

NaCC COMPETITION

Volume 4 No.4 2015

NEWS



THE OFFICIAL NEWSLETTER OF THE
NAMIBIAN COMPETITION COMMISSION



Namibian
Competition
Commission

**FAIR COMPETITION,
PROSPEROUS ECONOMY**

MISSION

To safeguard and promote competition in the Namibian Economy.

VISION

Fair market competition.

BRAND PROMISE

Fair competition for a prosperous economy.

VALUES

National economic interests come first

Our priority and commitment is to put national economic interests towards the attainment of Vision 2030 ahead of any other considerations.

Impartiality

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

Consistency

We shall be consistent in our approach in every instance, regardless of the circumstances and pressures that may be brought to bear.

Accountability for our role

We accept our responsibilities and are accountable for all our decisions and actions. We uphold and respect decisions taken by the Commission, whether or not an individual was party to an agreement.

Integrity

We act with integrity in matters of substance and procedure when executing the mandate of the Commission.



CONTENT

| | | |
|-----------|---|----|
| 01 | Editorial Note | 01 |
| 02 | Foreword by the CEO | 02 |
| 03 | News on Mergers and Acquisitions | 06 |
| 04 | News on Restrictive Business Practices Investigations | 07 |
| 05 | The Commission's Powers of Investigation | 09 |
| 06 | Annual Competition and Consumer Week Update | 12 |
| 07 | Women are the Future | 14 |
| 08 | Mergers and Acquisitions Update | 17 |
| 09 | Update on Restrictive Business Practices Investigations | 18 |
| 10 | Competition Terminology | 19 |

The Editor
Corporate Communications Officer
Namibian Competition Commission
P.O.Box 2104
Windhoek, Namibia

Tel: +264 (61) 224 622
Fax: +264 (61) 401 900
Email: info@nacc.com.na
www.nacc.com.na

01

Editorial Note



By Dina Gowases
Editor

Dear Readers,

The Commission extends its greetings for the year 2015 to all its stakeholders. May it be a fruitful and eventful year. We are appreciative of your support in all forms towards making the Commission an effective and efficient competition regulator. New Commissioners have been appointed to oversee the governance of the Commission. Renowned Advocate, Dr Sackey Akweenda has been appointed to the seat of Chairman on the Board of Commissioners. Mr Gideon Martin Luther Shilongo and Ms Teresia Kaulihowa form membership of the Board together with current Commissioners Mr Nghidinua Daniel and Ms Malverene Theron.

“The Commission fully supports the Government’s philosophy on gender equality”

Mr Mihe Gaomab II, the Chief Executive Officer, through his visionary leadership provides the foreword which details the formative years of the Commission and highlights developments as dictated by the growth of the Commission. This is a two-fold foreword. In the next edition we will provide you with the final leg which focuses on the vision and challenges of the Commission.

The Commission has handled over 400 mergers & acquisitions and over 30 case investigations into restrictive business practices. As part of our educational and information drive, we noted some of the significant cases pertaining to mergers and acquisitions as well as case investigations into restrictive business practice and the outcome thereof. The articles outline steps/procedures followed in handling these cases and what factors

contributed to the Commission reaching the decisions it made on the respective cases.

The competition regulation field is relatively new in Namibia and the Commission has been given the mammoth task of implementing the Competition Act 2 of 2003 on which the Commission’s mandate is premised. It is only befitting to inform our stakeholders on the Commission’s power to investigate contraventions of the Act. Section 33 of the Act empowers the Commission to either initiate or based on information provided by a complainant, investigate alleged infringements of the law.

The Commission held its annual Competition and Consumer Week in September themed “Competition Law, Policy and SMEs”. Small and medium enterprises (SMEs) form the backbone of any economy, all businesses started small and expanded through innovation, fair competition and profit. As such the Commission holds high regard for the protection and advancement of SMEs.

The Commission fully supports the Government’s philosophy on gender equality and as such more than 50% of the workforce constitutes women. We felt it important to highlight Mr Gaomab II’s stance on the “role of women after 21 March 2015 in the economic, social and political spheres”.

