

Draft Bill

BILL

To safeguard and promote competition in the Namibian market; to provide for the continued existence of the Namibian Competition Commission and make provision for its structure, powers, duties and functions; to provide for the establishment of the Competition Adjudicative Panel and make provision for its structure, powers, duties and functions; and to provide for related matters.

(Introduced by the Minister responsible for competition matters)

ARRANGEMENT OF SECTIONS

CHAPTER 1

PRELIMINARY, PURPOSE AND APPLICATION OF ACT

Section

1. Definitions
2. Purpose of Act
3. Application of Act

CHAPTER 2

INSTITUTIONAL AND ADMINISTRATIVE MATTERS

Part A

Namibian Competition Commission

4. Continued existence of Namibian Competition Commission
5. Board of Commissioners and appointment of members
6. Disqualification from appointment as a member of the Board of Commissioners
7. Powers and functions of Board of Commissioners
8. Term of office
9. Vacation of office and filling of vacancies

Draft Bill

10. Remuneration of members of the Board of Commissioners and members of a committee
11. Conduct of members of the Board of Commissioners and disclosure of interest
12. Meetings of the Board of Commissioners
13. Committees of the Board of Commissioners
14. Chief Executive Officer of the Commission
15. Appointment of staff of the Commission
16. The Executive
17. Conduct of Chief Executive Officer and other staff members of the Commission and disclosure of interest
18. Consultants
19. Appointment of inspectors
20. Rules

Part B

Administrative and financial matters concerning the Commission

21. Funds of Commission
22. Bank accounts
23. Investment of money
24. Financial year, financial statements, accounts, audit and annual report
25. Additional Report

CHAPTER 3

COMPETITION ADJUDICATIVE PANEL

26. Establishment of Competition Adjudicative Panel and appointment of members
27. Staffing of Competition Adjudicative Panel
28. Functions of and hearings by the Competition Adjudicative Panel
29. Evidence before Competition Adjudicative Panel
30. Remuneration of members of Competition Adjudicative Panel

CHAPTER 4

Draft Bill

RESTRICTIVE BUSINESS PRACTICES

Part A

Restrictive business practices

31. Horizontal restrictive practices
32. Vertical restrictive practices

Part B

Abuse of dominant position

33. Abuse of a dominant position

Part C

Exemption of certain prohibited practices

34. Application for exemption for certain prohibited practices and consideration of application
35. Determination of application for exemption
36. Exemption in respect of intellectual property rights
37. Exemption in respect of professional rules
38. Revocation or amendment of exemption and notification of grant, refusal, revocation or amendment of exemption
39. Conference in relation to an exemption application

CHAPTER 5

MERGER CONTROL

40. Merger defined
41. Control of mergers
42. Notice to be given to Commission of proposed merger
43. Investigation of proposed merger
44. Conference in relation to proposed merger

Draft Bill

45. Period for making determination in relation to proposed merger
46. Determination of proposed merger
47. Revocation of approval of proposed merger
48. Mergers falling below threshold
49. Mergers implemented in contravention of this Chapter
50. Review of merger decisions
51. Compliance with other laws relating to mergers

CHAPTER 6

MARKET INQUIRIES

52. Purpose of market inquiry
53. Initiation of market inquiry
54. Notice of market inquiry
55. Scope of market inquiry
56. Conducting of market inquiry by Executive
57. Obligations of Executive on finalising market inquiry

CHAPTER 7

INVESTIGATION AND ADJUDICATION PROCEDURES

Part A

Power to investigate and issuing of notice

58. Power to investigate
59. Notice of proposed investigation

Part B

Confidential information

60. Right to claim confidentiality
61. Restricted use of information

Draft Bill

Part C

Powers of entry and search and summons

- 62. Authority to enter and search premises with warrant
- 63. Authority to enter and search premises without warrant
- 64. Powers to enter and search
- 65. Conduct of entry and search
- 66. Summons

Part D

Complaint procedures

- 67. Initiating of complaint
- 68. Interim relief
- 69. Consent orders
- 70. Outcome of investigation

CHAPTER 8

- 71. Status and enforcement of orders
- 72. Civil actions
- 73. Variation or rescission of order
- 74. Limitations on instituting action
- 75. Standard of proof

CHAPTER 9

OFFENCES, ADMINISTRATIVE PENALTIES AND REMEDIES

- 76. Disclosure of information
- 77. Disclosure of private interest by staff members
- 78. Hindering administration of Act
- 79. Failure to comply with summons or to attend when summoned
- 80. Failure to comply with order

Draft Bill

- 81. Other offences
- 82. Penalties
- 83. Magistrate's court to impose penalties
- 84. Other orders
- 85. Administrative penalties
- 86. Proof of facts
- 87. Referral of matter to Prosecutor-General

CHAPTER 10

GENERAL

- 89. Corporate immunity
- 88. Advisory opinions
- 90. Competition advocacy
- 91. Limitation of liability
- 92. Delegation of powers and assignment of functions or duties

CHAPTER 11

REPEAL OF LAWS AND TRANSITIONAL PROVISIONS

- 93. Relationship with other authorities
- 94. Repeal of laws
- 95. Transitional provisions
- 96. Short title and commencement

Draft Bill

CHAPTER 1

PRELIMINARY, PURPOSE AND APPLICATION OF ACT

Definitions

1. In this Act, unless the context otherwise indicates -

“advocacy” means the promotion of competition in the economy through appropriate non- enforcement measures, programmes or activities aimed at various stakeholders;

“agreement” when used in relation to prohibited conduct includes a written or verbal, arrangement or understanding, whether or not legally enforceable;

“Acquiring undertaking” means an undertaking –

(a) that, as a result of a transaction in any circumstances set out in section 40, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another undertaking;

(b) that has direct or indirect control over the whole or part of the business of an undertaking contemplated in paragraph (a); or

(c) the whole or part of whose business is directly or indirectly controlled by an undertaking contemplated in paragraph (a) or (b);

“Board of Commissioners” means the Board of Commissioners referred to in section 5;

“Chief Executive Officer” means the Chief Executive Officer of the Commission appointed in terms of section 14(1);

“Commission” means the Namibian Competition Commission referred to in section 4(1);

Draft Bill

“committee” means a committee of the Board of Commissioners established under section 13;

“Competition Adjudicative Panel” means the Competition Adjudicative Panel established by section 26;

“Complainant” means a person who has submitted a complaint in terms of section 67(2) of the Act

"concerted practice” means conduct between undertakings achieved through direct or indirect contact, that replaces their independent actions;

“confidential information” means trade, business or industrial information that -

- (a) belongs to an undertaking;
- (b) has a particular economic value; and
- (c) is not generally available to or known by others;

“days “ means any day from Monday to Friday excluding all public holidays as referred to in section 1 of the Public Holidays Act, 1990 (Act No. 26 of 1990).

“dominant undertaking” means an undertaking referred to in section 33(3);

“essential facility” means an infrastructure or resource that cannot feasibly (whether economically, technically or environmentally) be duplicated or substituted in order to provide a service;

“historically disadvantaged persons” means persons who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices;

Draft Bill

“horizontal relationship” means a relationship between actual or potential competitors;

“horizontal restrictive practice” means an agreement, decision or concerted practice contemplated in section 31;

“inspector” means a person designated or appointed as such in terms of section 19;

“market inquiry” means a formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm;

“market power” means the ability of an undertaking to control prices, exclude competition or to behave to an appreciable extent independently of competitors, customers or suppliers;

“Minister” means the Minister responsible for competition matters;

“person” means a natural or a juristic person, and includes a partnership, association, trust, state-owned-entity or any group of people acting in concert, whether incorporated or not;

“premises” includes land, any building, structure, vehicle, vessel, aircraft or container;

“prescribed” means prescribed by a rule made or in force under this Act;

“prohibited conduct” means an act or omission by any person or undertaking in contravention of this Act, other than an act or omission that constitutes a criminal offence under this Act;

“public holiday” means the day referred to in section (1) of the Public Holidays Act, 1990 (Act No. 26 of 1990);

Draft Bill

“public regulation” means any law, or any licence, tariff, directive, or similar authorisation issued by a regulating authority or pursuant to any statutory authority;

“regulatory authority” means an entity established by or under any law which is responsible for regulating an industry or sector of an industry;

“respondent” means a person against whom a complaint has been initiated in terms of this Act;

“the Executive” means the Executive referred to in section 16(1);

“this Act” includes any rules or regulations made or in force under this Act;

“undertaking” includes an individual, firm, partnership, association, trust, body corporate, unincorporated body of persons and other entities or juristic persons, irrespective of whether active or dormant and whether created or controlled by private persons or by the State, which engage or intend to engage in commercial activities, whether for profit or not, and includes other entities directly or indirectly controlled by them, or under whose direct or indirect control they fall;

“vertical relationship” means the relationship between an undertaking and its actual or potential suppliers, customers, or both.

“vertical restrictive practice” means an agreement which has the effect contemplated in section 32;

Purpose of Act

2. The purpose of this Act is to safeguard and promote competition in Namibia in order to -

Draft Bill

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

Application of Act

3. (1) This Act applies to all economic activity within Namibia or having an effect in Namibia, except –
- (a) collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 2007 (Act No. 11 of 2007), as amended;
 - (b) in relation to goods or services which the Minister, with the concurrence of the Commission, declares, by notice in the *Gazette*, to be exempt from the provisions of this Act.
- (2) This Act binds the State in so far as the State engages in commercial activities, but the State is not subject to any provision relating to criminal liability.

Draft Bill

- (3) This Act and another Act do not limit each other where they can have effect concurrently, on competition matters, and if a provision of this Act and a provision of another Act are inconsistent, then the provision of this Act prevails.
- (4) If a particular number of days is provided for doing an act,
 - (a) the number of days must be calculated by –
 - (i) excluding the first day; and
 - (ii) including the last day.
 - (b) the days from 16 December to 15 January, both inclusive, are not counted in computing the time allowed for doing the act.

CHAPTER 2

INSTITUTIONAL AND ADMINISTRATIVE MATTERS OF THE COMMISSION

Part A

Namibian Competition Commission

Continued existence of Namibian Competition Commission

4. (1) The Namibian Competition Commission established by section 4 of the Competition Act, 2003 (Act No. 2 of 2003), continues to exist as the Namibian Competition Commission.
- (2) The Commission -
 - (a) has jurisdiction throughout Namibia;

Draft Bill

- (b) is a juristic person which is capable, in its own name, of suing and of being sued and, subject to this Act, of performing all the acts that a juristic person may perform lawfully;
- (c) is independent and subject only to the Namibian Constitution and the law;
- (d) may acquire or hire such movable or immovable property as may be required for the effective performance of its functions, and dispose of property so acquired or hired; and
- (e) may enter into contracts in connection with the performance of its functions.

Board of Commissioners and appointment of members

- 5.** (1) Subject to this Act, a member of the Commission established by the Competition Act, 2003, who is in office at the date of commencement of this Act is deemed to have been appointed as a member of the Board of Commissioners in terms of this Act and must perform the functions of the Board of Commissioners until his or her term of office expires.
- (2) The Board of Commissioners comprises of not less than three and not more than five members, including the chairperson and the vice chairperson, appointed by the Minister.
- (3) The vice-chairperson performs the functions of the chairperson whenever the office of the chairperson of the Board of Commissioners is vacant or the chairperson is for any other reason unable to perform those functions.
- (4) When appointing members of the Board of Commissioners the Minister may select persons who, collectively, have expertise in industry, commerce, economics, law, accountancy or public administration, provided that at least one member must have suitable qualifications and experience in law and at

Draft Bill

least one other member must have suitable qualifications and experience in economics.

- (5) Every member of the Board of Commissioners serves on a part-time basis.

