

NaCC COMPETITION

NEWS



THE OFFICIAL NEWSLETTER OF THE
NAMIBIAN COMPETITION COMMISSION



Namibian
Competition
Commission

**FAIR COMPETITION,
PROSPEROUS ECONOMY**

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Dear Readers

The Commission is refreshed in its resolve to continue the good fight of fair and sound competition, knowing that you, its stakeholders, are placing expectations on the institution to do better and to achieve greater results in promoting its ultimate goal: consumer welfare.

In striving to effectively carry out its mandate, the Commission continuously reviews its programmes and strategies, and therefore, in this issue, our Chief Executive Officer, Mr. Mihe Gaomab II, explores the areas of focus for the Commission to further reach its set objectives to enforce the Competition Act 2 of 2003.

The article on Insight into the Commission provides information on developments within the Commission as well as where we are and where we are heading.

Within its short period of existence, the Commission has reached incredible milestones and crossed many bridges in order to enforce the law and continues to go from strength to strength. In this regard, the Commission is thankful to its stakeholder, the line Ministry of Trade and Industry (MTI), for providing guidance and resources for the Commission to carry out its mandate.

There is a strong interface between competition and corruption, as corruption is an anti-competitive practice that impacts negatively on the ultimate goal of providing everyone a chance to acquire the kind of services or goods they wish to obtain in a fair manner. Corruption has the ability to destroy economies, therefore the Commission analyses, in its article on Corruption and Competition, how these subjects are related.

“Corruption has the ability to destroy economies, therefore the Commission analyses, in its article on Corruption and Competition, how these subjects are related.”

The Commission has been tasked by MTI to formulate a retail charter that will ensure that local produce is fairly treated, similar to foreign goods. We explain the role the Commission played in the drafting of the charter.

The thorny issue of the phasing out of garage / fuel cards is being closely monitored by the Commission, and since consumers' welfare lies close to the heart of the Commission, and is the sector that will ultimately be impacted by this change, the Commission explains its stance in this matter.

Also in this issue we ask the question: “Why does excessive pricing matter?” The answer to this is provided by our law officer, Mr Bernhard Tjatjara, in the article titled Excessive Pricing Under the Competition Act.



Dina Gowases
EDITOR

The Commission made certain determinations on some of the mergers and acquisitions that were filed. The outcomes thereof are also noted in this edition.

The Commission was established to ensure fair competition in order for all market players to have a fair chance to enter the market of their choice as well as to compete fairly without pushing each other out of business. The Commission continues to keep a watchful eye on the activities within the different economic sectors of the country in order to ensure that all players comply with the law. Thus, the Commission not only enforces the law but also advocates to various sectors of society on the benefits of competition and what a 'competition culture' means to ensure that we are all well acquainted with the law which governs our competition space for the economic development of the country.

We encourage all our stakeholders to continue to participate in the activities of the Commission, and in doing so, help us to deepen our enforcement efforts.

Kind regards

Dina Gowases
Editor

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.



Caption: (left to right) Director: Economics & Sector Research, Dr Michael Humavindu; Director: Restrictive Business Practices, Vivienne Katjuongua; Corporate Secretary, Nangosora Ashley Tjipitua (centre back row); Technical Advisor, Bridget Dundee; Director: Mergers & Acquisitions, Vitalis Ndalikokule; Chief Executive Officer, Mihe Gaomab II (centre front).

Formally established on 9 December 2009, the Namibian Competition Commission is now a fully-fledged institution and has moved with great speed to enact the Competition Law.

Since then, during the periods 2009/2010 to 2013/2014, the Commission was guided by four strategic objectives.

These are:

- Operationalising Compliance;
- Research and Development;
- Stakeholder Partnership Management; and
- Developing Capacity and Organisational Capability.

On the first strategic objective, the Commission put in place operational manuals on merger regulations and restrictive business practices. This has allowed the Commission to regulate over 300 mergers and to conduct over 30 case investigations involving restrictive business practices. The Commission further developed an extensive governance handbook covering its operations ranging from Human Resources, Finance, Administration and Corporate Communications. The Commission has also developed Charters on its Board and Committees, as well as on the Executive Committee.

On the second strategic objective, the Commission now has a fully functioning Economics and Sector Research Division with a strong research focus on sectorial inquiries ranging from franchising, auto and retail, while it has done merger impact analysis and finalised competition

policy. It has also put in place a price monitoring function for sensitive, but economically important products for Namibian consumers.

On the third strategic objective, the Commission strives to be a responsive and consultative institution and engages its stakeholders through forums, events and conferences on the technical and strategic nature of its work. To discuss evolving developments on competition law implementation and to advocate on competition matters to its stakeholders, the public and the media, the Commission meets with the Competition Law Forum on a regular basis and has instilled a culture of hosting the annual Competition and Consumer Protection Week in September.

Along with this advocacy, to inform stakeholders on competition issues, most notably the Economic Implications of the Wal-Mart / Massmart merger, the Commission also initiated public lectures at the Polytechnic of Namibia. This was done with the visiting Acting Commissioner of the Competition Commission of South Africa.

On the fourth strategic objective, the Commission put in place an effective operational centre of excellence in the form of the Corporate Services Division. The Division was applauded for its financial prudence and auditing clearance in the national media, while it has helped the Commission train its staff on a consistent and targeted basis to enhance skills formation on competition law implementation in Namibia. To advance its educational contribution for future skills formation, the Commission has assisted the University of Namibia (UNAM) on the development of the Competition Law curriculum, a curriculum where students enrol to graduate in that sphere of education.

“THE FUTURE STRATEGIC HORIZON FOR THE COMMISSION RESTS ON THREE CENTRAL PILLARS OF SUCCESS AND WAS COINED AS THE NEW ERA: ENFORCEMENT, RESEARCH AND ADVOCACY.”

The Commission can proudly attest that it has fulfilled its strategic objectives, although there is a strong belief that it can improve on them with concerted focus and by having inculcated them as part of the corporate culture of the organisation.

The future strategic horizon for the Commission rests on three central pillars of success and was coined as the NEW ERA: Enforcement, Research and Advocacy. The next five key strategic objectives are currently being discussed, and once decided on, will be a continuation of some objectives, but in a more action-orientated form.

We have the following:

- The first strategic objective, Operationalising Compliance, will be reworded to reflect action in terms of finalising case investigations, assuming manuals and policies are in place. It should read as “inculcating a compliance driven culture on competition enforcement” and “achieving effective and efficient merger regulation”.
- The Strategic Objective on Research and Development will be reformulated as “Implementing Action-Oriented Economics and Sector Research on Competition”. The purpose behind this is to allow the Commission to be able to measure, cost and assess impact in terms of our research programmes and in terms of action on the Competition Policy.
- As for the Stakeholder Partnership objective, it will be reformulated to effect advocacy. A starting point is “realizing a fully-fledged competition advocacy”.

