review also serves as a clearance for cooperating partners and global recognition to broaden our technical assistance request. *Towards that end, the Namibian Competition Commission will have a dissemination event in Namibia where all stakeholders will be invited to learn more about the content and challenges of the peer review, and updates on the implementation of the recommendations.*

A Namibian delegation led by the Honourable Deputy Minister of Trade and Industry, Mr Tjekero Tweya and a number of senior officials from the Ministry of Trade and Industry and the Namibian Competition Commission, as well as a non-state actor concerned on consumer protection in Namibia, attended the peer review meeting of the Commission held in Geneva, Switzerland from 8 – 11 July 2014 under the umbrella of the United Nations Conference on Trade and Economic Development (UNCTAD).

In July 2013, UNCTAD approached Namibia for a peer review as it was considered as one of the fastest growing Competition Authorities in the world. Namibia formally consented to the proposal of being peer reviewed and hence the review exercise was carried out by UNCTAD in November 2013.

The peer review process provides a unique opportunity to examine, and draw lessons from, experiences of, and challenges faced by, countries in the implementation of competition policies. The reports produced during the process regarding the state of competition law and enforcement in reviewed countries are impartial and rigorous, and are undertaken by competition policy experts from developed and developing countries with practical experience in implementing competition law. The peer review process is interactive and combines the exchange of experiences with recommendations for possible improvements either in the formulation of the competition law or in its enforcement. Further, it provides interested developing countries with technical assistance, should they be willing to implement the peer review recommendations.

UNCTAD had the following member States peer reviewed: Nicaragua, Pakistan and Ukraine (2013); Mongolia (2012); the United Republic of Tanzania, Zambia and Zimbabwe (Tripartite Report, 2012); Serbia (2011); Armenia (2010); Indonesia (2009); Costa Rica (2008); the West African Economic and Monetary Union, Benin and Senegal (2007); Tunisia (2006); and Jamaica and Kenya (2005). The countries that were peer reviewed for the year 2014 include Namibia, the Seychelles and Philippines.

Mr Gaomab said that the fully fledged operationalisation of the Namibian Competition Commission would not have been possible without the foresight and vision of the Former Minister and current Right Honourable Prime Minister, Dr Hage Geingob; the drive and resilience by the current Minister of Trade and Industry, Mr Calle Schlettwein and current Deputy Minister of Trade and Industry; Mr Tjekero Tweya and current Permanent Secretary, Dr Malan Lindeque, to see it through and the resolute governance of the Board of Commissioners, namely Mr Hangula, Ms Kasuto, Mr Daniel, Dr Kakujaha-Matundu, and Ms Theron. Mr Gaomab also expressed his appreciation to the entire staff of the Commission for their hard work and dedication, and last but not least, to the entire stakeholder community such as the Competition Law Forum, media, academia, sector regulators and businesses, and the broader public.

During the peer review meeting, Mr Gaomab II was elected as the Vice-President and Cum-Rapporteur by 193 countries at the meeting held in Geneva.
The United Nations Conference on Trade and Economic Development (UNCTAD) is an intergovernmental organisation which seeks to further the understanding of the nature of competition law and policy, and its contribution to development and creating an enabling environment for an efficient functioning of markets of the member states of the UN through the guidance of a Group of Experts on Competition Policy and Law.

FAQ

Volume 4 No. 3

In this edition we provide you with some of the questions posed by the media, in this instance, with regard to basic commodity prices, and the Commission's response to these questions. Should you require more clarity with regard to the Commission's responses, kindly contact the Economics and Research Division at +264 (0) 61 2246 22.

Q: The basic commodity prices keep increasing. Is this not worrying the NaCC?

NaCC: Rising commodity prices, especially of basic items, not luxurious ones, are a source of concern for everyone as this could impact on pressing matters – inequality and poverty.

Q: Why are local product prices like chicken sometimes higher than that of foreign products?

NaCC: At the end of the day, the defining issue is competitiveness – in terms of production. Given our small economies of scale, our local products will at times have to be sold at higher prices to reflect the cost structure of producing them.

Q: Is the NaCC ever considering regulating the prices of chicken, which have been escalating in recent months?

NaCC: The NACC, as relayed to the public in various forms, is developing a price-monitoring regime to assess and review, on a constant basis, the price and cost structure of certain industries that are amenable for industrialisation schemes such as the Infant Industry Protection. This is not regulation or price control, rather it is monitoring to ensure that the end price derived at their farm gate or factory price truly reflects the cost structure.

Q: What could be factors leading to price increments?

NaCC: Input prices to produce the local products are an important determinant of high-end product prices, especially where such inputs are sourced internationally. Secondly, there seems to be some price premiums extracted during the distribution channel of the product to the shops. Thirdly, the pricing relations between producer and retailer might also give way to some pricing rent extractions. The question is whether such pricing rent extractions, or what they call marketing margins, are efficiently priced, or whether the country could look at other alternatives, such as subsidised transportation by say TransNamib from farm gate to retail shelf. The NACC will delve deeper into the distribution channel and issues of buyer power between producer and retailer next year.

Q: How much authority does the NaCC have? Does it have the power to reduce the prices or to recommend that prices be controlled?

NaCC: The NACC can only engage in price monitoring, not price controls. The appropriate authority to ponder on price controls and regulations aspects is the Ministry of Trade and Industry.

Q: What are the challenges associated with controlling prices in the economy?

NaCC: There could be a danger that imposed prices by a government authority could render the producer much more inefficient, thereby leading to unsustainability and rendering our industrialisation ambitions to naught.

Q: Anything else you can add?

NaCC: The NACC is busy reviewing its domestic legislation and it has included relevant provisions of price monitoring to ensure that such a function is fully mainstreamed into its work.

NOTES

Design and Layout by Ogilvy Namibia