Disqualification from appointment as a member of the Board of Commissioners

- 6.** A person may not be a member of the Board of Commissioners if that person –
- (a) is an un-rehabilitated insolvent;
 - (b) has ever been, or is, removed from an office of trust on account of misconduct in respect of fraud or the misappropriation of money;
 - (c) is subject to an order of a competent court holding that person to be mentally unfit or disordered;
 - (d) has been convicted of an offence, committed after the Constitution of the Republic of Namibia, 1990 (Act No 1 of 1990) took effect and sentenced to imprisonment without the option of a fine; or
 - (e) is a member of the National Assembly, the National Council, regional council or local authority;
 - (f) is an office bearer of any party, movement or organisation of a party-political nature.

Powers and functions of the Board of Commissioners

- 7.** (1) The Board of Commissioners has the following powers and functions -
- (a) to direct the strategy of the Commission;
 - (b) to approve the budget of the Commission;

Draft Bill

- (c) to approve the policies of the Commission;
- (d) to ensure the effective and efficient use of the resources of the Commission;
- (e) to ensure that the Commission is in compliance with all its legal requirements and its reporting and financial accountability obligations contemplated in this Act;
- (f) to supervise the performance of the Chief Executive Officer;
- (g) to ensure that the Commission operates in accordance with the principles of good governance;
- (h) to determine phase 2 and 3 mergers;
- (i) to grant or refuse exemption applications;
- (j) to refer complaints relating to alleged prohibited conduct to the Competition Adjudicative Panel for adjudication;
- (k) to refer or oppose referrals to the Competition Adjudication Panel all jurisdictional matters or disputes of interpretation regarding the Act.

Term of office

- 8.** Subject to section 9, a member of the Board of Commissioners holds office for a term not exceeding three years, and may not serve for more than two terms.

Vacation of office and filling of vacancies

- 9.** (1) A member of the Board of Commissioners vacates office, if the member -

Draft Bill

- (a) is convicted of an offence and sentenced to imprisonment without the option of a fine;
 - (b) resigns his or her office by giving the Minister three months' notice in writing of his or her intention to resign, but the Minister may permit a member to resign with shorter notice;
 - (c) has been absent from three consecutive meetings of the Board of Commissioners without leave of the chairperson of the Board of Commissioners;
 - (d) is removed from office by the Minister under subsection (2).
- (2) The Minister may remove by notice in writing a member of the Board of Commissioners from office if the Minister, after giving the member a reasonable opportunity to be heard, is satisfied that the member -
- (a) has failed to comply with any obligation imposed by section 11;
 - (b) is guilty of neglect of duty or misconduct;
is incapable of performing his or her duties of the office, by reason of physical or mental illness; or
 - (c) becomes disqualified by virtue of section 6.
- (3) If the office of a member of the Board of Commissioners becomes vacant, the vacancy must be filled by the appointment of another person as a member for the unexpired portion of the term of office of the person who ceased to hold office.

Draft Bill

Remuneration of members of the Board of Commissioners and members of a committee

- 10.** The members of the Board of Commissioners and members of a committee who are not members of the Board of Commissioners, must be paid such remuneration, allowances or other benefits as determined by the Minister, with the concurrence of the Minister of Finance and in accordance with section 18 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019).

Conduct of members of the Board of Commissioners and disclosure of interest

- 11.** (1) A member of the Board of Commissioners may not -
- (a) engage in any activity that may undermine the integrity of the Commission;
 - (b) participate in any decision concerning a matter in respect of which the member has a financial or other personal interest; or
 - (c) use any confidential information, obtained in the performance of his or her functions as a member, to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person.
- (2) Every member of the Board of Commissioners must disclose in writing to the Minister and to the Board of Commissioners any direct or indirect financial interest which the member has or acquires in any business carried on in Namibia or elsewhere or in any body corporate carrying on any business in Namibia or elsewhere.
- (3) A member of the Board of Commissioners who has or acquires any financial or other personal interest, either directly or indirectly, in any matter which is before the Board of Commissioners for discussion and determination must -
- (a) immediately and fully disclose the interest to the Board of Commissioners; and

Draft Bill

- (b) withdraw from any further discussion or determination by the Board of Commissioners of that matter.

Meetings of the Board of Commissioners

- 12.**
- (1) The first meeting of the Board of Commissioners must be held at a place and time determined by the chairperson of the Board of Commissioners and any meeting of the Board of Commissioners thereafter must be held at a place and time determined by the members of the Board of Commissioners.
 - (2) If for any reason a meeting determined by the Board of Commissioners cannot take place, the Chief Executive Officer, with the concurrence of the chairperson of the Board of Commissioners, must convene the next meeting of the Board of Commissioners.
 - (3) The chairperson of the Board of Commissioners -
 - (a) may at any time convene a special meeting of the Board of Commissioners;
 - (b) presides at all meetings of the Board of Commissioners at which he or she is present.
 - (4) In the absence of the chairperson of the Board of Commissioners from a meeting, the vice-chairperson must perform the functions and exercise the powers of the chairperson of the Board of Commissioners.
 - (5) In the absence of both the chairperson and vice-chairperson of the Board of Commissioners from a meeting, the members of the Board of Commissioners present must elect under the chairpersonship of the Chief Executive Officer one of their number to preside at that meeting, and to perform the functions and exercise the powers of the chairperson of the Board of Commissioners.

Draft Bill

- (6) At a meeting of the Board of Commissioners -
 - (a) a majority of the members thereof form a quorum;
 - (b) in the absence of consensus, all decisions are decided by a majority of votes of the members present and voting; and
 - (c) the member presiding has a deliberative vote and, in the event of any equality of votes, also a casting vote.

- (7) The Board of Commissioners may invite any person who has expert knowledge of a matter before the Board of Commissioners for determination to attend a meeting of the Board of Commissioners, and take part in discussions in relation to that matter, but such person has no vote.

- (8) The member of the Board of Commissioners presiding at a meeting thereof must cause minutes to be taken and the proceedings recorded.

- (9) Despite subsection (6), a written resolution not passed at a meeting of the Board of Commissioners but signed by all the members of the Board of Commissioners is as valid and effectual as if it had been passed at a meeting of the Board of Commissioners duly convened and constituted.

Committees of the Board of Commissioners

- 13.** (1) The Board of Commissioners may establish one or more committees to -
 - (a) investigate and report to the Board of Commissioners on any matter which the Board of Commissioners may refer to the committee for that purpose; or
 - (b) exercise any power or perform any function of the Board of Commissioners which may be delegated or assigned to the committee, except the power to make rules.

Draft Bill

- (2) A committee must consist of one or more members of the Board of Commissioners or one such member and other persons, as the Board of Commissioners may determine.
- (3) The Board of Commissioners must designate a member thereof to be the chairperson of a committee.
- (4) The chairperson of the Board of Commissioners may attend any meeting of a committee of which he or she is not a member and may take part in the proceedings thereof as if he or she were appointed as a member thereof.
- (5) The Board of Commissioners may at any time dissolve or reconstitute a committee.
- (6) The Board of Commissioners is not divested or relieved of a power or function which has been delegated or assigned to a committee.
- (7) A decision by a committee in the exercise of a power delegated to the committee by the Board of Commissioners may be varied or set aside at the discretion of the Board of Commissioners.
- (8) Subsections (1) and (3) of section 11 apply with the necessary changes to members of a committee who are not members of the Board of Commissioners.
- (9) Section 12(5), (6), (7) and (9) apply with the necessary changes to the meetings of a committee.
- (10) The Board of Commissioners may determine the function, powers and procedures that govern the meetings of any committee.

Draft Bill

- (11) If a committee is unable for any reason to reach a decision on any matter, the committee must refer such matter to the Board of Commissioners for a decision.
- (12) A decision of the Board of Commissioners on any matter referred to it in terms of subsection (11) will be regarded as a decision of the committee concerned.
- (13) The Board of Commissioners may remove from office any member of any committee referred to in this section if the Board of Commissioners is reasonably satisfied, after having given the member concerned an opportunity to be heard, that the member -
 - (a) is physically or mentally unfit or unable to effectively exercise, perform or carry out the powers, functions or duties of a member; or
 - (b) has neglected the powers, functions or duties as a member.

Chief Executive Officer of the Commission

- 14.** (1) The Board of Commissioners must appoint a suitable person who has expertise relevant to the objects and functions of the Commission to be the Chief Executive Officer of the Commission.
- (2) The Board of Commissioners must determine, subject to section 18(3) of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019), the remuneration and other conditions of service of the Chief Executive Officer.
- (3) The Chief Executive Officer is appointed for a period of 5 years and is eligible for re-appointment upon the expiry of that period.
- (4) The Chief Executive Officer, subject to this Act and to the directions of the Board of Commissioners -

Draft Bill

- (a) must perform the functions as are conferred on him or her by or under this Act or as may be delegated or assigned to him or her by the Board of Commissioners;
 - (b) is responsible for the carrying out of the resolutions of the Board of Commissioners;
 - (c) manages the affairs of the Commission in order to form and develop an efficient administration; and
 - (d) is responsible for the organisation, control, management and discipline of the staff of the Commission.
- (5) Except if the Board of Commissioners decides otherwise, the Chief Executive Officer -
- (a) must attend meetings of the Board of Commissioners; and
 - (b) may take part in discussions on any matter under consideration before the Board of Commissioners, but has no right to vote on any such matter.
- (6) If the office of the Chief Executive Officer is vacant or he or she is for any reason unable to perform the functions of the office, the Board of Commissioners may appoint -
- (a) a management staff member of the Commission; or
 - (b) any other suitable person,

to act as Chief Executive Officer during the vacancy or during the period that the Chief Executive Officer is unable to perform those functions.

Draft Bill

- (7) Subject to this Act, the Secretary to the Commission appointed in terms of section 13(1) of the Competition Act, 2003, at the date of commencement of this Act is deemed to be appointed as the Chief Executive Officer of the Commission.
- (8) The remuneration and other conditions of service of the Chief Executive Officer referred to in subsection (7) as on the date of commencement of this Act may not be less favourable than the remuneration and other conditions of service which applied to him or her immediately before the date of commencement of this Act.
- (9) Any reference in any other law to the Secretary of the Commission appointed in terms of section 13(1) of the Competition Act, 2003, is construed as a reference to the Chief Executive Officer.

Appointment of Staff of the Commission

- 15.** (1) The Chief Executive Officer, subject to subsections (2) and (3) -
- (a) may appoint, after consultation with the Board of Commissioners, as many Executive Directors of the Commission as he or she considers necessary to assist him or her in the exercise of his or her powers and the performance of his or her functions under this Act;
 - (b) may appoint additional staff members of the Commission as he or she considers necessary to assist him or her in the exercise of his or her powers and the performance of his or her functions under this Act, and must determine the remuneration and other conditions of service and benefits of the additional staff members of the Commission.
- (2) The Board of Commissioners must determine, subject to section 18(3) of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019), the

Draft Bill

remuneration and other conditions of service and benefits of Executive Directors of the Commission;

- (3) Executive Directors and additional staff members appointed to the Commission immediately prior to the date of commencement of this Act continue to be Executive Directors and additional staff members of the Commission from that date and are deemed to be staff members appointed under subsection (1)(a) or (b), as the case may be.
- (4) The remuneration and other conditions of service of staff members referred to in subsection (1) as on the date of commencement of this Act may not be less favourable than the remuneration and other conditions of service which applied to them immediately before the date of commencement of this Act.