In terms of Capacity Development and Organisational Capability, we will reintroduce it as “Centre of Operational Excellence”.

For the effective implementation of the Performance Management System, once the overall strategic objectives are set, it should ensure a cascading link from broader strategic goals and divisional objectives, to individual performance measures.

The new strategic plan containing the new strategic objectives should drive the corporate focus of implementing activities, projects and cases for the next three financial years from 2014/2015 to 2016/2017.

Kind regards

**By Mr Mihe Gaomab II
Chief Executive Officer**

Anecdotal evidence shows that there is a strong interface between corruption and competition. Corruption is defined as “the abuse of public power for personal or private ends”.

Competition is defined as an “organised and systematic process in the market that involves businesses’ rivalry for mainly the profit motive”.

The interface between corruption and competition is thus characterised as the relation between the State (the decision-making powers of public officials and its representatives) and the Market (the business sector and its business people).

Corruption mainly takes place when public officials and individuals in the market break the law in pursuit of their personal or private interests. Competition, on the other hand, concerns the interplay of forces between businesses on pricing, volume of supply and market dynamics within the trade, financial and commercial environments.

There is thus a strong inverse relationship between competition and corruption in the sense that corruption thrives where business decisions are distorted, thereby impeding competition in the marketplace. Corruption often occurs frequently in the interaction of public officials and the individual members of the public and private sector.

Corruption distorts the proper allocation of resources, value of money, investment and business decisions, productivity and efficiency.

It is an insidious and wicked temptation of individuals and businesses, and the economic effects of it are notoriously hard to measure as it is normally clandestine and its effects are protractive.

Corruption dislikes the benefits of competition, which is lowered business transaction costs, innovation, efficiency, productivity, proper competitive market pricing, and wider choices of goods and services. Corruption is thus anti-competitive and keeps private sector development, which is essential for economic development in a country, hostage.

Corruption has been around for a very long time and is becoming a much more visible and volatile political issue, while it is also becoming an increasingly economic issue.

The classic way through which corruption has become an economic issue is through “rent seeking activities”. For most Namibians, rent is what we pay our landlord each month or what a rental agency charges us for using a car for a week. For us as competition economists, however, rent is short for “economic rent” and means something quite different.

Economic rent is that extra amount paid (over what would be paid for the best alternative use) to somebody or for something useful whose supply is limited either by nature or through human ingenuity. Rent seeking activities are however unlawfully corrupt conduct ranging from bribes and kickbacks, influence on procedures and decisions, misuse of facilitation fees to get decisions for own use and illegal contributions to unjust causes, to money laundering and the trade in exclusive secrets of information about competitors’ bids.

In terms of competition, corruption relates to anti-competitive practices

where there is illegal cooperation or collusion in terms of prices, quantities, market allocation and bidding or tendering processes. From the above, it shows that corruption and competition are arch-enemies.

Corruption thrives and undermines competition, whereas competition thrives in an environment that erodes corruption. Correlational Research done by Ades and Di Tella (1999) for global and multinational firms show that there is a low of competition with high levels of corruption, suggesting and confirming a strong inverse relationship between the two variables.

The studies showed that countries with higher levels of market dominance, merger concentration, bid rigging and export cartels, corruptive collusion, and barriers to entry and exit, and absence of competition laws suggest higher levels of corruption.

The Relevance of the Relationship Between Competition and Corruption in Namibia

The above analysis shows, through an overall argument, that there is a definite inverse relationship between corruption and competition. The empirical conclusion reached on this link and interface has also been confirmed at the OECD Meeting on Examining the Important Interface Between Competition and Corruption on 27 February 2014.

It would be important for policymakers in Namibia to practicalise this link and to join efforts in promoting competition whilst fighting corruption. Competition is pro-growth, market and development friendly, whereas corruption is anti-growth, market and development unfriendly.

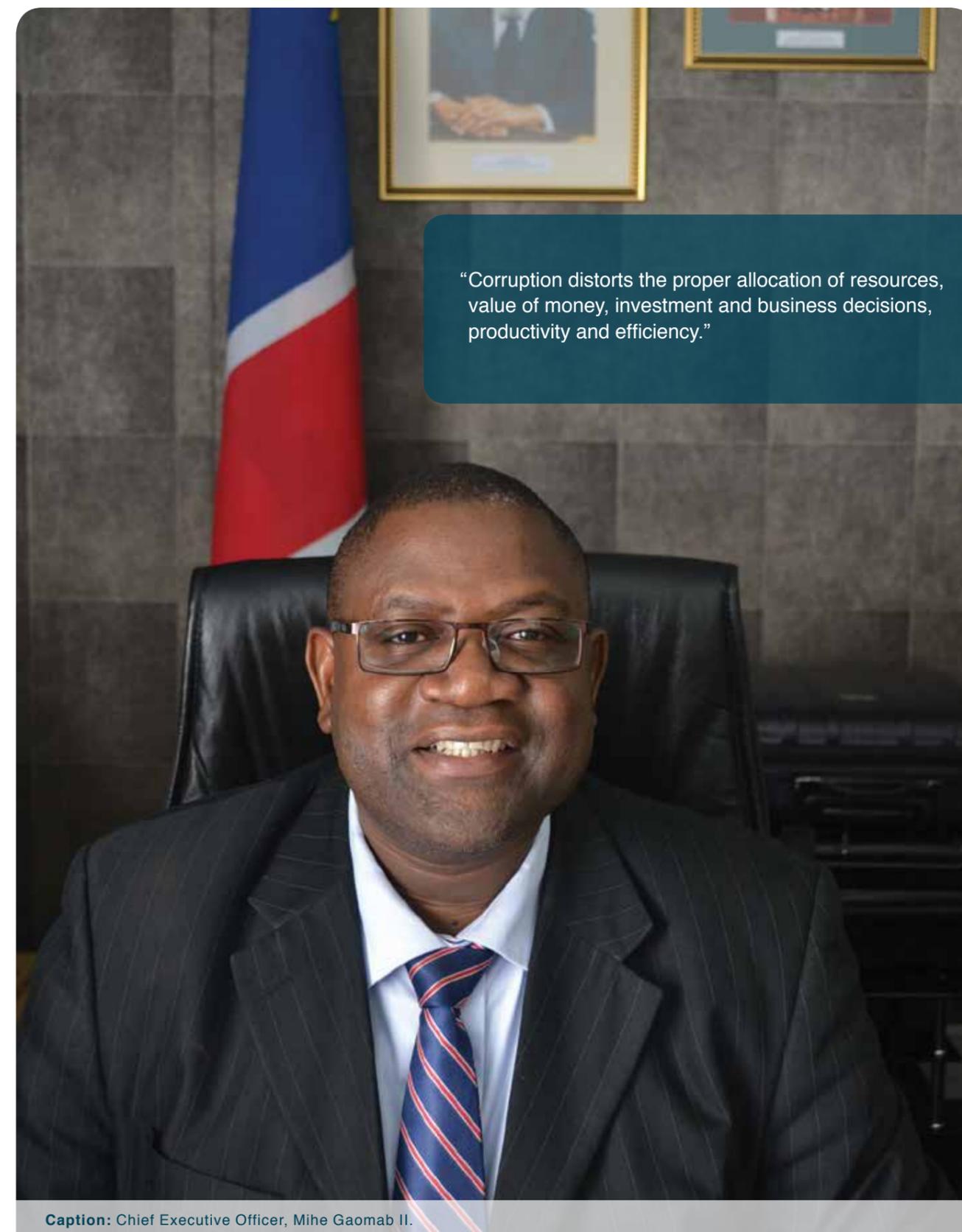
Towards that end, the Namibian Competition Commission and the Anti-Corruption Commission (ACC) have realised the importance of joint coordinated efforts by signing the Memorandum of Understanding (MOU) between the two authorities in 2012.