Each profession has a terminology unique to its environment and so does the competition regulation field. In order to enlighten our stakeholders on the various terms used in the enforcement of the Competition Law, we have created a section that explains some of the terminology used in competition regulation. One of our strategic objectives is stakeholder engagement and we hope through this newsletter that you, as our stakeholders, are provided with information that will bring about a better understanding of competition regulation in Namibia. ■

02 Foreword by the CEO



By Mihe Gaomab II
Chief Executive Officer

Highlights of the Commission during the formative years

The Commission had no gravitas or precedence when it opened its doors in 2009. During the formative months of its operations, there was a realisation that the implementation of a competition law is quite a daunting task, but certainly not impossible. Competition law enforcement was a new field of regulation in Namibia and required coordination of both the economic and legal discipline. Some provisions are time-bound and specific for case management and execution.

At the operationalisation of the Commission, work had to commence under the Competition Law enacted in Namibia in 2003 (Competition Act 2 of 2003). However, there were implementation challenges. Firstly, there was no competition policy to guide the modus operandi of the work, thus having no leverage to get the institutional footing right for the Commission. Secondly, the implementation of the Competition Law had no precedence, but was more premised on the South African Competition

Act 89 of 1998, which served as a tool to ensure immediate alignment of the implementation mechanisms with the experience and profile of competition enforcement in South Africa. Thirdly, the Commission had a number of cases for consideration and adjudication. This aided the operations of the Commission to immediately start implementing the Competition Law in line with the prescribed provisions and procedures.

Fourthly, the Competition Law was to be operationalised, administered and implemented in its full entirety. Unlike in some jurisdictions where the Competition Law enforcement is carried out on a sequential and staggered basis. Starting only with relevant sections such as the administration and institutionalisation of the Act. Fifthly, the legal industry in Namibia was eagerly awaiting the enactment and implementation of the Competition Law and since they had prior legal experience, especially with commercial law, there was a need to promptly respond on the full adherence and compliance of addressing competition cases.

Continued on page 03



Formulation of a competition policy

The purpose of a competition policy is to ensure that there is a framework in place to assist in identifying the competition prone sectors and to elucidate on anti-competitive practices that would have relevance for the enforcement of the Competition Law. There are also measures aimed at changing the structure of the economy and developing economic capabilities that would include protection for infant industries (Infant Industry Protection - IPP) and the implementation of a range of incentive schemes.

There is an evolving need to understand the policy context on competition as it relates to other complementary policies such as the country's industrial policy. Measures such as TPP should be implemented in a manner that does not undermine competition and the development of a culture of competition in the Namibian economy. When local industries are developed, we hope that such industrial fabric can stimulate entrepreneurial activity for broader private sector and SME development.

“There is an evolving need to understand the policy context on competition as it relates to other complementary policies”

Furthermore, the role of state-owned enterprises (SOEs) in infrastructure and network sectors of the economy such as telecommunications, ports, and electricity is regarded as critical in attracting investment and developing the required infrastructure in support of modernising the economy and promoting competitiveness. The noted industries are dominated by large monopolistic entities, and raises the issue of how competition can be introduced in these sectors, thus the focus on competitive neutrality provisions.

The early stages of the implementation of the Competition Policy will shape the Commission's resolve to play a role in the design of implementation support measures such as infant industry protection, towards the implementation of the nation's Industrial Policy. It affords the Commission the opportunity to embed competition compliance in the design of these measures.

The Commission should be aware of the poten-

tially adverse consequences, if state-led development, through SOEs, is implemented in a way that undermines competition. Through a World Bank study we have a better understanding of the competitive neutrality and associated administration costs of SOEs and its discernible impact on competition in Namibia. Although enforcement on SOEs may also become a determining factor in terms of budgetary execution for the foreseeable future.