The Executive

- 16.** (1) The Executive of the Commission comprises the Chief Executive Officer and the Executive Directors.
- (2) In addition to any other powers and functions conferred on the Executive by or under this Act or any other law, it has the following powers and functions –
 - (a) investigating complaints relating to alleged prohibited conduct in terms of this Act;
 - (b) investigating merger notifications;
 - (c) authorising with or without conditions or prohibiting phase 1 mergers;
 - (d) assessing exemption applications;
 - (e) enforcing compliance with this Act;

Draft Bill

- (f) initiating and conducting market inquiries;
- (g) undertaking impact assessments;
- (h) developing guidelines in respect of any matter to better achieve the purposes of this Act;
- (i) implementing measures to develop public awareness of this Act;
- (j) implementing measures to increase market transparency;
- (k) negotiating agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;
- (l) advising, and receiving advice from, any regulatory authority;
- (m) liaising and exchanging information, knowledge and expertise with authorities of other countries entrusted with functions similar to those of the Commission;
- (n) advising the Minister or other relevant authorities on any policy or legislative adoption or change that might have an impact on competition
- (o) conducting price surveillance studies;
- (p) issuing non-binding advisory opinions;
- (q) negotiating and entering into consent agreements;
- (r) carrying out research into competition related matters on its own accord or referred to the Commission by the Minister;

Draft Bill

- (s) disseminating information to persons engaged in trade or commerce and the public with respect to the provisions of this Act and the functions of the Commission.
- (3) Section 12 and 13 apply, with the necessary changes, to the meetings and committees of the Executive.

Conduct of Chief Executive Officer and other staff members of the Commission and disclosure of interest

- 17.** (1) The Chief Executive Officer and other staff members of the Commission may not -
- (a) engage in any activity that may undermine the integrity of the Commission;
 - (b) participate in any decision concerning a matter in respect of which the Chief Executive Officer or staff member has a financial or other personal interest;
or
 - (c) use any confidential information, obtained in the performance of his or her functions as Chief Executive Officer or staff member, to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person.
- (2) The Chief Executive Officer must submit, within 30 days of his or her appointment, and annually thereafter, to the Board of Commissioners a written statement of any direct or indirect financial interest he or she holds or has acquired in any business carried on in Namibia or elsewhere or in any body corporate carrying on any business in Namibia or elsewhere.
- (3) Every other staff member of the Commission other than the Chief Executive Officer must submit, within 30 days of his or her appointment, and annually

Draft Bill

thereafter, to the Chief Executive Officer a written statement of any direct or indirect financial interest he or she holds or has acquired in any business carried on in Namibia or elsewhere or in any body corporate carrying on any business in Namibia or elsewhere.

- (4) If -
- (a) the Chief Executive Officer acquires after his or her appointment any direct or indirect financial interest in any business carried on in Namibia or elsewhere or in any body corporate carrying on any business in Namibia or elsewhere, the Chief Executive Officer must give, within 7 days after the acquisition, a written statement of the nature of the interest to the Board of Commissioners;
 - (b) any other staff member of the Commission than the Chief Executive Officer acquires after his or her appointment any direct or indirect financial interest in any business carried on in Namibia or elsewhere or in any body corporate carrying on any business in Namibia or elsewhere, the staff member must give, within 7 days after the acquisition, a written statement of the nature of the interest to Chief Executive Officer.
- (5) The Chief Executive Officer and other staff members of the Commission who has or acquires any financial or other personal interest, either directly or indirectly, in any matter which is before the Commission for investigation, discussion or determination must -
- (a) immediately and fully disclose the interest to the Board of Commissioners, or the Chief Executive Officer, as the case may be; and
 - (b) if he or she is present at the meeting at which the matter is discussed or determined, withdraw from any further discussion or determination of that matter.

Draft Bill

Consultants

18. The Commission may engage persons to give advice to, and perform services for, the Commission on such terms and conditions as the Commission may determine.

Appointment of inspectors

19. (1) The Chief Executive Officer may -
- (a) designate any staff member of the Commission; or
 - (b) appoint any other suitable person,
- to be an inspector for the purposes of conducting a search and seizure as contemplated in Part C of Chapter 7 of this Act.
- (2) An inspector is appointed on such terms and conditions as the Chief Executive Officer may determine.
- (3) The Chief Executive Officer must furnish an inspector with a certificate of appointment in the prescribed form, which certificate is *prima facie* proof of the appointment concerned.
- (4) An inspector must, in performing any function in terms of this Act -
- (a) be in possession of the certificate of appointment referred to in subsection (3); and -
 - (i) upon request show the certificate to any person who is affected by the exercise of the functions of the inspector under this Act.

Draft Bill

- (5) An inspector performing any function in terms of this Act may be accompanied by an interpreter and any other person reasonably required to assist in conducting the search and seizure.

Rules

- 20.** The Board of Commissioners, in consultation with the Minister, may make rules by notice in the *Gazette* relating to the functions of the Commission, including -
- (a) the administration, organisation and operations of the Commission;
 - (b) the procedure to be followed in respect of applications and notices to, and proceedings of, the Commission;
 - (c) the form of applications, notices, certificates and other documents required for the purposes of this Act, including time periods and information required in respect of applications;
 - (d) fees to be paid for purposes of this Act; and
 - (d) any other matter which is required or permitted to be prescribed under this Act, or considered necessary or expedient by the Commission in order to achieve the objects of this Act.

Part B

Administrative and financial matters concerning the Commission

Funds of Commission

- 21.** (1) The funds of the Commission consist of -
- (a) money appropriated by Parliament for the purposes of the Commission;

Draft Bill

- (b) fees payable to the Commission in terms of this Act;
 - (c) interest derived from the investment of funds of the Commission;
 - (d) a portion of administrative penalties levied for prohibited conduct as prescribed; and
 - (e) money received from any other source.
- (2) Each year, the Commission must submit to the Minister, at least 90 days before the commencement of its next financial year, an annual business and financial plan in accordance with sections 14, 15 and 16 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019).
- (3) Expenditure incurred for the performance of the functions of the Commission, including remuneration, allowances or other benefits payable to members of the Board of Commissioners or a committee, staff members of the Commission or other persons, must be defrayed from the funds of the Commission.
- (4) The Chief Executive Officer is the accounting officer of the Commission and is responsible for the control and management of -
- (a) all income and expenditure of the Commission; and
 - (b) all assets and the discharging of all financial liabilities of the Commission.

Bank accounts

- 22.** (1) The Commission must open and maintain in its name such bank accounts at one or more banking institutions in Namibia, registered in terms of the Banking Institutions Act, 1998 (Act 2 of 1998) as are necessary for the performance of the functions of the Commission.

Draft Bill

- (2) The Board of Commissioners must ensure that -
 - (a) all money received by or on behalf of the Commission is deposited into the bank account concerned as soon as practicable after being received;
 - (b) any payment by or on behalf of the Commission is made from the bank account concerned; and
 - (c) no money is withdrawn, paid or transferred from the bank account concerned without the authority of the Board of Commissioners, or that of its delegated official.
- (3) Funds drawn on any account of the Commission, or any other form or document to be completed for the withdrawal, payment or transfer of money from any of the bank accounts of the Commission, must be approved on the Commission's behalf by at least two persons authorised for that purpose by the Board of Commissioners.

Investment of money

- 23.** Any money of the Commission that is not immediately required for expenditure by the Commission may be invested at a banking institution referred to in section 22(1) or a building society registered in terms of the Building Societies Act, 1986 (Act 2 of 1986).

Financial year, financial statements, accounts, audit and annual report

- 24.** (1) The financial year of the Commission is as prescribed.
- (2) The Board of Commissioners must appoint a person registered as an accountant and auditor in terms of the Public Accountants' and Auditors' Act, 1951 (Act

Draft Bill

No. 51 of 1951) and engaged in public practice as such, as the auditor of the Commission.

- (3) The Board of Commissioners must -
 - (a) keep full and proper records of the financial affairs of the Commission;
 - (b) prepare financial statements for each financial year in accordance with generally accepted accounting practices principles and procedures as are necessary to represent fairly the state of affairs and business of the Commission and to explain the transactions and financial position of the Commission;
 - (c) submit those financial statements within three months after the end of the financial year to the auditor of the Commission for auditing;
 - (d) submit within six months of the end of the financial year to the Minister -
 - (i) an annual report on the activities of the Commission during that financial year;
 - (ii) the audited financial statements of the Commission for that financial year; and
 - (iii) the report of the auditor on those statements.
- (4) The annual report and financial statements referred to in subsection (2) must comply with the requirements of section 22(2) of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019), and must -
 - (a) fairly present the state of affairs of the Commission, their business, their financial results, their performance against predetermined objectives and their financial position at the end of the financial year concerned;

Draft Bill

- (b) include particulars of -
 - (i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year;
 - (ii) any criminal or disciplinary steps taken as a consequence of such losses or irregular expenditure or fruitless and wasteful expenditure;
 - (iii) any losses recovered or written off; and
 - (iv) any other matter that may be prescribed.
- (5) The Minister must table the report and statements referred to in subsection (3) in the National Assembly –
 - (a) within 30 days after receipt thereof, if the National Assembly is in ordinary session; or
 - (b) if the National Assembly is not in ordinary session, within 14 days of the commencement of its next ordinary session.

Additional report

- 25.** If the Minister at any time so requires, the Board of Commissioners must furnish, in addition to the annual report contemplated in section 24(3), to the Minister a report and particulars relating to the performance of the functions of the Commission or the Board of Commissioners in relation to any matter as the Minister may require.

Draft Bill

CHAPTER 3

COMPETITION ADJUDICATIVE PANEL

Establishment of Competition Adjudicative Panel and appointment of members

- 26.** (1) There is hereby established a Competition Adjudicative Panel which –
- (a) has jurisdiction throughout Namibia;
 - (b) is independent and subject only to the Constitution and the law;
 - (c) must exercise its functions in accordance with this Act; and
 - (d) must perform its functions impartially and without fear, favour or prejudice and in as transparent a manner as is appropriate having regard to the nature of the specific function.
- (2) The Competition Adjudicative Panel consists of a chairperson and at least six other members appointed by the President on a part-time basis for a renewable term of 5 years.
- (3) In appointing the chairperson and members of the Competition Adjudicative Panel as contemplated in subsection (2) the President must have regard to persons with suitable qualifications and experience in law or economics.
- (4) The Judicial Services Commission must recommend, for appointment to the Competition Adjudicative Panel by the President, those members with suitable qualifications and experience in law.
- (5) The President must designate a member of the Competition Adjudicative Panel as deputy chairperson thereof to perform the functions of the chairperson whenever the office of the chairperson of the Competition

Draft Bill

Adjudicative Panel is vacant or the chairperson is for any other reason unable to perform those functions.

- (6) Sections 9 and 11 apply with the necessary changes to the chairperson, deputy chairperson and other members of the Competition Adjudicative Panel.

Staffing of Competition Adjudicative Panel

- 27.** (1) The Chairperson of the Competition Adjudicative Panel may appoint –
- (a) a Registrar who, in addition to any other duties conferred on him or her shall be responsible for convening all sittings of the members;
 - (b) such other staff as he or she considers necessary for the performance of the Competition Adjudication Panel’s functions under this Act on such terms and conditions as it may determine, in consultation with the Minister and with the concurrence of the Minister of Finance.
- (2) Despite subsection (1), the Chief Executive Officer of the Commission may second a staff member of the Commission as Registrar, and other staff members to offer support, to the Competition Adjudicative Panel.