The objective of this MOU is to provide a framework within which the Parties can develop and undertake collaborative research, activities and projects; and to establish a program of technical cooperation; and disseminate and share knowledge in the fields of competition law & policy and anti-corruption.

Both Commissions are fighting corrupt conducts that are both business (NaCC mandate) and individual (ACC mandate). The realisation of the MOU is yet to be fully implemented with coordinated dawn raids and joint efforts in combating collusive and individual corrupt conducts in the Namibian market place.

Corruption is wrong and makes fair competition impossible. It restricts the resilience, dynamism and market competitiveness, and will make our visionary goals unreachable in terms of Vision 2030. It should be discouraged and rooted out. Competition on the other hand should be encouraged in a cordial and regulated fashion as a condition to do business. Competition is good for the Namibian market, the Namibian economy and Namibian economic growth and development.

**By Mr Mihe Gaomab II
Chief Executive Officer**



“Corruption distorts the proper allocation of resources, value of money, investment and business decisions, productivity and efficiency.”

Caption: Chief Executive Officer, Mihe Gaomab II.

INSIGHT INTO THE NAMIBIAN COMPETITION COMMISSION

At Independence, Namibia inherited an economy concentrated around a few sectors such as mining, fishing and agriculture. The country has a manufacturing sector, but it is relatively small, representing less than 10% of the GDP.

The Namibian Competition Commission (NaCC) opened its doors in December 2009, six years after the Competition Act No. 2 was passed in 2003. The main duty of the Commission is to safeguard and promote fair competition across all sectors of the Namibian economy, having regulatory oversight of over 80 000 business entities.

The Commission was established to promote a culture of fair competition, which allows all players in the market arena to have a fair chance of establishing businesses and growing their businesses. In this way everyone can contribute to the overall economic development of the country.

The Commission aims for efficiency in terms of allocating resources and thereby realising the best possible quality of products, services for consumers, competitively priced products and adequate supplies to consumers.

The Commission comprises of five Commissioners and 32 staff professionals administering and implementing the competition law. After South Africa, Namibia is the second country to implement the competition law in SACU and the sixth to do so in the SADC region following South Africa, Malawi, Tanzania, Zambia and Zimbabwe.

Since its inception in December 2009, the Commission has handled a total of 213 mergers and acquisitions as well as over 20 cases on enforcement of restrictive business practices. The Commission is proud to state that these cases were undertaken, investigated and concluded through local Namibian capacity.

In its four years of existence, the Commission has handled significant mergers and acquisitions, one of which is the Wal-Mart / Massmart takeover that resulted in a victory for the NaCC in Namibia's Supreme Court.

The NaCC handles 8 to 10 cases monthly, including those approved with conditions and others that were prohibited.

Here are a few profile cases:

- Afrisam – Ohorongo merger (prohibited or declined);
- Wal-Mart / Massmart merger (NaCC won a landmark judgement in the Supreme Court);
- Capricorn Investment Holdings – ABSA merger (banking, which was withdrawn);
- Leo (Powercom) – Telecom merger (conditions imposed to ensure market reform and behaviour of the ICT players);
- Exxaro Base Metals – Wilrou-Glencore merger (to allow for local value mineral beneficiation);
- EBH – DCD merger (to allow for a more market-level playing field and participation for docking facilities and employment protection at the Walvis Bay port);
- SOS – EMED medical emergency services (which was

prohibited or declined);

- Agra Limited – A. Rosenthal (Pty) Ltd and Kalahari Arms and Ammunition (Pty) Ltd trading as Safari Guns and Outfitters (approved with behavioral and structural conditions); and
- Namox Namibia (Pty) Ltd ("Namox") – The LPG Business of Puma Energy (Pty) Ltd (prohibited or declined).

In line with the relevant provisions of the Act, the Commission is a Competition Advisor to the Minister of Trade and Industry. The Commission also assists the reporting line Ministry of Trade and Industry on their mandate to ensure domestic trade competitiveness and effective internal market regulation.

Towards that end, the Commission is carrying out research matters of interests in prioritised sectors such as retail, automotive, franchising and manufacturing with a view to lend support towards understanding those sectors, and to ensure market intelligence on those sectors.

The Commission notes that there is an abundance of South African retail giants across Southern African and particularly in Namibia. The focus on the Retail Sector is as a result of the Wal-Mart Supreme Court challenge won in March 2013 on a condition of putting in place a supplier-developing programme for Wal-Mart.

"In its four years of existence, the Commission has handled significant mergers and acquisitions, one of which is the Wal-Mart / Massmart takeover that resulted in a victory for the NaCC in Namibia's Supreme Court."

The Commission has decided to launch a research study in order to be informed on the issues and challenges facing that sector, and how it relates to the overall commercial environment, taking into account amongst others, automotive sales, food and manufactured produce. The Commission will also hold a stakeholders' workshop (date still to be confirmed) to discuss the retail sector study and to seek solutions to the challenges afflicting the sector.

The Commission views its developmental agenda to NDP4 and Vision 2030 as one where competition not only thrives, but one in which local manufactured produce such as wine, Namibian-produced hair, processed agricultural items, handicrafts and basic small manufactured produce get a fair opportunity of supplying retailers in Namibia and beyond in areas where Wal-Mart is operating.

