

Are Namibian SOEs Subjected to Competition Law?

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In 2006 the Government of the Republic of Namibia passed the State Owned Enterprises Act contextualizing legally the definition and function of SOEs and the implicit and explicit mandates placed upon them by the Government of the Republic of Namibia, which acts as the State.

According to the renowned Namibian Academic, Joseph Diescho in a recent public commentary, he defined an SOE as a state-owned company, state-owned entity, state enterprise, publicly owned corporation, government business enterprise, government-owned corporation, commercial government agency, public sector undertaking, or parastatal which its form is a legal entity that undertakes commercial, productive, regulatory and service oriented activities on behalf of the Government who acts as shareholder, stockholder, regulator and operator to the SOEs.

Some SOEs are service rendering such as the University of Namibia and standard setting such as the Namibia Standards Institute whilst others are productive enterprises such as Transnamib, NamWater, Namport and NamPower, to mention but a few.

SOEs in Namibia can perform in their nature and design the role of commercial and service undertakings in Namibia. Such are the natural monopolies who are infrastructure driven in areas of railways, roads, air, ports, finance, power, energy, industry, and telecommunications whilst some offer strategic goods and services in areas of post office and defense. SOEs can be fully or partially owned by government.

SOEs started to perform its role way before independence in 1990 and on 25 October 2001, the Cabinet of the Republic of Namibia adopted a Report on a Governance Policy Framework for State Owned Enterprises in Namibia and on the 21st March 2015 His Excellency, Dr. Hage G. Geingob, the President of the Republic of Namibia, created a process of a firmly established institutional foundation of an ongoing consideration of attending to the reform of SOEs under the Ministry for Public Enterprises.

The Namibian Competition Commission is part of the regulatory SOEs who performs a mandate on behalf of Government to supervise and acts as a supreme regulator on regulating competition between businesses in the Namibian marketplace.

The Competition Act, No 2 of 2003 (“the Act”) does make provision for the SOEs to be subjected to its provisions, as the Act binds the State in so far as the State engages in trade or business for the production, supply or distribution of goods or the provision of any service, but the State is not subject to any provision relating to criminal liability. The Competition Act further applies to the activities of statutory bodies, except in so far as those activities are authorised by any law.

Hence the above provisions indicates that the SOEs are subject to the Competition Law in Namibia when it is engaged in productive enterprising and commercial service involvement of the economy. There is however worldwide concerns whether the involvement of the State through the SOEs crowd out the private businesses in the private sector within a marketplace. This is more so since the Act applies to SOEs as it engages in economic or commercially service oriented activities.

The Commission has recognized that the Act applies to SOEs and has started to interrogate on the essentiality of amending the law to further strengthen the powering legislation of attending to the conduct and behavior of SOEs so that there is level playing field of both the public and private sectors through competitive neutrality.

Competitive neutrality describes the aim of a level playing field in mixed public and private markets, where state-owned or quasi-public bodies line up to compete with private sector companies. These markets tend to be distorted as a result of structural and behavioral advantages enjoyed by public providers and a failure by public buyers to ensure a fair competition process and private sector engaging in market failure and anti competitive behavior.

A range of policy tools can therefore be employed to achieve competitive neutrality such as ensured legislative measures designed to mitigate the conflict of interest in the state being both regulator and provider in some sectors, and a more uniform approach by the Commission to counter SOEs anticompetitive behavior which causes consumer harm, ensured fairer procurement, and the full application of competition law to state-owned enterprises.

The revised Competition Act aims to propose further to give wider powers and aims to strengthen certain economic regulatory powers and concurrent powers with sector regulators to enforce the Competition Act 2003 in relation to the private and public sectors in Namibia.

For example the current Competition Act in its present form does not apply to the agricultural sector of the Namibian economy in respect of agricultural commodities which have not undergone the process of manufacture. According to Section 1 of the Act which deals with definition of "goods" it does not include agricultural commodities which have not undergone a process of manufacture.

These include products such as maize, millet (mahangu), and wheat. However, the Commission is cognizant that the nature of conduct and behavior of such companies who produces these goods where it undergoes process of manufacture are applicable to the provisions of the Competition Act when the immediate processing of manufacture in whatever form starts and hence companies in those sectors may be held liable if they contravene the Act when such goods undergo processing for manufacturing purposes.

The Commission considers it timely to amend the Act which will give the Commission more power to enforce and regulate all important sectors such as the agricultural sector. The Commission is aware of the current impact the way the agriculture sector is organized who could have implications on consumers hence its decision to broaden its scope and ensure its full applicability into all sectors of the Namibian economy.

The current Act is however specific that all SOEs and statutory bodies are subject to the mandate of the Commission particularly if there are no enabling or empowering provisions in the laws of the SOEs. SOEs are subject to the Competition Act that defines the mandate of the Commission, except in so far as SOEs are allowed currently by their own laws (emphasis laws promulgated by parliament not regulation, directives, notices, determinations, or gazettes) on competition issues in terms of their structural and behavioral conduct in the marketplace.

This means that all SOEs or any statutory bodies definitively fall within the ambit of the Competition Law and is fully subject to the Commission's mandate on competition regulation in Namibia.