Functions of and Hearings by the Competition Adjudicative Panel

- 28.** (1) The Competition Adjudicative Panel may –
- (a) adjudicate on any prohibited conduct referred to it to determine whether the conduct has occurred, and if so, impose any remedy provided for in this Act;
 - (b) adjudicate on all jurisdictional matters and disputes of interpretation relating to the provisions of this Act;

Draft Bill

- (c) review any decision of the Board of Commissioners that may, in terms of this Act be referred to it;
 - (d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.
- (2) Section 20 read with the changes required by the context applies to the Competition Adjudication Panel, and reference to the Board of Commissioners must be construed as a reference to the Competition Adjudicative Panel.
- (3) The Competition Adjudicative Panel hears matters referred to it in terms of this Act and must do so -
- (a) in an inquisitorial manner;
 - (b) as expeditious as possible;
 - (c) in accordance with the principles of natural justice; and
 - (d) as informally as possible.
- (4) The chairperson of the Competition Adjudicative Panel manages the caseload of the Competition Adjudicative Panel and may assign each matter referred to the Competition Adjudicative Panel to a subpanel of the Competition Adjudicative Panel composed of at least any three members of the Competition Adjudicative Panel.
- (5) When assigning a matter to a subpanel of the Competition Adjudicative Panel, the chairperson must -

Draft Bill

- (a) subject to section 26 subsection (3), ensure that at least one of the members concerned is a person who has suitable legal qualifications, training and experience; and
 - (b) designate one of the members concerned to preside over the proceedings at the hearing.
- (5) If there is no member of the subpanel of the Competition Adjudicative Panel concerned who has suitable legal qualifications, training and experience as contemplated in section 26 subsection (3), the chairperson of the Competition Adjudicative Panel may appoint, with the concurrence of the President, and on the conditions agreed between the parties, another person with suitable legal qualifications, training and experience to advise the three members concerned regarding the consideration of a matter.
- (6) In carrying out its functions a subpanel contemplated in subsection (1) may -
- (a) have regard to international developments in the field of competition law;
 - (b) consult any person, organisation or institution with regard to any matter.
- (7) A decision of a subpanel is the decision of the Competition Adjudication Panel.
- (8) The decision of the Competition Adjudicative Panel must be given in writing and must include reasons for that decision.
- (9) Section 66 applies with the necessary amendments to the hearing of a matter by the Competition Adjudicative Panel and subpanels.
- (10) The decisions and orders of the Competition Adjudicative Panel have the same force and effect as the decisions and orders of the High Court.

Draft Bill

- (11) An order of the Competition Adjudicative Panel may be filed in the High Court as an order of the Court in accordance with its rules.
- (12) If, on the expiry of the term of office of a member of the Competition Adjudication Panel, that member is still considering a matter before the Panel, that member may continue to act as a member in respect of that matter only.

Evidence before the Competition Adjudicative Panel

- 29.**
- (1) The Competition Adjudicative Panel, when hearing a matter as contemplated in section 29 may receive in evidence any statement, document, information or matter that may in its or their opinion assist to deal effectively with a matter adjudicated by it, whether or not the statement, document, information or matter would otherwise be admissible in a court of law.
 - (2) During a hearing the person presiding thereat may order a person appearing before the hearing, subject to subsection (4) -
 - (a) to answer any question; or
 - (b) to produce any article, item, book or document.
 - (3) Every person giving evidence at a hearings must answer, subject to subsection (4), any question put to him or her.
 - (4) A person attending before the Competition Adjudicative Panel at a hearing is entitled to the same immunities and privileges as a witness before the High Court.

Remuneration of members of Competition Adjudicative Panel

- 30.** The members of the Competition Adjudicative Panel must be paid such remuneration, allowances or other benefits as the President, with the concurrence of the Minister of Finance, may determine.

Draft Bill

CHAPTER 4 RESTRICTIVE BUSINESS PRACTICES

Part A *Restrictive Business Practices*

Horizontal restrictive practices

- 31.** (1) An agreement between, or decision or concerted practice by, undertakings in a horizontal relationship, or an association of undertakings, in the same market is per se prohibited –
- (a) if it involves any of the following practices –
- (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services;
 - (iii) collusive tendering;
 - (iv) limiting or controlling production, market outlets or access, technical development or investment; or
- (2) An agreement between, or decision or concerted practice by, undertakings in a horizontal relationship, or an association of undertakings, in the same market is prohibited if it has the effect of preventing, restricting or distorting competition in a market, unless a party to the agreement, decision or concerted practice can prove that any technological, efficiency, or other precompetitive or public interest gain resulting from it outweighs that effect.
- (3) It is presumed that an agreement or a concerted practice of the nature prohibited by subsection (1) and (2) exists between two or more undertakings if -

Draft Bill

- (a) any one of the undertakings owns a significant interest in the other or they have at least one director or one substantial shareholder in common; and
- (b) any combination of the undertakings engages in any of the practices mentioned in subsection (1).
- (4) The presumption created by subsection (3) may be rebutted if an undertaking or a director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which any of the undertakings engaged in was a normal commercial response to conditions prevailing in the market.
- (5) For the purposes of subsection (3), “director” includes -
 - (a) a director of a company as defined in the Companies Act, 2004 (Act No. 28 of 2004);
 - (b) a member of a close corporation as defined in the Close Corporations Act, 1988 (Act No. 26 of 1988);
 - (c) a trustee of a trust; or
 - (d) in relation to an undertaking conducted by an individual or a partnership, the owner of the undertaking or a partner of the partnership; or
 - (e) a person holding an equivalent position in an undertaking.
- (5) Subsection (1) and (2) do not apply in respect of an agreement entered into between or a practice engaged in by -
 - (a) a company and its wholly owned subsidiary, as contemplated in section 1 of the Companies Act, 2004, or a wholly owned subsidiary of that subsidiary company; or

Draft Bill

- (b) undertakings other than companies, each of which is owned or controlled by the same person or persons.

Vertical restrictive practices

32. (1) An agreement between two or more undertakings in a vertical relationship is prohibited if it has the effect of preventing, restricting or distorting competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from the agreement outweighs that effect.
- (2) The practice of resale price maintenance is per se prohibited.
- (3) Despite subsection (2), a supplier or producer may recommend a resale price to a reseller of the goods or services, provided -
- (a) the supplier or producer makes it clear to the reseller or provider that the recommended price is not binding; and
 - (b) if the product, or any document or thing relating to any product or service, has a price affixed or applied by the supplier or producer, the words “recommended price” appear next to the price so affixed or applied.

Part B

Abuse of a Dominant Position

Abuse of a dominant position

33. (1) Any conduct on the part of one or more undertakings which amounts to an abuse of a dominant position is per se prohibited.

Draft Bill

- (2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes –
 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties; or
 - (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.
 - (e) refusing a competitor access to an essential facility.
- (3) One or more undertakings is or are dominant if -
 - (a) it has or they have at least 45% of that market;
 - (b) it has or they have at least 35%, but less than 45%, of that market, unless it or they can show that it does not or they do not have market power; or
 - (c) it has or they have less than 35% of that market, but has or have market power.
- (4) For purposes of determining market power as contemplated in subsection (3), various factors, including the following, may be taken into account -
 - (a) the ability of the undertaking to restrict a potential competitor from entering the market, prevent a competitor from expanding in the market or force a competitor to exit the market;

Draft Bill

- (b) the financial position of the undertaking;
- (c) the existence of countervailing buyer power;
- (d) the barriers to entry into the market, including absolute barriers (such as regulatory or tariffs), and structural barriers (such as sunk costs or technology);
- (e) the actual and potential level of import competition in the market;
- (f) the level and trends of concentration, and history of collusion, in the market; or
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation,

Part C

Exemption of certain restrictive business practices

Application for exemption for certain prohibited practices and consideration of application

- 34.** (1) Any undertaking or association of undertakings may apply to the Commission to be exempted from Part A of this Chapter in respect of any agreement, decision or concerted practice or a category of agreements, decisions or concerted practices.
- (2) An application for an exemption under subsection (1) must -
- (a) be made in the prescribed form and manner; and
 - (b) be accompanied by such information as may be prescribed or as the Commission may reasonably require.

Draft Bill

- (3) The Executive must give notice in the *Gazette* of an application received in terms of subsection (1) -
 - (a) indicating the nature of the exemption sought by the applicant; and
 - (b) calling upon interested persons to submit to the Commission, within 30 days of the publication of the notice, any written representations that they may wish to make in regard to the application.

Determination of application for exemption

35. (1) After consideration of an application in terms of section 34 and any representations submitted by interested persons, the Executive must refer the matter to the Board of Commissioners for a determination in respect of the application.
- (2) The Board of Commissioners must make a determination within 150 days of receipt of a complete application by the Commission and may -
- (a) grant -
 - (I) a conditional exemption for a specified term; or
 - (ii) an unconditional exemption for a specified term,

if the agreement, decision or concerted practice concerned, or category of agreements, decisions or concerted practices concerned meets the requirements of subsection (3); or
 - (b) refuse to grant an exemption, and state the reasons for the refusal; or

Draft Bill

- (c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice concerned, does not constitute a breach of Part A of this Chapter.

- (3) The period referred to in subsection (3) may be extended by the Executive due to the complexity of the issues involved, before the expiry of that period, by notice in writing to the applicant, such extension may not exceed 120 days.

- (4) The Board of Commissioners may grant an exemption in terms of subsection (2)(a) only if any restriction imposed on the undertakings concerned by the agreement, decision or practice concerned or category of agreements, decisions or practices concerned, contributes to or results in or will be likely to contribute to or result in -
 - (a) the maintenance or promotion of exports;
 - (b) the promotion of the ability of small undertakings, or undertakings controlled or owned by historically disadvantaged persons, to become competitive;
 - (c) the change in productive capacity necessary to stop decline in an industry;
 - (d) the technical or economic progress or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry; or
 - (e) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or practice or the category of agreements, decisions or practices.

- (3) The Board of Commissioners may grant an exemption subject to the conditions and for the period as the Board of Commissioners may deem fit.

Draft Bill

Exemption in respect of intellectual property rights

36. The Board of Commissioners may grant -

- (a) upon application; and
- (b) on such conditions as the Board of Commissioners may determine,

an exemption in relation to any agreement, decision or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights.

Exemption in respect of professional rules

37. (1) A professional association whose rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market may apply to the Commission in the prescribed manner for an exemption in terms of subsection (2).

(2) The Board of Commissioners may exempt all or part of the rules of a professional association from the provisions of Part A of this Chapter for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of preventing, distorting or lessening competition or heightening barriers to entry in a market, is reasonably required to maintain -

- (a) professional standards; or
- (b) the ordinary function of the profession.

(3) Upon the Commission receiving an application in terms of subsection (1) the Executive must -

Draft Bill

- (a) publish a notice of the application in the *Gazette*;
 - (b) allow interested parties 30 days from the date of that notice to make representations concerning the application; and
 - (c) consult the Minister responsible for the administration of any law governing the profession concerning the application.
- (4) After considering the application and any submission or other information received in relation to the application, and consulting with the responsible Minister, the Executive must refer the matter to the Board of Commissioners and the Board of Commissioners must-
- (a) grant an exemption, reject the application or issue a clearance certificate, by issuing a notice in writing to the applicant;
 - (b) give written reasons for its decision; and
 - (c) publish a notice of that decision in the *Gazette*.
- (5) If the Board of Commissioners considers that any exempted rules, either wholly or any part thereof, should no longer be so exempted, the Board of Commissioners may revoke the exemption in respect of the rules or the relevant part of the rules, at any time after it has given notice in the *Gazette* of the proposed revocation.
- (6) The exemption of a rule or the revocation of an exemption has effect from the date as may be specified by the Board of Commissioners.
- (7) In this section -
- (a) “professional association” means the controlling body established by or registered under any law in respect of the following professions, and includes

Draft Bill

any other association which the Board of Commissioners is satisfied represents the interests of members of any profession, including:

- (i) accountants and auditors;
- (ii) architects;
- (iii) engineering;
- (iv) estate agents;
- (v) legal practitioners;
- (vi) quantity surveyors;
- (vii) land surveyors;
- (viii) town and regional planners;
- (ix) health services professions governed by -
 - (aa) the Social Work and Psychology Act, 2004 (Act No. 6 of 2004);
 - (bb) the Allied Health Professions Act, 2004 (Act No. 7 of 2004);
 - (cc) the Nursing Act, 2004 (Act No. 8 of 2004);
 - (dd) the Pharmacy Act, 2004 (Act No. 9 of 2004);
 - (ee) the Medical and Dental Act, 2004 (Act No. 10 of 2004);

Draft Bill

- (ff) the Veterinary and Para-veterinary Professions Proclamation, 1984 (Proclamation No. 14 of 1984);
- (x) any other profession to which this section have been declared applicable by the Minister by notice in the *Gazette*;
- (b) in this section, “rules” means rules regulating a professional association that are binding on its members, and includes codes of practice and statements of principle.