In terms of its price mandate, the Commission is putting in place price monitoring mechanisms to understand retailers' pricing strategies and to understand the pricing trends of sensitive, but economically protected sectors such as cement, dairy, meat and poultry.

There is still a lack of understanding in regards to the competition policy and law in Namibia and the work of the NaCC does not appear to be well known by the general public. The Commission aims to change this.



Caption: Commission Staff Members.

It is imperative that the public has a fair understanding of the benefits of competition and as such, provides broad-based support for a strong competition policy. Therefore, competition advocacy, whose ultimate aim is the development of a competition culture, is one of the key strategic focus areas of the Commission.

Efforts of competition advocacy are inclusive of all parts of a society and should address consumers, business people, trade unions, educators, the legal community, government, regulatory officials and the judiciary. These sectors may need to understand how competition benefits an economy and we hope to create a level of trust, credibility and confidence in the Commission as an advocate for sound competition policy. In order to do this we have developed a corporate identity and set up a website (www.nacc.com.na).

Along with this, the Commission also hosts an annual competition and consumer week in September. The Commission further aims to hold sensitisation workshops and periodic media engagements to improve public awareness on competition policy and law in 2014 (dates still to be confirmed). Along with this, public outreach programmes were set in motion to educate and inform the public about the benefits of competition.

Parliamentarians will soon be part of a workshop aimed at sensitising stakeholders on the processes of competition while the NaCC participates in trade fairs and commemorative days from time-to-time to enhance its visibility, the most recent of which was our participation in Africa Public Day on July 2013.

To supplement these strategies, the NaCC will soon start an aggressive

marketing drive targeting the public in all 13 regions.

Lack of skills in competition policy and law were a major challenge facing the Commission as these are relatively new phenomenon in Namibia. Therefore, there is a need to harness skills on the enforcement and administration of the Act. The Commission is proud to announce that it has developed the requisite skills in competition policy and law in the country. When it started in 2009 there was a short supply, or complete lack, of competition skills in Namibia. Since then, the Commission has developed these skills within the country and Namibians can now administer and implement the Competition Act. The Commission is proud to announce that it has no long-term foreign consultants attached or employed.

The Commission views capacity building as an integral part of its operations and therefore continuously engages staff members in training programmes locally, regionally and internationally in order to enhance their competition law skills. This helps them to carry out their duties effectively and efficiently.

The Commission liaises with Academia and the broader Research fraternity to lend support to curriculum development on competition policy and law at the University of Namibia (UNAM). Recently, second-year Bachelor of Accounting students visited the Commission to familiarise themselves with the computerised accounting systems processes regarding company assets. Since the Commission has been hailed in recent media reports as one of the institutions with the best financial auditing record and accounting practices, the students felt it beneficial to undertake their group assignment, which focused on asset acquisition, disposal and transfer processes, with the Commission.

TEAMBUILDING COOKING COMPETITION



Teams collaborate on some dance moves.



Izelda Goagoses fighting it out with the carrots.



Sophia, Marelize, Marius, and Justin.



Liswaniso, Jowetha, Martha, Josef, Vivienne, and Bridget.



Marelize Bock and Sophia Haoses caucusing on a cooking strategy.



Marelize stirring things up for her team while team members share a light moment.



Vivienne Katjuongua and Martha Hawanga ensure that they meet the cooking deadline.



Red team chefs, Latunga Haiping; Dr Michael Humavindu and Justine Shikulu getting down to cooking business.



Dartago Liswaniso sharing a recipe with Latunga.



What's cooking Martha, Jowetha and Bridget?



(front) Gideon, Bernatus; (back row) Izelda, Dina, and Melissa.



Latunga, Paulus, Vitalis, Dr Humavindu and Justine.



Vitalis Ndalikokule and Paulus Angula steering cooking matters.



Jowetha Andima and Josef Hausiku preparing for a cook-down.



Marelize and Marius admiring their final product.



HR guru Gideon Garoeb turned executive chef.



Izelda, Dina and Marius Eichab sharing cooking tips.



The Commission's Strategic Planning session Consultant Mark Burke acts as a judge for the cooking competition.

“AFTER SOUTH AFRICA, NAMIBIA IS THE SECOND COUNTRY TO IMPLEMENT THE COMPETITION LAW IN SACU AND THE SIXTH TO DO SO IN THE SADC REGION FOLLOWING SOUTH AFRICA, MALAWI, TANZANIA, ZAMBIA AND ZIMBABWE.”

The Commission, in terms of Section 67 of the Act, has the responsibility to negotiate agreements with any regulatory authority with whom it exercises concurrent jurisdiction over competition matters. This is done to ensure the consistent application of the principles of the Act and as such, the Commission has entered into a memorandum of understanding with the Electricity Control Board, Namibia Ports Authority, Bank of Namibia and the Anti-Corruption Commission (ACC). It is in the process of exploring cooperation agreements with the Namibia Financial Services Institution (NAMFISA), the Tender Board of Namibia and the Competition Commission of South Africa (CCSA).

Leadership

The NaCC's responsibility and scope of supervision is multi-faceted and central to the overall economic transformation of Namibia and the current political and social situation in the country.

I therefore believe that competition enforcement in Namibia can be based on three Fs:

- Our principled approach and centrality of work has to be FAIR to all players involved in terms of safeguarding and promoting fair competition in Namibia;
- Our work involves FREEDOM for all market players where one dominant player should not undercut or drive other players out of the market through anti-competitive practices; and
- Our work also involves FLEXIBILITY within the marketplace by regulating the conduct of firms, prohibiting anti-competitive arrangements and abuse of dominance, which impede the competitive process and hamper the legitimate rights, interests and behaviour of other market players, including consumers. Hence we should always aim to accommodate special provisions on small businesses, foreign competitors and consumers.

Our regard is to be conscious of the public's interest, provisions on protecting consumers by safeguarding competitive prices and product choices, as well as promoting employment, investment and advancing the social and economic welfare of Namibians at all times. The Act tells us to consider special issues within Namibia's economy, some of which are the protection and promotion of small undertakings, as well as promoting a greater spread of ownership of historically disadvantaged people.

The Commission also stands for impartiality, consistency and putting the economic interests of Namibia ahead of other considerations.

Competition is the grain of progress and development. It is embedded in our quest to improve ourselves personally and professionally. When competition is fair and just, it creates room for survival and assists in evolution, development and innovation.

I hope that with the task given to me to ensure competition surveillance and supervision in Namibia, I will hold the trust that our Government has bestowed on me and strive to realise our goals.

In this way, I can assist in proper competitive behaviour that contributes to the overall economic development of Namibia, and to our progress as a Nation.



“The Commission acknowledges the pricing trends of basic consumer goods, but care should be taken in whether these prices are induced at production levels or retailers' levels, or whether it is due to infant industry protection.”