“The Commission, established formally on 09 December 2009, is now a fully-fledged institution”

Other significant developments include the commitments entered into under the Southern African Customs Union (SACU) such as the Economic Partnership Agreement (EPA) and commitments in terms of the World Intellectual Property Organisation (WIPO), and the role of the Business Intellectual Property (BIPA) that also influences the way in which a competitive economy emerges in Namibia. The Commission therefore, needs to appreciate the implications of these developments and its likely influence on competition in the country, hence the need to ensure technical capacity to enforce the Act, justifying the budget cycle proposed.

Highlights/developments of NaCC

The Commission, established formally on 09 December 2009, is now a fully-fledged institution. It has moved with speed to enact the Competition Law and is considered one of the fastest growing competition authorities in the world.

The Commission was guided by four strategic objectives since its establishment from 2009/2010 to 2013/2014. During September 2011, the initial Strategic Plan of the Commission guided its operations and execution. It was premised on the following key four strategic objectives:

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

The first strategic objective of operationalising compliance, the Commission put in place operational manuals on merger regulation and

restrictive business practices. The Divisions have manuals that provide procedural guidelines to assess their respective cases. There are plans to have the research guidelines from the Economics and Sector Research Division in place, which is currently at an advanced stage.

The Commission completed close to 400 mergers and acquisitions since inception and has over 30 case investigations on restrictive business practices.

“The case load of the Commission has increased and is increasingly also becoming complex”

It is generally acknowledged that the Commission has not gone far with addressing the anti-competitive practices during the institutional and strategic implementation phases, but for the next strategic horizon on enforcement, commendable efforts have been made in the area of restrictive business practices.

The scope of the Commission’s competition regulatory activities is likely to expand significantly as advocacy interventions are developed and implemented and the enforcement activities increase. In absolute terms the case load of the Commission has increased and is increasingly also becoming complex and as a consequence, requires volume of resources.

A notable achievement during the implementation phase is that of the highlighted Supreme Court judgement where the Commission set a landmark precedent of winning a case that involved the biggest international supermarket retailer, Wal-Mart, in 2011/12.

In pursuance to the operationalisation of the Act, the outcome of the Wal-Mart Supreme Court challenge has led to the need of reviewing the Act to ensure that progress is made through an Internal Review Committee to realise a draft amended bill by end of 2014 to be presented to the Ministry of Trade and Industry for comments and input before procedures for final Parliament approval.

The Commission has also put in place thresholds for mergers and abuse of dominance. The thresholds were gazetted in December 2012, which serves as a net for thresholds which the Commission may not consider for notification by clients on mergers and

classified as an abuser of dominance.

For the second strategic objective on research and development, the Commission interrogated the need for proposing proactively for a research capacity. In 2012, the Commission created the research division, known as the Economics and Sector Research Division with adequate staffing and a strong research programme.

Pursuant to the establishment of the research division, the Commission assisted the Ministry of Trade and Industry and other stakeholders on research needs such as the Retail Sector Study, Sector Prioritisation and Price Monitoring. The Commission has through the research division, developed a strong research programme on sectoral inquiries ranging from franchising, auto, retail and has done merger impact analysis and finalised the National Competition Policy. It has also finalised a consumer protection study with relevance to the Competition Law and competitiveness studies on cement and poultry in Namibia.

“The first Competition Newsletter was published in 2011 and gained prominence for advocating competition developments in the country”

For the third strategic objective of strategic partnership management, the Commission strived to foster and maintain continuous competition outreach and advocacy to its clients and stakeholders with an objective to be a responsive, engaging and consultative institution. The first Competition Newsletter was published in 2011 and gained prominence for advocating competition developments in the country. There is continuous engagement with stakeholders through forums, events and conferences on the technical and strategic nature of work. The Commission meets with the Competition Law Forum on a regular basis to caucus on evolving developments in competition law implementation. The Commission has inculcated a culture of hosting an annual competition and consumer protection week in September to advocate competition matters to its stakeholders, public and the media.

In order to ensure timely advocacy interventions

Continued on page 05



into the public domain, the Commission wrote contemporary articles on competition to elucidate on some issues of relevance. The Commission also initiated public lectures at Polytechnic and UNAM to further inform the stakeholders on competition issues, notably the economic implications of the Wal-Mart Massmart Merger, with guest speaker from the Competition Commission of South Africa, Commissioner Tembinkosi Bonakele.