Revocation or amendment of exemption and notification of grant, refusal, revocation or amendment of exemption

- 38.** (1) Subject to subsection (2), the Board of Commissioners may revoke or amend an exemption granted in terms of this Part if -
- (a) the exemption was granted on the basis of materially incorrect or misleading information;
 - (b) there has been a material change of circumstances since the exemption was granted; or
 - (c) a condition upon which an exemption was granted has not been complied with.
- (2) If the Board of Commissioners proposes to revoke or amend an exemption under subsection (1), it must -
- (a) give notice in writing of the proposed action to the person to whom the exemption was granted, and to any other person who in the opinion of the Board of Commissioners is likely to have an interest in the matter; and

Draft Bill

- (b) call upon such persons to submit to the Board of Commissioners, within 30 days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

- (3) The Board of Commissioners must as soon as practicable cause to be published in the *Gazette* notice of any exemption -
 - (a) granted, amended or revoked; or

 - (b) where a certificate of clearance has been issued,

under this Part.

- (4) An undertaking or association of undertakings that has applied for an exemption may apply, in the prescribed manner, to the Competition Adjudicative Panel to review the Commission's decision under this Part.

Conference in relation to an exemption application

39. (1) If the Executive considers it appropriate it may at any time during the assessment of an exemption application determine that a conference be held in relation to the application.
- (2) If the Executive determines that a conference must be held it must give reasonable written notice to the applicants and any other person whose presence is considered by the Executive to be desirable, in which it -
 - (a) convenes the conference;

 - (b) specifies the date, time and place for the holding thereof; and

 - (c) stipulates the matters to be considered thereat.

Draft Bill

- (3) The Commission must cause such record of the conference to be kept as is sufficient to set out the matters raised by the persons participating in the conference.

CHAPTER 5 MERGER CONTROL

Merger defined

- 40.** (1) For purposes of this Chapter a merger occurs when one or more -
 - (a) undertakings;

directly or indirectly acquire or establish direct or indirect control over the whole or part of another undertaking.
- (2) A merger contemplated in subsection (1) may be achieved in any manner, including through -
 - (a) purchase or lease of the shares, an interest, assets or business of the other undertaking in question;
 - (b) amalgamation or other combination with the other undertaking in question; or
 - (c) a joint venture between two or more undertakings.
- (3) A person controls an undertaking if the person -
 - (a) beneficially owns more than one half of the issued share capital of the undertaking;

Draft Bill

- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- (c) is able to appoint or to veto the appointment of a majority of the directors of the undertaking;
- (d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act, (Act No. 28 of 2004);
- (e) in the case of an undertaking that is a trust, has the ability to -
 - (i) control the majority of the votes of the trustees;
 - (ii) appoint the majority of the trustees; or
 - (iii) appoint or change the majority of the beneficiaries of the trust;
- (f) in the case of the undertaking being a close corporation -
 - (i) owns the majority of the members' interest;
 - (ii) controls directly or has the right to control the majority of members' votes in the close corporation; or
- (g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Control of mergers

- 41.** (1) Subject to subsection (2) and section 48(1), this Chapter applies to all proposed mergers not contemplated in that subsection.

Draft Bill

- (2) The Minister, with the concurrence of the Executive, may by notice in the *Gazette* determine and specify a class of proposed mergers to which this Chapter does not apply.
- (3) The Minister may determine under subsection (2) a class or classes of proposed mergers on any basis which the Minister considers appropriate, in general or in relation to specific industries, including with reference to -
 - (a) the aggregate value of the assets of the parties to the proposed merger, or the value of the assets of any one or more of them;
 - (b) the aggregate turnover over a specified period of the parties to the proposed merger, or the turnover of any one or more of them;
 - (c) a threshold of the combined annual turnover or assets, or a threshold of combinations of turnover and assets;
 - (d) a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds;
 - (e) specified industries or categories of undertakings.
- (4) For purposes of this Chapter, the Board of Commissioner must prescribe criteria for determining whether a merger is a phase 1, 2 or 3 merger.

Notice to be given to the Commission of proposed merger

42. (1) If a merger to which this Chapter applies, is proposed each of the undertakings involved therein must in the prescribed manner and form notify the Commission thereof.

Draft Bill

- (2) The parties to a merger may not implement a proposed merger to which this Chapter applies until the Executive or Board of Commissioners, as the case may be, has approved the proposed merger, with or without conditions, in accordance with this Chapter.
- (3) If, after receipt of a notification to the Commission in terms of subsection (1), the Executive is of the opinion that in order to investigate the proposed merger it requires further information, it may request such further information in writing at any time from any one or more of the undertakings concerned.

Investigation of proposed merger

- 43.**
- (1) The Executive must investigate all proposed mergers and
 - (a) determine phase 1 mergers; or
 - (b) make recommendations to the Board of Commissioners with respect to phase 2 and 3 mergers.
 - (2) For the purpose of investigating a proposed merger, the Executive may require any party to a proposed merger to provide additional information in respect of the merger.
 - (3) Any person, whether or not a participant in a proposed merger, may voluntarily submit to the Executive any document, affidavit, statement or other relevant information in respect of a proposed merger.
 - (4) The Executive has the same powers to investigate a proposed merger as it has to investigate prohibited conduct under Part C of Chapter 7 of this Act.

Conference in relation to proposed merger

Draft Bill

- 44.** (1) If the Executive considers it appropriate it may at any time during the investigation of a proposed merger determine that a conference be held in relation to a proposed merger.
- (2) If the Executive determines that a conference must be held it must give reasonable written notice to the undertakings involved and any other person whose presence is considered by the Executive to be desirable, in which it -
- (a) convenes the conference;
 - (b) specifies the date, time and place for the holding thereof; and
 - (c) stipulates the matters to be considered thereat.
- (3) The Executive must cause such record of the conference to be kept as is sufficient to set out the matters raised by the persons participating in the conference.

Period for making determination in relation to proposed merger

- 45.** (1) Subject to subsection (2), the Executive or Board of Commissioners, as the case may be, must consider and make a determination in relation to a proposed merger of which the Commission has received notification in terms of section 42 (1) -
- (a) within 30 days after the date on which the Commission receives that notification; or
 - (b) if the Executive requests further information under section 42(3), within 30 days after the date of receipt by the Executive of the information; or
 - (c) if a conference is convened in accordance with section 44, within 30 days after the date of conclusion of the conference.

Draft Bill

- (2) If the Executive is of the opinion that the period referred to in paragraph (a), (b) or (c) of subsection (1) should be extended due to the complexity of the issues involved it may, before the expiry of that period, by notice in writing to the undertakings involved, extend the relevant period for a further period, not exceeding 60 days, specified in the notice.
- (3) The Executive may suspend or annul any consideration period referred to in subsections (1) or (2) if –
 - (a) there are material changes to the merger notification;
 - (i) If the consideration period is suspended for the reasons set out in subsection (3)(a), it will continue to run on the date that all information pertaining to the material changes is received by the Executive.
 - (ii) If the consideration period is annulled for the reasons set out in subsection (3)(a), the notification is deemed to be received by the Commission on the date that all information pertaining to the material changes is received by the Executive.
 - (b) the Executive is of the opinion that a document submitted in respect of a merger contains false or misleading information.
 - a. If the consideration period is suspended for the reasons set out in subsection (3)(b), it will continue to run on the date that the correct information is received by the Executive.
 - b. If the consideration period is annulled for the reasons set out in subsection (3)(b), the notification is deemed to be received by the Commission on the date that the correct information is received by the Executive.

Draft Bill

Determination of proposed merger

46. (1) Subject to sections 43 and 44, when considering a proposed merger, the Executive or Board of Commissioners, as the case may be, must determine whether -
- (a) or not the merger is likely to substantially prevent or lessen competition in the relevant markets, and -
 - (i) if it appears that the merger is likely to substantially prevent or lessen competition, then determine whether or not the merger is likely to result in any technological, efficiency or innovation gain which will be greater than, and offset, the effects of any substantial prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented.
 - (b) a merger can or cannot be justified on public interest grounds set out in subsection 4.
- (2) In determining whether or not a merger is likely to substantially prevent or lessen competition in the relevant markets, the Executive or Board of Commissioners, as the case may be, must assess the probability that the undertakings in the market will behave competitively or co-operatively after the merger and the probability that the merged undertaking will exercise market power and raise prices or reduce output of goods and services in that market after the merger, taking into account any factor that is relevant to competition in that market, including, the following factors -

;

Draft Bill

- (a) the barriers to entry into the market, including absolute barriers (such as regulatory or tariffs), and structural barriers (such as sunk costs or technology);
 - (b) the actual and potential level of import competition in the market;
 - (c) the level and trends of concentration and history of collusion, in the market;
 - (d) the degree of countervailing power in the market;
 - (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
 - (f) the nature and extent of vertical integration in the market;
 - (g) whether the merger will result in the removal of an effective competitor;
 - (h) whether the merger will result in the removal of a potential competitor
 - (i) the extent of ownership by a party to the merger in another undertaking or other undertakings in related markets; and
 - (j) any other mergers engaged in by a party to a merger for such period as may be stipulated by the Commission
- (3) When determining whether or not the merger is likely to result in any technological, efficiency or innovation gain, the Executive or Board of Commissioners, as the case may be, must assess any factor that is relevant to such an assessment, including -
- (a) research and development in that market;

Draft Bill

- (b) cost savings, excluding those likely to be achieved through retrenchment of employees, in the merging undertakings;
 - (c) more intensive use of existing capacity in the merging undertakings; and
 - (d) economies of scale or scope in the merging undertakings
- (4) When determining whether a merger can or cannot be justified on public interest grounds, the Executive or Board of Commissioners, as the case may be, must consider the effect that the merger will have on factors, including promoting –
- (a) local procurement of goods and services
 - (b) the growth of a particular industrial sector or region
 - (c) the ability of national industries to compete in international markets;
 - (d) value addition in downstream markets, such as the beneficiation of natural resources;
 - (e) employment;
 - (f) 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;
 - (g) a greater spread of ownership in the merging undertakings, in particular to increase ownership stakes of historically disadvantaged persons

Draft Bill

- (5) Having considered a proposed merger as contemplated in this section, the Executive or Board of Commissioners, as the case may be, must -
- (a) approve the proposed merger with or without conditions; or
 - (b) prohibit the proposed merger.
- (6) The Executive or Board of Commissioners, as the case may be, must -
- (a) give notice of the determination made in relation to a merger-;
 - i. to the parties involved in the proposed merger, in writing; and
 - ii. by notice in the *Gazette*; and
 - (b) issue written reasons for its determination -
 - (i) if it prohibits or conditionally approves a proposed merger; or
 - (ii) if it is requested to do so by any party to the merger.
- (7) Where the Executive or Board of Commissioners approves a merger subject to conditions, it can amend such conditions, given changes in circumstances or where new information comes to its attention.