The Namibian Competition Commission (NaCC) has been tasked by its line ministry, the Ministry of Trade and Industry (MTI), to develop a Retail Charter for Namibia. The Charter is not aimed at, nor does it constitute measures to, control food prices or quantities of food in Namibia.

It is the aim of the Ministry that the main objective of the Retail Charter is to ensure that local produce is fairly and equitably treated, similar to foreign-produced goods of retail chains and supermarkets in Namibia. This pertains to aspects such as shelving, rebates and goods return policies. These aspects are central to the need of protecting consumers in Namibia and, although the list is short, at this early stage it is still necessary to determine what else will be included.

The Commission produced a Retail Sector Study report and the current draft of the Retail Charter actually constitutes a lot of the elements suggested in the Report. This report will be shared with concerned stakeholders in due time.

The Commission will still play an active role in the Retail Charter but the process is consultative and requires extensive engagement that would be coordinated by the Namibia Trade Forum (NTF) under the auspices of the Ministry of Trade and Industry.

As the Minister of Trade and Industry, the Honourable Calle Schlettwein, indicated during his parliamentary speech recently, the Commission and NTF have been tasked to verify actual cost structures and production levels on infant protected products such as meat, dairy, poultry and cement.

The Commission's work is therefore to verify cost structures and production levels in order to assess the ex-factory / farm gate price, whilst the NTF is to assess retail prices. The two institutions would then collaborate to try to decipher the differences in margins between the farm gate prices and the retail prices, and propose policy measures to the

Minister of Trade and Industry.

The Commission will commence its reporting to the Minister on a monthly basis on movements in farm gate prices of the various commodities it is monitoring and make policy input to MTI whenever required. This is all in the interest of making the competitive markets work efficiently.

The Commission acknowledges the pricing trends of basic consumer goods, but care should be taken in whether these prices are induced at production levels or retailers' levels, or whether it is due to infant industry protection.

It is the Commission's position that prices are to increase for the foreseeable future, but concerted efforts will be made through the Competition Act 2 of 2003 and the Retail Charter in order to contain such increases.

It is further advised that producers who face rising key input costs on infant protected goods and consumer goods produced locally, need to examine the Retail Charter to seek ways to increase productive efficiencies. This could be through various means, like seeking alternative substitutes to some of their key inputs.

As for consumers, it could also be that efforts can be made in terms of seeking the zero VAT-rating on some basic inputs. This can ensure proper cost management and that the passing on of extra costs to the consumer can be avoided.

The Commission is cognisant of the fact that its assessment and monitoring of the cost and retail pricing structures of the industry could put it in a position to counter excessive and predatory pricing strategies. The Commission has suggested some policy measures to the MTI and will continue to do so in order to ensure that the Namibian prices of the infant industry protected sectors are within reach of Namibian consumers.

THE IMPACT ON COMPETITION REGARDING THE PHASING OUT OF FUEL / GARAGE CARDS



“IT IS THE COMMISSION’S VIEW THAT DETERRENCE IS BETTER THAN PUNISHMENT AND THAT ANY ANTI-COMPETITIVE CONDUCT OR CONCERTED PRACTICES BE DISCOURAGED OR ROOTED OUT IN THE NAMIBIAN BUSINESS AND ECONOMIC LANDSCAPE.”

THE CONTEXT

As of 28 February 2014, Fuel and Garage Cards became an invalid payment option in Namibia. This stems from a new regulation, the Determination on the Conduct of Card Transactions within the National Payment System (PSD-4), which was issued by the Bank of Namibia and came into effect on 30 June 2013.

Although the Namibian Competition Commission took note of the development and acknowledged the regulatory consistency between the Bank of Namibia and the Commission in terms of its Memorandum of Agreement (MOA), signed in December 2011, the Commission has a concern regarding the matter in terms of its implications on competition in Namibia.

THE IMPACT ON CONSUMERS

The Commission’s mandate is to ensure competitive pricing and a wider choice of products and services for consumers. The Commission is highly concerned that the phasing out of fuel and garage cards influences this choice and the chance consumers have in their preferences to transact, not only by cash, but by electronic payments.

The Commission is, however, considerate of the fact that there are viable reasons for the discontinuance of the fuel and garage cards in line with the localisation of the National Payment System by the Bank of Namibia.

Whilst such action is justifiable, it is the Commission’s view that the choices of consumers must not be constrained, nor inconvenienced, due to the phasing out of these cards. Therefore, the Commission urges Commercial Banks to create and make available innovative product offerings to their customers.

The Commission calls on the involved stakeholders to do this to ensure that consumers are afforded a choice on a medium of payment to use when settling their fuel transactions. In this way, if there are financial impacts on consumers as a result of the phasing out of the fuel and garage cards, they are reasonable, fair and just.

IMPACT ON COMPETITION

It has come to the attention of the Commission that commercial banks have entered into agreements with certain service station owners to accept specific banks’ credit and debit cards, thereby disadvantaging on a competitive basis other service station owners. This is a concern for the Commission as, in terms of the Competition Act, it could be viewed as collusive practises that are either restrictive or exclusive in nature, thereby limiting or restricting competition in the market.

The Commission strongly advises the Association of Service Station Owners (ASSO), collectively representing a spectrum of related members, to refrain from telling or persuading their members to engage in a uniform conduct. This could be viewed collusive in nature and may

not be in accord to the free spirit of competition in that industry. If it does inform its members to behave in a uniform fashion, this may be viewed as a concerted practice of all members behaving in a direct or indirect way that replaces their independent actions.

The Commission views this development seriously and believes that not only does it restrict and constrain consumers’ choices, thereby violating consumer protection, but it also creates room for anti-competitive behaviour that can become collusive and exclusive to the detriment of free and spirited competition in the industry.

The Commission would like to inform the public however, that the choice of payment for fuel rests with the services providers. The free choice to use any medium of payment either by cash or electronic settlement in terms of payment in a market economy is determined by market forces or regulated by the Bank of Namibia. Thus, it is the free choice of service stations to accept, or not to accept, any medium of payment; provided it is acceptable according to regulations. Similarly, it is the free choice of service stations who wish to accept any medium of payment to do so without being forced.

The Commission reiterates that any collusive nature by coerced or exclusive conduct should be avoided between commercial banks and the service station owners, and further, amongst and between the service station owners through the Association. The Commercial banks are also well advised that they must improve and innovate their product

offerings without a competitive bias in the sector. This will ensure that consumers are not disadvantaged in terms of consumer choice.