There is also a conducive and productive relationship with the reporting line ministry, Ministry of Trade and Industry, which is supportive, sound and positive. This ensures a continuous feed on the sphere of the competition work and aligning the policy positions on competition with other policy areas of interests such as the industrial Policy, Small Business Development Policy, Intellectual Property, and Foreign Investment Act.

“The Commission also attends events on a committed and sustained basis, hosted by the African Competition Forum (ACF) and the International Competition Networks (ICN)”

The Commission also attends events on a committed and sustained basis, hosted by the African Competition Forum (ACF) and the International Competition Networks (ICN). As a highlight, the Commission hosted an ACF Research Workshop in Namibia in December 2012, which was attended by 22 (twenty-two) competition authorities in Namibia.

For the fourth strategic objective of developing capacity and organisational capability, the Commission ensured full staffing and an appropriate structure for work execution.

In line with Section 13 of the Act on the organisation, control, management and discipline of the staff of the Commission, the Human Resources

Policy adopted in December 2009, serves as the binding policy and procedures discourse on the code of conduct and employment conditions.

The Commission is now fully staffed with requisite expertise, qualifications and experience of four Directors, subordinated by professional and corporate support staff, with the Office of the CEO supported by the Corporate Secretary/Legal Advisor and Technical Advisor.

The Commission is also acknowledged widely for its operational and financial transparency. To date, the Commission has no record of a qualified external audit by the Auditor General. It has maintained a clean bill of health. Equally, one could argue that the Commission may be recognised as one of the best managed SOEs in the country, as it strives to implement a coherent and cohesive institution, with a strong corporate governance culture taking into account, the mammoth mandate with a limited budget.

Pursuant to the objective of addressing skills development and organisational capacity, the staff are exposed and trained on a short-term basis through a targeted and focussed training approach. The Commission views capacity development as essential to its success and continuously strives to train its Namibian staff to enhance skills formation on competition law implementation in Namibia. To advance its educational contribution for future skills formation, the Commission assists UNAM with curriculum development on competition law, where students enrol to graduate in that sphere.

The Commission has fulfilled its strategic objectives during the 2009/2010 to 2013/14 period with dedication and determination as directed by the Board to see the Commission through its institutional and implementation phases. There is acknowledgement that there is need for improvement with concerted focus and this has been inculcated as part of the corporate culture of the organisation.

We hope to make an impact in the economy through efficient and effective competition law enforcement in contributing to poverty alleviation and addressing income inequality, although our role towards that end, is not immediately discernible. ■



03 News on Mergers and Acquisitions



The merger between Sands Hotel (Pty) Ltd. and MHG International Holdings (Mauritius)

Introduction: During August 2014, the Commission received a notification in terms of Section 44(1) of the Competition Act 2 of 2003, on the proposed acquisition of Sands Hotels (Pty) Limited (Sands Hotels) by MHG International Holdings (Mauritius) (MHG).

Acquirer: MHG International Holding (Mauritius), is a Mauritius registered company wholly owned by Minor International Plc (Minor). Minor is listed on the Stock Exchange of Thailand, and is not controlled by a single shareholder.

Target: Sands Hotels (Proprietary) Limited (Sands Hotels) is a company incorporated in accordance with the laws of the Republic of Namibia and trades as Kalahari Sands Hotels and Casino. Sands Hotels provides short-term accommodation (as well as related services such as conferencing facilities and casino gaming services). It is a luxury, four star hotel aimed at business and leisure travelers and offers extensive conferencing and meeting facilities.

Outcome: The proposed transaction does not raise competition or public interest concerns such as employment in the relevant market.

As the primary acquiring undertaking, MHG and its holding company do not generate turnover in or from Namibia and do not have any market share in Namibia.

The proposed transaction is unlikely to result in any substantial lessening or prevention of competition in any relevant markets or result in the merged entity acquiring a dominant position or strengthening a dominant position in the relevant markets.