Revocation of approval of proposed merger

47. (1) Subject to subsection (2) and after consideration of any representations made in terms thereof, the Executive or the Board of Commissioners, as the case may be, may at any time revoke a decision approving the implementation of a proposed merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, if -

Draft Bill

- (a) the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or
 - (b) any condition attached to the approval of the merger that is material to the implementation is not complied with.
- (2) If the Executive or the Board of Commissioners, as the case may be, proposes to revoke its decision under subsection (1) it must -
- (a) give notice in writing of the proposed revocation to every undertaking involved in the merger, and to any other person who in the opinion of the Executive or the Board of Commissioners, as the case may be, is likely to have an interest in the matter; and
 - (b) call upon such persons to submit to the Executive, within 30 business days of receipt of the notice, any representations which they may wish to make in regard to the proposed revocation.

Mergers falling below threshold

- 48.** (1) Notwithstanding section 41(1) and (2), the Executive may at any time, if a proposed merger falls below the threshold referred to in section 41(3), compel the undertakings concerned to notify the Commission if the Executive considers it necessary to deal with the merger in terms of this Act.
- (2) The Executive may require the parties to a proposed merger contemplated in subsection (1) to notify the Commission as contemplated in section 42 and the merger must -
- (a) be considered within the periods referred to in section 45(1), (2) and (3), as the case may be; and
 - (b) be considered and determined in terms of section 46.

Draft Bill

- (3) Any party to a proposed merger contemplated in subsection (1) which has not been compelled to notify the Commission -
 - (a) may voluntarily notify the Commission of that merger, as contemplated in section 42; and
 - (b) may then take no further steps to implement that merger until the merger has been approved or conditionally approved by the Executive or the Board of Commissioners, as the case may be.

Mergers implemented in contravention of this Chapter

- 49.** If a merger is suspected of having been implemented in contravention of this Chapter, the Executive may investigate the contravention as contemplated in Chapter 7 of the Act and the Board of Commissioners may refer the matter to the Competition Adjudicative Panel for a hearing as contemplated in Chapter 3 of the Act.

Review of merger decisions

- 50.** The parties involved in a merger may apply to the Competition Adjudicative Panel, as prescribed, to review –
- (a) a determination by the Board of Commissioners to prohibit a merger or approve a merger subject to conditions; or
 - (b) a decision by the Board of Commissioners to revoke approval of a merger or amend conditions imposed by the Board of Commissioners,
- under this Part.

Compliance with other laws relating to mergers

Draft Bill

- 51.** An approval of a merger by the Executive or the Board of Commissioners, as the case may be, under this Chapter does not relieve an undertaking from complying with any other applicable laws in Namibia.

CHAPTER 6

MARKET INQUIRIES

Purpose of market inquiry

- 52.** The purpose of a market inquiry is to determine -
- (a) whether any -
 - (i) feature, or combination of features in the market; or
 - (ii) conduct by one or more undertakings in the market,has the effect of preventing, restricting or distorting competition; and
 - (b) appropriate remedies to restore effective competition in the market.

Initiation of market inquiry

- 53.** The Board of Commissioners, for the purpose of achieving the objectives of this Act, may initiate a market inquiry if any one or more of the following occurs -
- (a) the Board of Commissioners on reasonable grounds suspects that a prevention, restriction or distortion of competition is occurring;
 - (b) a complaint has been lodged with the Commission by anyone;
 - (c) the Minister requests the market inquiry in writing;

Draft Bill

- (d) the outcome of research, investigation or a merger evaluation process points to possible competition problems in a particular market or markets; or
- (e) a market inquiry undertaken in another jurisdiction leads to the need for a similar inquiry in Namibia.

Notice of market inquiry

- 54.** (1) The Board of Commissioners, in initiating a market inquiry must publish a notice in the *Gazette*, in the prescribed form, which notice must specify -
- (a) the purpose of the inquiry;
 - (b) the terms of reference of the inquiry;
 - (c) the duration of the inquiry;
 - (d) the manner of making submissions to the inquiry;
 - (e) the matters that the Board of Commissioners wishes submissions regarding the inquiry to deal with; and
 - (f) the date of publication of the final report regarding the inquiry.

Scope of market inquiry

- 55.** The scope of a market inquiry may include -
- (a) the structure of the market concerned;
 - (b) the conduct of various players or undertakings in the market concerned, including suppliers and consumers; or

Draft Bill

- (c) any other relevant matter.

Conducting of market inquiry by Executive

- 56.** (1) The Executive may conduct, subject to the powers granted to it in terms of this Act, a market inquiry in the manner as it considers appropriate.
- (2) In conducting or for the purposes of an inquiry, the Executive may -
- (a) convene and hold public hearings;
 - (b) request persons to appear voluntarily before the Executive and, under oath, answer questions, give evidence or produce information;
 - (c) in the prescribed manner, summon persons who fail to appear voluntarily before the Executive to so appear and to, under oath, answer questions, give evidence or produce information.
- (3) Sections 62 to 65 of this Act do not apply to the conduct of a market inquiry.
- (4) Section 66, applies, with the necessary amendments, to the conduct of a market inquiries.

Obligations of Executive on finalising market inquiry

- 57.** (1) At the end of a market inquiry the Executive must submit a report to the Board of Commissioners for approval and once approved must publish in the *Gazette* a notice of the final report regarding the inquiry.
- (2) Subsequent to publishing the final report of the market inquiry as contemplated in subsection (1) the Board of Commissioners may -

Draft Bill

- (a) direct the Executive to initiate a formal investigation against any undertaking in accordance with section 58;
- (b) make recommendations to a regulatory authority in relation to competition matters;
- (c) make policy or legislative recommendations to government;
- (d) take any other action within its powers in terms of this Act; or
- (e) take no further action.

CHAPTER 7

INVESTIGATION AND ADJUDICATION PROCEDURES

Part A

Power to investigate and issuing of notice

Power to investigate

- 58.** (1) The Executive may, either on its own initiative or upon receipt of information or a complaint or a request from any person, investigate any prohibited conduct if the Executive has reasonable grounds to suspect contravention of Chapters 4 and 5 this Act.
- (2) If the Executive, having received from any person a complaint or a request to conduct an investigation, decides not to conduct an investigation, the Executive must in the prescribed form, inform such person of the reasons for its decision.

Draft Bill

Notice of investigation

- 59.** (1) Subject to subsection (4), if the Executive decides to conduct an investigation as contemplated in section 58, it must as soon as practicable before completing its investigation give written notice of the investigation to every undertaking whose conduct is being investigated.
- (2) The notice referred to in terms of subsection (1) must at least contain -
- (a) an indication of the subject matter and the purpose of the investigation;
 - (b) an invitation to the undertaking to submit any representation that the undertaking would like to make in connection with the investigation;
 - (c) a specified time period within which the representation may be made.
- (3) For the purpose of an investigation the Executive may by notice in writing served on any person in the prescribed manner, require that person -
- (a) to furnish to the Executive by writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Executive considers relevant to the investigation;
 - (b) to produce to the Executive, or to a person specified in the notice to act on the Executive's behalf, any document or article, specified in the notice which relates to any matter which the Executive considers relevant to the investigation;
 - (c) to appear before the Executive at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice.

Draft Bill

- (4) If the Executive is of the opinion that giving notice in terms of subsection (1) will materially prejudice an investigation, it may defer the giving of the notice until it has exercised its powers to enter and search any premises in terms of section 62.

Part B

Confidential information

Right to claim confidentiality

- 60.** (1) Subject to subsection (2), when submitting information to the Commission or Competition Adjudicative Panel, a person may identify information that the person claims to be confidential information.
- (2) A person referred to in subsection (1) must support any claim contemplated therein by a written statement in the prescribed form, explaining why the information concerned is confidential.
- (6) If the Executive, Board of Commissioners or Competition Adjudicative Panel, upon receipt of the statement referred to in subsection (2), is of the opinion that the information concerned may not be confidential, the Executive, Board of Commissioners or Competition Adjudicative Panel may notify in writing the person referred to in subsection (1) thereof, stating -
 - (a) the reasons for its opinion; and
 - (b) the steps it intends taking regarding the information.
- (4) The person referred to in subsection (1) may make further written representations with regard to the notification referred to in subsection (3).

Draft Bill

- (5) Upon receipt of the representations referred to in subsection (4) the Executive, Board of Commissioners or Competition Adjudicative Panel must determine whether or not the information is confidential.
- (6) If the Executive, Board of Commissioners or Competition Adjudicative Panel finds that the information is confidential it must –
 - (a) make any appropriate order concerning access to that information; and
 - (b) inform the person referred to in subsection (1) of its decision and its reasons forthwith.
- (7) From the time information comes into the possession of the Executive, Board of Commissioners or Competition Adjudicative Panel until a final determination regarding the confidentiality thereof, including any reviews, if applicable, has been made concerning it, the Executive, Board of Commissioners or Competition Adjudicative Panel must treat as confidential any information that is the subject of a claim in terms of this section.
- (8) A person who submits information in terms of subsection (1) may request that his or her identity be treated as confidential information only if such a person is not a complainant as contemplated in section 67(2).

Restricted use of information

- 61.** (1) When making any decision in terms of this Act the Executive, Board of Commissioners or Competition Adjudicative Panel, subject to subsection (2), may take confidential information into account in making the decision.
- (2) If the Executive's, Board of Commissioner's or Competition Adjudicative Panel's reasons for a decision reveals any confidential information, it must provide a copy of the proposed reasons to the person referred to in section 60(1) at least 14 business days before publishing those reasons.

Draft Bill

Part C

Powers of entry and search and summons

Authority to enter and search premises with warrant

- 62.** (1) For the purpose of assisting the Executive to ascertain or establish whether any undertaking has engaged in or is engaging or is about to engage in prohibited conduct, a Judge of the High Court may upon application by any member of the Executive or an inspector, who has in writing duly been authorised by the Chief Executive Officer to do so, issue a warrant to enter and search any premises -
- (2) A warrant referred to in subsection (1) -
- (a) may be issued at any time and must specifically -
- (i) identify the premises that may be entered and searched; and
- (ii) authorise an inspector to enter and search the premises and to exercise the powers contemplated in section 64;
- (b) is valid for a period of 21 business days from the date it is issued and lapses if -
- (i) it is executed;
- (ii) it is cancelled by the judge who issued it or by any judge of the High Court; or
- (iii) the purpose for issuing it has lapsed;

Draft Bill

- (c) may be executed on any day between 07h00 and 19h00, unless the judge who issued it authorised and specified that it may be executed at night at a time that is reasonable in the circumstances.
- (3) Upon first entering any premises under a warrant, the person authorised by the warrant must either -
 - (a) provide, if the owner or person in control of the premises is present -
 - (i) his or her authority to enter the premises by handing a copy of the warrant to the owner or person; and
 - (i) his or her identity to the owner or person; or
 - (b) if none of the owner or person in control of the premises is present, affix a copy of the warrant to the premises in a prominent and visible place.

Authority to enter and search premises without warrant

- 63.** (1) An inspector who is not authorised by a warrant as contemplated in section 62 may, enter and search any premises, other than a private dwelling used for residential purposes only, to exercise the powers contemplated in section 62 if -
- (a) he or she has provided his or her identity to the owner or person in control of the premises and has explained to the owner or person the purpose of the entry and search; and
 - (b) the owner or any other person in control of the premises consents to the entry and search of the premises; or
 - (c) the inspector believes -

Draft Bill

- (i) that a warrant would be issued under section 62 if applied for; and
 - (ii) that the delay in obtaining a warrant would defeat the object of the entry and search.
- (2) An entry and search contemplated in subsection (1) may be carried out on any day between 07h00 and 18h00 unless carrying it out at night is justifiable and necessary in the circumstances.