In conclusion, the Commission informs the Public that any concerted or collusive practice or constrained consumer choice under the Competition Act will be dealt with in accordance to the provisions of the Act. It is the Commission’s view that deterrence is better than punishment and that any anti-competitive conduct or concerted practices be discouraged or rooted out in the Namibian business and economic landscape.

EXCESSIVE PRICING UNDER THE COMPETITION ACT 2 OF 2003: SOME POINTERS FOR THE NAMIBIAN PUBLIC

The prohibition of excessive pricing is always present in competition law and is enforced by various competition authorities around the globe. Why does excessive pricing matter? In general, the harmful economic effect of excessive pricing results in the exploitation of consumers.

A lively debate amongst competition lawyers and economists is the issue of “excessive price”. In Namibia, Section 26(1) of the Competition Act 2 of 2003 proscribes, in a broad way, any conduct on any part of an undertaking, or undertakings, which amounts to abuse of a dominant position in a market in Namibia, or part thereof. Section 26(2) (a) of the Act specifically prohibits excessive pricing. The essence of this section is to prohibit any conduct that amounts to ‘(a) directly or indirectly imposing of unfair purchase or selling prices or other unfair trading conditions’.

To date, there have not been court decisions in Namibia on excessive price. However, on a case-by-case basis, the issue of excessive pricing is becoming one of the tasks at the Namibian Competition Commission. Therefore, for the benefit of our readers, it would seem appropriate at this stage to formally introduce how an excessive price can be determined since the Act is silent on this aspect.

This article attempts to explain how foreign authorities have dealt with the exercise of determining when a price is excessive. The diversity of examples in different foreign authorities show that in order to determine whether a price is excessive or not, an empirical inquiry into costs and prices needs to be conducted.

The test for excessive pricing was enunciated in one of the first celebrated international competition law cases of *United Brands and United Brands Continental BV v. The Commission of the European Communities* (1978) EUECJ C-27/76; (1978) 1 CMLR 429, (“United Brands”).

In this case, the European Court of Justice (“ECJ”) ruled that the United Brands Company (UBC) had abused its dominant position in the market for bananas by, amongst other, charging unfair (excessive) prices for the sale of Chiquita bananas to customers in Belgium, Luxembourg, Denmark and Germany. In arriving at that decision, the ECJ reasoned that a price is ‘excessive’ when “it has no reasonable relation to the economic value of the product supplied”, and that “this excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin”.

The task on how to determine an excessive price as it appears from the United Brands case is two-fold. Firstly, the cost of the product and its price should be compared. Secondly, a comparison of whether the price is in itself excessive or excessive when compared with a price of a profitable and effective competitor of the same product needs to be done.

About two decades later, the authorities repeated the test enunciated in the United Brands case and elastically developed it. This was in the case of *Napp Pharmaceutical Holdings Ltd & Others v. General of Fair Trading* (2002) CAT 1 (“Napp case”) in which the issue of excessive price was again placed in the spotlight before the Competition Appeal



Tribunal in the United Kingdom. In that case, it was alleged that Napp had charged excessive prices to customers in the community segment of the market for the supply of sustained release morphine tablets and capsules in the UK. In doing so, it was further alleged that Napp had abused its dominant position in the market for the supply of sustained release morphine tablets and capsules in the UK.

In dealing with the allegations, the Tribunal, relying on the United Brands case test, said that it had to be shown that Napp’s prices were above the competitive level first by “assessing whether the difference between the costs actually incurred and the price actually charged is excessive. The Competition Tribunal then endorsed that to determine whether a price is excessive, the methods used by the Director are various comparisons of “(i) Napp’s prices with Napp’s costs, (ii) Napp’s prices with the costs of its next most profitable competitor, (iii) Napp’s prices with those of its competitors and (iv) Napp’s prices with prices charged by Napp in other markets”.

The Competition Appeal Tribunal then pronounced itself that Napp had made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition and that it was guilty of excessive pricing. What can be observed from the Napp case is that the comparisons were extended to include prices charged in other markets.

Unlike the Namibian Competition Act, the South African Competition Act 89 of 1998 (“the 1998 Act”), in section 1(1)(ix) simply defines an ‘excessive price’ as “a price for a good or service which – (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value referred to in sub-paragraph (aa).”

This definition is borrowed from the United Brands case. This much was acknowledged in the South African Competition Appeal Court in the celebrated case of *Mittal Steel South Africa Ltd and Others v Harmony Gold Mining Ltd, Case No 70/CAC/Apr07* (“Mittal case”). This was the first case to deal with excessive pricing in South Africa. In that case, the court was called upon to determine whether the practice of Mittal of employing import parity pricing in the South African Flat Steel

“THIS ARTICLE ATTEMPTS TO EXPLAIN HOW FOREIGN AUTHORITIES HAVE DEALT WITH THE EXERCISE OF DETERMINING WHEN A PRICE IS EXCESSIVE.”

Market constituted abuse of dominance by way of excessive pricing in contravention of section 8(a) of the 1998 Act.

The court indicated that it was not being oblivious to the provisions of section 8(a) of the 1998 Act, because of the fact that definition of excessive pricing was borrowed from United Brands.

“The prohibition of excessive pricing is always present in competition law and is enforced by various competition authorities around the globe. Why does excessive pricing matter? In general, the harmful economic effect of excessive pricing results in the exploitation of consumers.”

Taking a purposive approach, Davis JP, with whom other members of the court concurred, formulated a quatrain of questions which can be utilised to determine whether a price is excessive or not. He said that the first is the determination of the actual price of the good or service in question and which is alleged to be excessive. Secondly, he went on to say that one needs to determine the economic value of the good or service expressed in monetary terms, as an amount of money.

Thirdly, he argued that if the actual price is higher than the economic value of the good or service, is the difference unreasonable, or put it in another way, is there no ‘reasonable relation’ between the actual price and the economic value of the good or service? Fourthly, he concluded by asking: is the charging of the excessive price to the detriment of the consumers?

The Judge President then articulated how the quatrain of questions can be answered. He went on to say that the first two questions call for factual determinations of the actual price and the economic value, and the third for a value judgment. He also pointed out that the fourth enquiry also involves a value judgment.

From the plethora of cases stated above, it is safe to conclude that

to determine an excessive price, there has to be an empirical inquiry. The empirical inquiry has to be done by using several determinants and comparisons of costs of product, economic value of the product, its price, the relationship between economic value and its price (the profit margin) and also comparisons of prices of effective and profitable competitors. However, this is not a numerus clausus.

I submit that the methods of determining an excessive price under section 26(2) (a) of the 2003 Act in Namibia is going to be the same as the approaches of foreign authorities, such as the United Brands, Napp and Mittal cases.