The Commission resolved to approve the transaction without conditions.

The merger between Telkom SA SOC Limited and Business Connexion Group Limited

Introduction: During August 2014, the Commission received a notification in terms of Section 44(1) of the Competition Act 2 of 2003, on the proposed acquisition of Business Connexion Group Limited by Telkom SA SOC Limited.

Acquirer: Telkom SA SOC Limited (Telkom) is a public company registered in accordance with the laws of South Africa. Telkom is a telecommunications service provider in South Africa and offers a wide range of services and products.

In Namibia Telkom provides directory services through TDS Namibia which provides directory services for Telecom Namibia Limited (Telecom). TDS Namibia has been appointed as the selling and publishing agent for Telecom's telephone directories.

Target: Business Connexion Group Limited (BCX Limited) is a company registered in accordance with the laws of South Africa. BCX is a significant player in the ICT industry within South Africa with strong capabilities in managed IT infrastructure.

Outcome: The Commission found the proposed transaction less likely to lessen or prevent competition in the relevant product or geographical market. The Commission thus resolved to approve the merger without conditions.

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

04 News on Restrictive Business Practices Investigations



Auto Glass Repairs and Replacement Sector

Complainants: Gerrit C. Cilliers t/a Atlantic Windcreens (Atlantic) & Jasper Schrader t/a Gecko Glass Swakopmund (Gecko).

Respondents: Santam Namibia Ltd. (Santam), Mutual & Federal Insurance Company of Namibia Ltd. (Mutual & Federal) and Greg's Motors Spares (Greg's).

The Commission received a complaint in January 2013 alleging anti-competitive practices in the market for auto glass repair and replacement. The Commission conducted a pre-screening assessment to determine whether the conduct is prohibited under the Competition Act 2 of 2003. Based on the findings, the Commission is required to decide whether to conduct an investigation or not in terms of Section 33 (1) of the Act.

The complainants and Greg's are in the business of auto glass repairs and replacements. Apart from auto glass repair and replacements, Greg's also deals in car parts and accessories sales. Mutual and Federal and Santam are short-term insurance companies. Short-term insurance *inter alia* encompasses all types of insurance other than life insurance and is flexible and binding only for a limited amount of time.

The complainants alleged that the respondents have entered into agreements which may be in contravention of the Act. In terms of the agreements an insured would not pay excess fees in respect of claims for windscreen replacements done at

Greg's using Grandmark Glass. In addition, no quotations are required for Greg's. However, if the insured elects to use other repairers, he/she is required to provide at least up to three quotations. Greg's is allegedly preferred by the Insurers as it is an approved "Grandmark Glass" fitment centre. The complainants also sell and fit Grandmark Glass products. The complainants became aware of the agreements through Santam in June 2012 and Mutual and Federal in November 2012.

The complainants were of the view that the agreement amounts to restrictive business practices as envisaged in Section 23 of the Act and has the following effect on them:

"It applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

The complainants wanted the Commission to investigate, have the agreements stopped and impose a pecuniary penalty on the involved parties. Correspondence between the Insurers and brokers were attached in support of the complaint.

The Commission has identified the following Sections of the Act as being relevant and/or applicable: Section 23 (1); (2) (a); and (3) (f).

The Commission has identified the relevant product market as Auto Glass Repairs and Replacements for insured vehicles (herein referred to as the "auto glass market"). Mutual and Federal and Santam are players in the short-term insurance market



for motor vehicle repairs. The geographic market according to information provided was national.

The Commission conducted a screening process to determine the validity of the allegations. According to information gathered the alleged agreement is a way to alleviate the delays and is aimed at delivering fast and efficient service. Furthermore, Grandmark Glass at the time was also found to have the cheapest products, which in turn is good for consumers. The excess paid by clients was waived to enable consumers to have access to the most affordable products in the market, at the time. This would save the client costs since it is the driver of the insurance business. It was explained that these agreements are not exclusive but are available to any auto glass repairer who offers competitive prices. Similar agreements could not be entered into with other auto glass suppliers and repairers as they were found to be more expensive.