Powers to enter and search

- 64.** (1) An inspector to whom a warrant has been issued under section 62 or who enters and searches any premises as contemplated in section 63(1) may, subject to section 65 -
- (a) enter upon or into and search the premises concerned;
 - (b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
 - (c) examine any article, item, book or document that is on or in those premises that has a bearing on the investigation;
 - (d) request information about any article, item, book or document from -
 - (i) the owner of or the person in control of the premises;
 - (ii) any person who has control of the article, item or document, or
 - (iii) any other person who may have the information;

Draft Bill

- (e) take extracts from or make copies of any article, item, book or document that is on or in the premises that has a bearing on the investigation;
 - (f) use any computer system on the premises or require assistance of any person on the premises to use that computer system, to -
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) seize any output from that computer for examination and copying; and
 - (g) attach and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.
- (2) An inspector to whom a warrant has been issued under section 62 or who enters and searches any premises as contemplated in section 63(1) may be accompanied and assisted by a police officer.

Conduct of entry and search

- 65.** (1) An inspector who enters and searches any premises under section 62 or 63 must conduct the entry and search with strict regard for -
- (a) decency and order; and
 - (b) each person's right to dignity, freedom, security and privacy.
- (2) During any search under section 64(1)(b) only a female inspector or female police officer may search a female person and only a male inspector or male police officer may search a male person.

Draft Bill

- (3) An inspector who enters and searches premises under section 62 or 63 must, before questioning any person-
 - (a) advise that person of the right to be assisted at the time by a legal practitioner; and
 - (b) allow that person to exercise that right.
- (4) An inspector who removes anything from any premises under section 64(1)(g) must -
 - (a) issue a receipt in the prescribed form for it to the owner of or person in control of the premises; and
 - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (5) During a search a person may refuse to permit the inspection or removal of an article, item, book or document on the ground that it contains privileged information.
- (6) If the owner or person in control of an article, item, book or document refuses in terms of subsection (5) to permit the inspection or removal thereof to the inspector conducting the search, the inspector may request in the prescribed form the sheriff of the Magistrates Court or High Court to attach and remove the article, item, book or document for safe custody until the Magistrates Court or High Court determines whether or not the information is privileged.
- (7) Subject to subsection (8), an inspector or a police officer contemplated in section 64(2) may overcome any resistance to the entry and search of a premises by using as much force as is reasonably required, including the breaking of a door or a window of the premises.

Draft Bill

(8) Before using any force as contemplated in subsection (7) an inspector or a police officer concerned must -

(a) audibly demand admission to the premises concerned; and

(b) announce the purpose of the entry,

unless there is reasonable ground to believe that doing so may induce someone to destroy or dispose of an article, item, book or document that is the object of the search.

(9) Subject to subsection (10), the Commission may compensate any person who suffers, upon reasonable exercise of power, damage by virtue of a forced entry as contemplated in subsection (7), unless such forced entry was necessary as a result of lack of co-operation by the relevant party or parties, in which the Commission will not be liable to compensate that party or parties for damages suffered due to forced entry.

(10) The compensation referred to in subsection (9) is limited to the replacement value and installation or repair costs of the damage concerned suffered in reasonable exercise of its powers.

(11) Sections 62 to 65 of the Act do not apply to the conduct of market inquiries.

Summons

66. (1) At any time during an investigation contemplated in this Act, or if specifically empowered to do so by this Act, the Executive may summon any person who it believes is able to -

(a) furnish any information on or relating to the subject of the investigation; or

Draft Bill

- (b) have possession or control of any article, item, book or document that has a bearing on the investigation -
 - (i) to appear before the Executive to be interrogated at a date, time and place specified in the summons; or
 - (ii) at a date, time and place specified in the summons, to deliver or produce to the Executive any article, item book or document specified in the summons.
- (2) A person questioned a person conducting an investigation or by the Executive must answer each question truthfully and to the best of that person's ability, but the person is not obliged to answer any question if the answer is self-incriminating.
- (3) No self-incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except if -
 - (a) the answer given or statement made amounts to perjury; or
 - (b) the person concerned gave false evidence or false information knowing or believing it to be false; or
 - (c) the person concerned failed to answer any question fully and to the best of the person's ability when questioned by an inspector or other person or the Executive.

Part D

Complaint procedures

Draft Bill

Initiating of complaint

- 67.** (1) The Executive may initiate a complaint against an undertaking that is alleged to have engaged in prohibited conduct.
- (2) Any person may -
- (a) submit information concerning an alleged prohibited conduct to the Executive in any manner or form; or
- (b) submit a complaint against an alleged prohibited conduct to the Executive in the prescribed form.
- (3) Upon initiating or receiving a complaint in terms of this section the Executive must investigate the complaint as quickly as practicable.

Interim relief

- 68.** (1) At any time, whether or not a hearing has commenced before the Competition Adjudicative Panel into an alleged prohibited conduct, the Executive on its own initiative or upon application by a Complainant may invoke the provisions of subsection (2).
- (2) If the Executive on its own initiative or upon the Complainant's application as contemplated in subsection (1), on reasonable grounds believes that an undertaking has engaged, is engaging, or is proposing to engage, in conduct that constitutes or may constitute a prohibited conduct and that it is necessary for the Executive to act as a matter of urgency for the purpose –
- (a) of preventing serious, irreparable damage to any person or category of persons; or

Draft Bill

- (b) of protecting the public interest, the Executive may make application to the Competition Adjudicative Panel for an interim order restraining the undertaking or undertakings from engaging in such conduct.
- (3) In proceedings under this section, the standard of proof is the same as the standard of proof in the Court on a common law application for an interim interdict.
- (4) An interim order granted by the Competition Adjudicative Panel pursuant to subsection (2) is of effect until -
 - (a) conclusion of a hearing into the alleged prohibited conduct; or
 - (b) expiry of the period of six months beginning on the date of issue of the interim order, whichever is the earlier.
- (5) If an interim order has been granted and a hearing into that matter has not been concluded within six months after the date of that order the Competition Adjudicative Panel, on good cause shown, may extend the interim order for a further period not exceeding six months.
- (6) An undertaking affected by an interim order that has a final or irreversible effect may appeal to the High Court against that order.

Consent orders

- 69.** (1) If during or after completion of the investigation of a complaint contemplated in this Part the Board of Commissioners and the respondent agree on the terms of an appropriate order, the Competition Adjudicative Panel may make the agreement a consent order.
- (2) With the consent of a respondent a consent order may include an award for damages to the complainant.

Draft Bill

- (3) A consent order does not preclude a complainant from applying for any other remedy provided for in this Act.
- (4) The Competition Adjudicative Panel, after receiving an application for a consent order, may -
 - (a) make the order as agreed to and proposed by the Board of Commissioners and the respondent;
 - (b) indicate any changes that must be made in the draft order before it will make the order; or
 - (c) refuse to make the order.

Outcome of investigation

- 70.**
- (1) When the Board of Commissioners refers a complaint received in terms of section 67(2) to the Competition Adjudicative Panel it may -
 - (a) refer all the particulars of the complaint as submitted by the complainant;
 - (b) refer only some of the particulars of the complaint as submitted by the complainant, and issue a notice of non-referral in respect of any particulars of the complaint not referred to the Competition Adjudicative Panel; or
 - (c) add particulars to the complaint as submitted by the complainant.
 - (2) Within twenty-four months after a complaint was submitted to the Commission in terms of section 67(2), the Board of Commissioners must refer, subject to subsection (2), the outcome of the investigation to the Competition Adjudicative Panel, if it determines that prohibited conduct has been established or, in any other case, issue a notice of non-referral, in the prescribed form.

Draft Bill

- (3) In a particular case -
 - (a) the Board of Commissioners and the complainant may agree to extend the period allowed in subsection (2), for a further period not exceeding 12 months;
or
 - (b) on application by the Board of Commissioners made before the end of the period contemplated in subsection (2), the Competition Adjudicative Panel may extend that period, on good cause shown, for a further period not exceeding 12 months.
- (4) If the Board of Commissioners has not referred a complaint to the Competition Adjudicative Panel within the time contemplated in subsection (2), or the extended period contemplated in subsection (3), the Board of Commissioners must be regarded as having issued a notice of non-referral on the expiry of the relevant period.
- (5) If the Board of Commissioners issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Adjudicative Panel, with leave of the Competition Adjudicative Panel.
- (6) The Competition Adjudicative Panel's decision on complaints referred to it must be published by notice in the *Gazette*.

CHAPTER 8

ENFORCEMENT

Status and enforcement of orders

Draft Bill

- 71.** (1) Any decision or order of the Executive, Board of Commissioners or Competition Adjudicative Panel has a final and binding effect, unless otherwise stated.
- (2) If in any action in a civil court a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and -
- (a) if the issue raised is one in respect of which the Competition Adjudicative Panel has made an order, the court must apply the determination of the Board of the Competition Adjudicative Panel.; or
- (b) otherwise, the court must refer that issue to the Competition Adjudicative Panel, as the case may be, to be considered on its merits, if the court is satisfied that -
- (i) the issue has not been raised in a frivolous or vexatious manner; and
- (ii) the resolution of that issue is required to determine the final outcome of the action.

Civil actions

- 72.** (1) A person who has suffered loss or damage as a result of a prohibited conduct –
- (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order in terms of section 69(2); or
- (b) who has not been awarded damages as contemplated in paragraph (b) may file, when instituting proceedings in a court for an award of damages allegedly suffered as a result of prohibited conduct, a certificate of findings by the Competition Adjudicative Panel, in the prescribed manner.

Draft Bill

- (2) A certificate referred to in subsection (1)(b) is conclusive proof of its contents and is binding on a civil court.
- (3) A person's right to institute a claim for damages arising out of prohibited conduct comes into existence -
 - (a) on the date that the Competition Adjudicative Panel has made a determination in respect of a matter that affects that person; or
 - (b) in the case of a review, on the date that the review process in respect of that matter is concluded.

Variation or rescission of order

- 73.** The Competition Adjudicative Panel, acting of its own accord or on application, in the prescribed manner, by a person or undertaking affected by a decision or order, may vary or rescind its decision or order -
- (a) erroneously granted in the absence of a party affected thereby;
 - (b) in which there is ambiguity or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
 - (c) made or granted as a result of a mistake common to all of the parties to the proceedings.

Limitations on instituting action

- 74.** (1) A complaint in respect of prohibited conduct may not be initiated more than three years after the conduct has ceased.
- (2) Despite what is contained in subsection (1), in the case of mergers implemented contrary to the provisions of Chapter 5 of this Act, an application

Draft Bill

in terms of section 49 in respect of the prior implemented transaction may not be initiated more than three years after the Commission became aware of the contravention.

Standard of proof

75. In any proceedings in terms of this Act other than criminal proceedings the standard of proof is on a balance of probabilities.

CHAPTER 9

OFFENCES, ADMINISTRATIVE PENALTIES AND REMEDIES

Disclosure of information

76. (1) Subject to subsection (2), a member of the Competition Adjudicative Panel, subpanel, the Board of Commissioners, a committee, the Chief Executive Officer, the Executive Directors, any other employee of the Commission and any other person required or permitted to be present at any meeting of the Executive, the Competition Adjudicative Panel, a subpanel, the Board of Commissioners, a committee or during any investigation or at any hearing or proceedings in terms of this Act, who publishes or communicates or in any other way discloses confidential information relating to the affairs of any person or undertaking that has come to such person's knowledge -
- (a) in the exercise of any power or performance or carrying out of any function or duty under this Act; or
 - (b) as a result of such person's attendance at the meeting, investigation, hearing or review,
- commits an offence.