Excessive pricing is adverse to consumer welfare in any developing country. Such consumer exploitation cannot be justified at any rate. It is the ethos of competition law to protect consumers from exploitation, therefore one of the purposes of the Namibian Competition Act, as contemplated in its section 2(b), is to “provide consumers with competitive prices and products”.



Decisions on the merger cases between:

1. The acquisition of Trentyre Namibia (Pty) Ltd by Nictus Holdings Ltd;
2. The merger between Trustco Property Holdings (Pty) Ltd and Elisenheim Property Development Company; and
3. The proposed merger between Colas South Africa (Pty) & the Roads Contractor Company Ltd and Guinea Fowl Investments Seventeen (PTY) Ltd.

1. THE PROPOSED ACQUISITION OF TRENTYRE (NAMIBIA) (PTY) LTD BY NICTUS HOLDINGS LTD

Introduction: On 13 December 2013, the Namibian Competition Commission received a notification in terms of section 44(1) of the Competition Act 2 of 2003 on the proposed acquisition of Trentyre (Namibia) (Pty) Ltd ("Trentyre") by Nictus Holdings Ltd ("Nictus").

The transaction involved Nictus acquiring control of Trentyre from Magister Ltd.

Acquirer: Nictus is a public company incorporated in accordance with the laws of Namibia and listed on the Namibian Stock Exchange. It is a diversified investment holding company of a group of companies involved in the retail of automobiles and furniture, and provides vehicle hire and financial and short-term insurance services in Namibia.

Target: Trentyre is a private company incorporated in terms of the laws of Namibia. It is wholly owned by Magister Ltd, a Mauritian company, and its ultimate owner is GoodYear Tire and Rubber Company, an American company.

Trentyre has 15 branches throughout Namibia and owns 4 service stations (retail fuelling stations) and supplies the following tyre products through its branches:

- Passenger vehicle and van tyres (consumer tyres);
- Truck and bus tyres (commercial tyres); and
- Agricultural and industrial tyres (off the road (OTR) tyres).

Competition analysis: The Commission concluded that there is no overlap between the products and services provided by the merging parties since the merging parties face competition from several competitors in all the relevant markets. Therefore, the Commission found that the merger was unlikely to impact on competition.

Public interest: Further, the Commission found that the proposed merger was unlikely to have a negative effect on employment as, according to the merging parties, the management and employees of Trentyre and the terms and conditions of their employment would remain unchanged.

Conclusion: Since the proposed merger raised no competition or public interest concerns, the Commission resolved to approve it without conditions.

2. THE PROPOSED MERGER BETWEEN TRUSTCO PROPERTY HOLDINGS (PTY) LTD AND ELISENHEIM PROPERTY DEVELOPMENT COMPANY (PTY) LTD

Introduction: On 10 February 2014, the Commission received a notification in terms of section 44(1) of the Competition Act 2 of 2003 on the proposed acquisition of the Elisenheim Property Development Company (Pty) Ltd by Trustco Property Holdings (Pty) Ltd.

Acquirer: The primary acquiring undertaking is Trustco Property Holdings (Pty) Ltd ("Trustco Property"), a private company incorporated in accordance with the laws of Namibia.

Trustco Property is wholly owned by Trustco Group Holdings Ltd ("Trustco"), a public company listed on the Namibian Stock Exchange ("NSX") and the Johannesburg Stock Exchange ("JSE").

Trustco Property is a property investment company involved in the acquisition and development of immovable property (industrial, commercial and residential). The properties are sold under freehold developments to individuals or let to tenants.

Target: The primary target undertaking is Elisenheim Property Development Company (Pty) Ltd ("Elisenheim"), a private company incorporated in accordance with the laws of Namibia. Elisenheim is a property development company exclusively involved in a township development called the Elisenheim Urban Development.

Competition analysis: There is no significant overlap between the activities of the merging parties, as the Trustco Group is not currently involved in any township developments similar to the Elisenheim Urban Development. However, they are involved in the acquisition and development of immovable property in the relevant geographic market and both merging parties own property zoned as residential and office property.

The Commission noted, that based on the market shares of the merging parties in the relevant markets, there is very little or no market share accretion as a result of the merger.

The merger does not appear to lessen or prevent competition, or result in the merged parties or any other undertakings acquiring or strengthening a dominant position in the relevant markets.

Public interest: The Commission noted that the proposed merger will have no negative impact on existing employment opportunities and is likely to create more employment opportunities.

Conclusion: The proposed merger is unlikely to result in a substantial lessening of competition or in any undertaking acquiring or strengthening a dominant position. Therefore it does not raise any public interest concerns.

The Commission thus resolved to approve the proposed merger without conditions.

3. PROPOSED MERGER: COLAS SOUTH AFRICA (PTY) LTD & THE ROADS CONTRACTOR COMPANY LTD AND GUINEA FOWL INVESTMENTS SEVENTEEN (PTY) LTD (Information provided by Justin Muyendekwa, Economist, Mergers & Acquisitions Division)

Introduction: On 22 July 2013, the Commission received a notification in terms of section 44(1) of the Competition Act 2 of 2003 on the proposed merger of Colas South Africa (PTY) LTD & the Roads Contractor Company LTD (RCC) and Guinea Fowl Investments Seventeen (PTY) LTD.

The transaction entails Colas South Africa and the RCC acquiring equal shareholding in Guinea Fowl Investments which was to be renamed Oryx Surfacing (Pty) Ltd and thereafter, transferring their road surfacing businesses and leasing and / or transferring their road surfacing assets to Oryx Surfacing (Pty) Ltd.

Acquirers: 1) Colas South Africa is a South African company and wholly owned subsidiary of Colas S.A., a company registered in France. It controls and has an interest in a number of undertakings: Colas East Africa, Colas Zambia, Colas Namibia and Dust-a-Side Namibia. Only Colas Namibia and Dust-a-Side Namibia undertake and conduct business activities in Namibia. It supplies bituminous binders and slurry for the purpose of road surfacing in Namibia through its Namibian subsidiary, Colas Namibia. Colas Namibia imports, manufactures and supplies bituminous binders to contractors for the purpose of road surfacing works undertaken and conducted in Namibia.

2) The RCC is a Namibian state-owned enterprise, wholly owned by the Government of the Republic of Namibia, as represented by the Ministry of Works and Transport. It controls the following undertakings: RCC Zambia (Pty) Ltd, Brick & Concrete Industries (Pty) Ltd, and RCC Capital (Pty) Ltd. The RCC conducts the business of road construction, road maintenance, railway construction, plant hire and civil engineering throughout Namibia.

Target: Guinea Fowl Investments is a shelf company, and as such was not directly controlled by any undertaking, nor does it undertake any activities.