The Commission further found that premiums were influenced by the costs of procuring wind-screens and other auto glass. It is necessary to keep the costs as low as possible for clients by procuring products at low prices. This would result in clients paying lower premiums and maintaining the current premium levels. The cheaper prices benefit consumers in that the excess payable is linked to the procurement cost. Lower prices result in the excess portion of the insured decreasing as well as the monthly premium for the risk insured.

The Commission was therefore required to answer the following issues in its assessment:

- Are there any agreements between the respondents?
- If yes, do these agreements constitute restrictive business practices as envisaged in terms of Section 23 of the Act, in that they apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage?
- If the answer is negative, is there other notable anti-competitive conduct on the basis of which the Commission can initiate and start an investigation against the respondents or any other undertaking identified?

The available evidence confirms the existence of agreements between the respondents and indicates that these are normal service level agreements wherein issues of rates, discounts and rebates are set out.

The next issue to be determined is whether

these agreements constitute restrictive business practices as envisaged in terms of Section 23 (3) (f) of the Act, in that the object or effect of applying dissimilar conditions to “equivalent transactions” with Greg’s, prevent or substantially lessen competition in the relevant market. Pivotal to this question is whether the transactions in question are equivalent.

Grandmark Glass offers similar prices and discounts to all its customers, depending on the quantity each one purchases. The auto glass repairers add their margins and sell to their customers, who in this case are mostly the insurers. Some of the auto glass repairers use the PG price model or price higher than others, despite the fact that they all obtain the windscreens at similar prices from Grandmark Glass.

The transactions between the complainants, Greg’s and the insurers are functionally the same but are not equivalent in an economic sense, since all the undertakings price differently and hence the insurers’ submission being higher due to marked up prices by the complainants, compared to Greg’s, and can therefore not benefit from the excess fee waiver. Phrased otherwise, the transactions are not the same/similar, hence dissimilar conditions cannot be applied to non-equivalent transactions.

Consequently, refusal by the insurers to waive excess does not constitute a contravention of the Act as the conduct does not fall within the conduct prohibited under Section 23 of the Act as the transactions are not equal in all the aspects. The motive does not seem to be one of promoting or giving Greg’s a competitive advantage over the complainants, but appears to be a purely business decision where they look for the lowest prices and best terms possible to cut costs of procurement. In this instance Greg’s offers just that, but invitations have been extended to other auto glass repairers as well.

The goods and services, the subject of the transaction, must be of similar grade and quality. Equivalence of transactions entails equality in value, amount, meaning or worth. In the matter at hand, it is not disputed that the transaction is functionally the same. It concerns windscreens sold to insurers but the prices offered by the complainants and Greg’s are not similar. Price is the main factor which makes the transaction not equivalent despite the fact that the goods and transaction are equal in many respects.

The Commission recommended not to investigate and the file was closed. ■■■

05 The Commission's Powers of Investigation



By Bernhard Tjatjara
Law Officer: Restrictive Business Practices

The Competition Act No. 2 of 2003 came up with novelties or innovations that did not exist in Namibia before. The creation and establishment of the Namibian Competition Commission in 2009 is one of the phenomena emanating from such legal development. This phenomenon is new to some and might take quite a long while before the organised professions of lawyers, business people and members of the public will completely master all the nitty-gritty's, explore all the nooks and crevices of the new Act. This article attempts to enlighten our readers on the powers of the Commission in its investigations of anti-competitive behaviour prohibited by the Act, giving a synopsis of the Commission's powers to investigate.

The powers to investigate are a remnant of Section 16 and Section 33 of the Act. Section 16(1)(f) of the Act empowers the Commission to investigate contraventions of the Act, whereas Section 33 empowers the Commission with the powers to start an investigation in its own stead or based on a complaint received from any person on any conduct which is alleged to constitute or may constitute an infringement of prohibition Part I (which deals with restrictive business agreements, concerted practices) or prohibition Part II (which governs abuse of a dominant position).