Draft Bill

- (2) Subsection (1) does not apply to information disclosed -
 - (a) for the purposes of the proper administration or enforcement of this Act;
 - (b) for the purpose of the administration of justice; or
 - (c) at the request of an inspector, the Executive, the chairperson or any other member of the Competition Adjudicative Panel or a committee, entitled to receive the information, or a court.

Disclosure of private interest

- 77.** The Chief Executive Officer, an Executive Director, an inspector, any other staff member of the Commission or any other person engaged by the Commission in connection with any power, function or duty of the Commission -
- (a) who has a financial or other personal interest in any matter which is the subject of an investigation by the Executive or meeting of the Board of Commissioners or committee, or a hearing or proceedings by the Competition Adjudicative Panel or subpanel-
 - (i) who does not disclose that interest to the Chief Executive Officer or chairperson of the Board of Commissioners, committee, Competition Adjudicative Panel, or subpanel, as the case may be; and
 - (ii) who does participate or assist in the investigation of that matter, the conduct of that hearing or proceedings, unless the Chief Executive Officer, the chairperson of the Board of Commissioners, a committee, the Competition Adjudicative Panel or subpanel otherwise directs;

Draft Bill

- (b) who uses any confidential information obtained in the performance of their functions to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person,

commits an offence.

Hindering administration of Act

- 78.** A person commits an offence who hinders, opposes, obstructs or unduly influences any person who is exercising a power or performing a duty delegated, conferred or imposed on that person by this Act.

Failure to comply with summons or to attend when summoned

- 79.** A person commits an offence who, having been duly summoned in terms of section 66 or directed to attend before the Executive, Board of Commissioners, a committee, the Competition Adjudicative Panel or subpanel -

- (a) fails without reasonable cause to appear at the date, time and place specified or to remain in attendance until excused; or
- (b) attends as required, but -
 - (i) refuses to take an oath or affirmation lawfully required;
 - (ii) refuses, after having taken the oath or an affirmation, to answer any question to which the Executive, Board of Commissioners, committee, Competition Adjudicative Panel, subpanel or any other person may lawfully require an answer or gives evidence which the person knows is false; or
 - (ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person.

Draft Bill

Failure to comply with order

80. A person commits an offence who contravenes or fails to comply with any order of the Competition Adjudicative Panel given in terms of this Act.

Other offences

81. (1) A -

(a) person commits an offence who -

- (i) does anything calculated to improperly influence the Executive, the Competition Adjudicative Panel or any member thereof concerning any matter connected with the exercise of any power or the performance or carrying out of any function or duty;
- (ii) anticipates any decision the Executive or the Competition Adjudicative Panel concerning an investigation, hearing or review in a way that is calculated to influence the proceedings or findings concerned;
- (iii) does anything in connection with an investigation, hearing or review that would have been contempt of court if the proceedings had occurred in a court of law;
- (iv) knowingly provides false information to the Executive or the Competition Adjudicative Panel;
- (v) wilfully interrupts the proceedings or acts unruly in the place where an investigation, hearing or review is being conducted;
- (vi) wilfully obstructs the execution of a warrant to enter and

Draft Bill

search;

- (b) member of the Board of Commissioners who contravenes or fails to comply with section 11(1), (2) or (3) or a member of a committee of the Board of Commissioners who contravenes or fails to comply with section 11(1) or (2), read with section 13(8), commits an offence.
 - (c) member of the Executive who contravenes or fails to comply with section 17 or a member of a committee of the Executive who contravenes or fails to comply with section 17, commits an offence
- (2) An inspector or other person commits an offence who, without authority, but claiming to have authority in terms of section 62 or 63, enters or searches premises and exercise any power contemplated in section 64(1) and (2).

Penalties

82. A person convicted of an offence in terms of this Act, is liable -

- (a) in the case of a contravention of or failure to comply with a order given by the Competition Adjudication Panel in terms of this Act, to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 20 years or to both the fine and the imprisonment;
- (b) in the case of a contravention of or failure to comply with section 76, 78 or 80, to a fine not exceeding N\$100 000 or to imprisonment for a period not exceeding six years, or to both the fine and the imprisonment; or
- (c) in any other case, to a fine not exceeding N\$40 000 or to imprisonment for a period not exceeding two years, or to both the fine and the imprisonment.

Magistrate's court to impose penalties

Draft Bill

- 83.** Despite any other law, a magistrate's court has jurisdiction to impose any penalty provided for in section 82.

Other orders

- 84.** The Competition Adjudicative Panel may make an appropriate order in relation to prohibited conduct in terms of this Act, including –

- (a) declaring conduct to be prohibited conduct in terms of this Act;
- (b) interdicting any prohibited conduct;
- (c) directing any action to be taken by the undertaking or undertakings concerned, to remedy or reverse the prohibited conduct or the effects thereof;
- (d) imposing an administrative penalty in terms of section 84;
- (e) where a merger is being or has been implemented in contravention of this Act, in addition to paragraphs (a) to (c), –
 - (i) interdicting the parties from implementing such a merger;
 - (ii) declaring void any agreement or provision of an agreement to which such a merger was subject; or
 - (iii) directing any party to the merger to sell or dispose of in any specified manner, any shares, interest or other assets it has acquired pursuant to the merger; or
 - (iv) any other appropriate order.

Administrative penalties

Draft Bill

85. (1) The Competition Adjudicative Panel may impose an administrative penalty on an undertaking for prohibited conduct.
- (2) An administrative penalty imposed in terms of subsection (1) may not exceed 10% of the undertaking's annual global turnover during the undertaking's preceding financial year.
- (3) When determining an appropriate penalty the Competition Adjudicative Panel may consider the following factors –
- (a) the nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered as a result of the contravention;
 - (c) the behaviour of the undertaking concerned;
 - (d) the level of profit derived from the contravention;
 - (e) the degree to which the undertaking has cooperated with the Commission; and
 - (f) whether the respondent has previously been found in contravention of this Act.
- (4) In determining the extent of the administrative penalty to be imposed, the Competition Adjudicative Panel may -
- (a) increase the administrative penalty referred to in subsections (2) to include the turnover of any undertaking or undertakings that control the respondent, where the controlling undertaking or undertakings knew or should reasonably have known that the respondent was engaging in the prohibited conduct; and
 - (b) on notice to the controlling undertaking or undertakings, order that the controlling undertaking or undertakings be jointly and severally liable for the payment of the administrative penalty imposed.

Proof of facts

Draft Bill

- 86.** In any criminal proceedings in terms of this Act -
- (a) if it is alleged that a person at an undertaking is or was an employee, that person is presumed to be an employee at that undertaking, unless the contrary is proved;
 - (b) if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item is presumed to have made the statement, entry, record or information, unless the contrary is proved; and
 - (c) a statement, entry or record or information in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it, unless it is proved that that person did not make, enter, record or store it.

Referral of matter to Prosecutor-General

- 87.** If it appears to the Executive that a person has committed an offence in terms of this Act, the Executive must refer the matter, all relevant information and evidence assembled by the Commission in connection with the matter to the Prosecutor-General for the prosecution of the offence.

CHAPTER 10

GENERAL

Corporate immunity

- 88.** (1) If the Executive considers it reasonable, just and equitable to do so, it may grant full or partial immunity from prosecution in terms of this Act and from liability for the payment of an administrative penalty.

Draft Bill

- (2) The Executive must publish a corporate immunity policy setting out the purpose of the policy and the conditions that need to be fulfilled in order for an undertaking to qualify for full or partial immunity as contemplated in subsection (1).

Advisory opinions

89. The Executive may issue, on payment of the prescribed fee, a non-binding advisory opinion to an individual or undertaking on any matter of law arising from this Act.

Competition advocacy

90. (1) The Commission must take reasonable measures for the promotion of competition advocacy, creating awareness, disseminating information, imparting knowledge and providing training on competition matters.
- (2) In the exercise of its powers as contemplated in subsection (1) the Commission shall have the authority to, at its instance –
 - (a) issue opinions on the competition impact of existing or proposed policies, laws, regulations or standards issued by public bodies.
 - (b) issue, when it considers it pertinent, opinions on the competition impact of state aid.

Limitation of liability

91. Neither the Board of Commissioners, a committee of the Board of Commissioners, the Competition Adjudicative Panel, a subpanel of the Competition Adjudicative Panel, or any member of the Board of Commissioners, a committee of the Board of Commissioners, the Competition Adjudicative Panel, a subpanel of the Competition Adjudicative Panel, the Executive, the Chief Executive Officer, an Executive Director, an inspector, any other staff member of the Commission or any other person

Draft Bill

engaged by the Commission in connection with any power, function or duty of the Commission is liable in respect of anything done in good faith in terms of this Act.

Delegation of powers and assignment of functions or duties

- 92 (1) The Board of Commissioners may in writing -
- (a) delegate to the Chief Executive Officer, any power conferred upon the Board of Commissioners by or under this Act.; and
 - (b) delegate to the Chief Executive Officer, any function or duty imposed upon the Board of Commissioners by or under this Act.
- (2) The Chief Executive Officer and the Executive may in writing -
- (a) delegate any power conferred upon the Chief Executive Officer or the Executive by or under this Act to an Executive Director, an inspector or any other staff member of the Commission, excluding the power to make a decision in relation to an investigation; and
 - (b) assign any function or duty imposed upon the Chief Executive Officer and Executive by or under this Act to an Executive Director, an inspector or any other staff member of the Commission.
- (3) The Board of Commissioners, the Executive or the Chief Executive Officer -
- (a) is not divested of any power delegated or any function or duty assigned under subsection (1) or (2);
 - (b) may vary or set aside any decision made under the power so delegated or perform any function or duty so assigned; and
 - (c) at any time withdraw the delegation of any power or the assignment of any

Draft Bill

function or duty.

- (4) If a decision varied or set aside under subsection (3)(b) relates to any person, that person may, within 14 days after the variation or setting aside of the decision, make written representation to the Board of Commissioners or the Chief Executive regarding the variation or setting aside.

Relationship with other authorities

- 93.** (1) If a regulatory authority, in terms of any public regulation, has jurisdiction in respect of any conduct regulated in terms of Chapter 4 and 5 within a particular sector, the Commission and that authority –
- (a) must negotiate an agreement to coordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
 - (b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.
- (2) In addition to the matters contemplated in paragraph (a) of subsection (1), an agreement in terms of that subsection must –
- (a) identify and establish procedures for the management of areas of concurrent jurisdiction;
 - (b) promote co-operation between the regulatory authority and the Commission; and
 - (c) provide for the exchange of information and the protection of confidential information.
- (3) An agreement referred to in subsection (1) must be published in the *Gazette*.

Draft Bill

CHAPTER 11

REPEAL OF LAWS AND TRANSITIONAL PROVISIONS

Repeal of laws

94. The Competition Act, 2003 (Act No 2 of 2003) is hereby repealed.

Transitional provisions

95. (1) Any rule or notice issued or any order or decision made or given under a law repealed by section 93 that may be issued, made or given under any provision of this Act is deemed to have been made under that provision.

(2) All -

(a) applications pending before the Namibian Competition Commission, the Minister or the High Court;

(b) investigations or hearings pending before that Commission; and

(c) proposed mergers pending before that Commission,

in terms of a law repealed by section 93 on the date on which this Act comes into operation must be dealt with and finalised by that Commission, Minister, or the Court, as the case may be, in accordance with that law.

Short title and commencement

96. (1) This Act is called the Competition Act 2019, and comes into operation on a date to be determined by the Minister by notice in the *Gazette*.

Draft Bill

- (2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

-00000-