Competition analysis: The Commission identified the relevant product market as that of Road Surfacing in Namibia. Although the identified product market was that of road surfacing, the Commission found that an important link exists between the downstream road surfacing market and its upstream bituminous products supply market. Given that the proposed merger is likely to have an effect on the upstream market (specifically regarding the supply of bitumen and bituminous binders and possible foreclosure of the only competitor to Colas Namibia) the Commission analysed both markets.

The Commission also assessed certain exclusivity clauses in the merging parties' agreement and the existing relationship between the RCC and the Roads Authority.

Considering all the relevant information at its disposal, the Commission resolved to prohibit the proposed merger.

The Commission prohibited the proposed merger based on its findings that the proposed merger is likely to result in:

- The prevention and lessening of competition in the downstream road surfacing market and the upstream market for the supply of bituminous binders and bitumen products;
- Colas Namibia strengthening its dominant position in the upstream market for the supply of bituminous products;
- No public benefit that would outweigh any detriment that would be as the result of the implementation of the proposed merger;
- The restriction of trade in the upstream market for the supply of bituminous products.

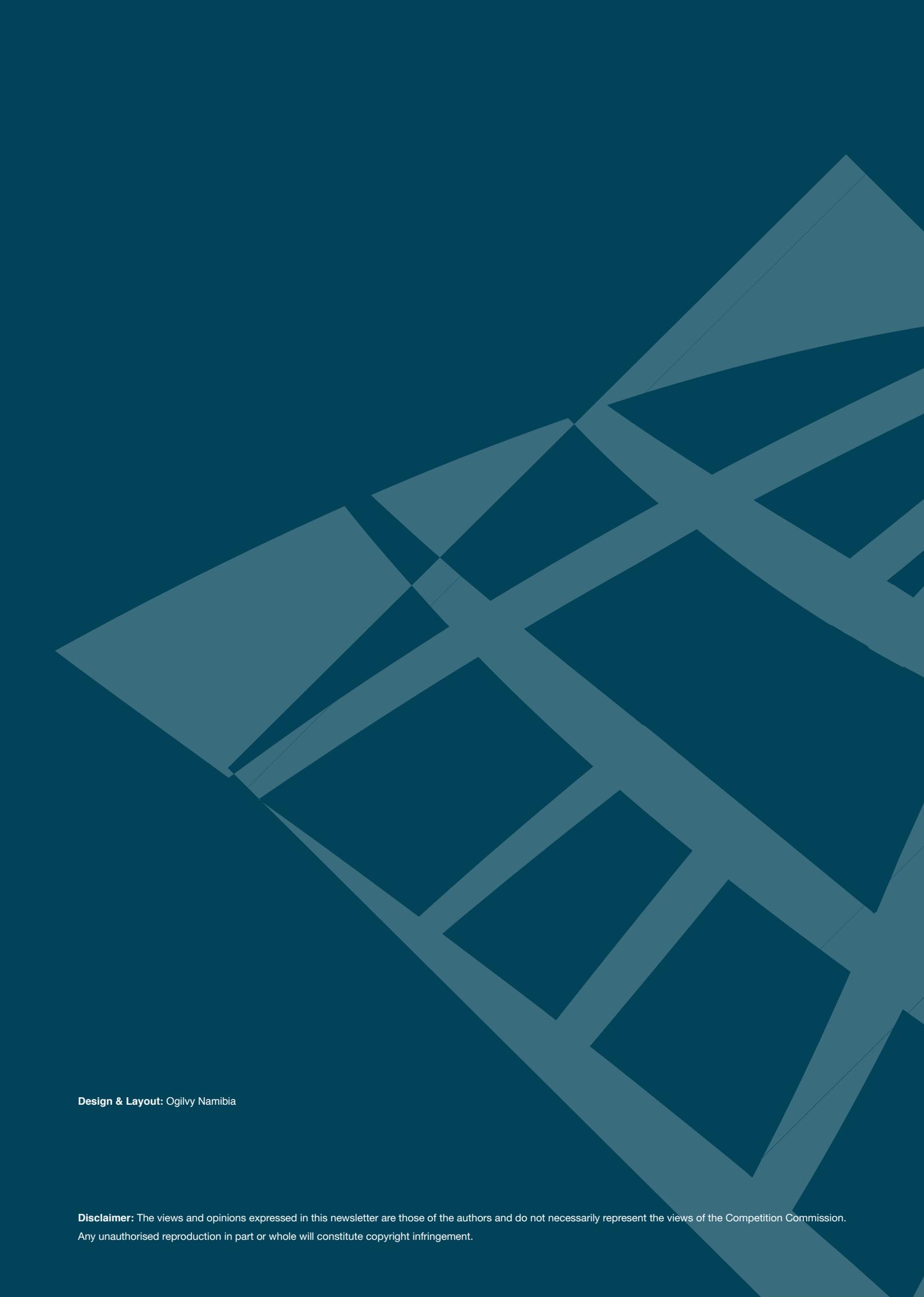
Public interest concerns: Small and Medium Enterprises, which comprise of small subcontractors largely owned by historically disadvantaged persons, could be restricted from gaining access to, or continuing to, operate in the relevant markets as subcontractors to the RCC.

The transaction did not raise any direct employment concerns, however, regarding section 47 (2) (e), approving the merger was going to negatively affect SMEs currently being subcontracted by the RCC. This in turn can also cause job losses on the part of SMEs, which is not in the public interest.

Conclusion: The Namibian Competition Commission on 30 December 2013 declined to give approval for the implementation of the proposed merger, as the merger raised competition and public interest concerns.

NB: The public is urged to refer to the Government Gazette for official merger determinations.

| CASE NUMBER | PRIMARY ACQUIRING FIRM | PRIMARY TARGET FIRM | INITIAL DATE FILED | STATUS |
|-----------------|---|--|--------------------|-----------------------------|
| 2013JULY0033MER | Guinea Fowl Investments Seventeen (Pty) Ltd. | Colas South Africa (Pty) Ltd & The Roads Contractor Company Ltd. | 22/07/2013 | Declined |
| 2013OCT0050MER | Pink Family Outfitters (Pty) Ltd. | Woolworths Namibia (Pty) Ltd. | 28/10/ 2013 | Approved without conditions |
| 2013NOV0052MER | Namibia Breweries Limited | Camelthorn Brewing Company (Pty) Ltd. | 15/11/2013 | Approved without conditions |
| 2013OCT0051MER | Fedex Express (Namibia) Proprietary Limited ("Fedex Namibia") | Supaswift Express Services (Namibia) (Pty) Ltd. | 28/10/2013 | Approved without conditions |
| 2013OCT0048MER | Erastus Shikongo Shapumba | Hartebeest Properties CC | 14/11/2013 | Approved without conditions |



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