The powers enable the Commission to:

- Request the appearance of certain persons before the Commission and the production of specified documents or specified information;
- Enter and search business premises or persons on premises without a warrant;
- Enter and search business premises or persons with a warrant; and

- To take and receive evidence in the form of a statement, document or information.

What triggers the use of the powers of investigation by the Commission?

Section 33 of the Act, provides that the Commission may either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of-

- The Part I prohibition; or
- The Part II prohibition.

The formal powers of investigation will kick in, only when there is reasonable grounds for suspecting that:

- Agreements between undertakings, decisions of associations of undertakings or concerted practices fall under section 23 of the Act; and
- There has been abuse of a dominant position infringing Article 26 of the Act.

Whether there is reasonable grounds will depend on the evidence that is available to the Commission at the time of screening.

When the power can be used

When the Commission has reasonable grounds for suspecting that a conduct of any undertaking or undertakings may fall within the prohibitions under Part I or Part II of the Act, it may require for the purpose of investigation under Section 33(4)(b) of the Act, any person to produce to the Commission any document



or article, specified in the notice which the Commission considers relevant to the investigation.

Under Section 33(4)(c) of the Act, still for the purpose of investigation, the Commission may require a person to appear before the Commission at a time and place specified in the notice, to give evidence or to produce any document or article specified in the notice.

This power of investigation is frequently used by the Commission. A person will usually receive a notice from the Commission to furnish information or produce any document or article or to appear before the Commission (Rule 16(2)).

The notice is usually served to the person concerned at his or her place of work or residence or if the person is absent from his workplace or residence, to any person 16 years of age or older, or it can be served by registered post to the address of the person concerned (Rule 16(3)).

“The Commission can require any person to produce documents or information that it considers relevant to the investigation”

The scope of the power

The Commission can require any person to produce documents or information that it considers relevant to the investigation. The Commission is not limited to approaching undertakings suspected of infringement. The notice may for instance be addressed to third parties such as complainants, suppliers, customers and competitors.

The procedure

The power to request the production of documents or information using Section 33(4)(c) of the Act is exercised by serving a written notice. The written notice must be in the form of Form 5. Form 5 (written notice) will usually:

- State the subject matter and purpose of investigation;
- Specify or describe the documents or information required; and
- Set out the nature of the offence that may be committed if a person fails to comply when the powers of investigation are exercised.

The notice may also state the time and place at which a document or information must be produced and the manner and the form in which it is to be produced. The notice, for example may require the person to appear at 09h00am before the Commission at the Commission’s premises on a specific date and require such a person to produce documents whilst in attendance at the particular time. If a document is produced, the Commission may require that an explanation of the document be provided.

Power to enter business premises with or without a warrant:

When the power can be used

Section 34 of the Act caters for the Commission’s power to enter and search premises to enable the Commission to make a determination whether an undertaking has engaged in or is about to engage in conduct that constitutes or may constitute an infringement of the Part I or Part II prohibitions. In that regard, an inspector may enter and search any premises with a warrant or without a warrant if the premises are not a private dwelling. The power to enter and search without a warrant is premised on either of the three grounds and are namely, if the owner of the premises consents to the entry and search of the premises or if the inspector on reasonable grounds believes that a warrant would be issued if applied for or that the delay in obtaining a warrant would defeat the object of the entry and search.

The scope of the power

An inspector (an employee of the Commission or appointed on a part-time basis) may enter and search any premises or search any person on the premises if there is reasonable grounds that the person has personal possession of any document or article that has a bearing on the investigation. The inspector may also examine any document or article found on the premises that has a bearing on the investigation or request any information about any document or article from the owner of the premises or the person who is in control of the premises. The inspector may take extracts from, or make copies of any book or document found on the premises that has a bearing on the investigation or use any computer system on the premises or attach and if necessary remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

The procedure

Upon first entering any premises with a warrant, the person authorised by the warrant must provide the owner or person in control of the premises proof of his or her authority to enter the premises by handing

Continued on page 11



a copy of the warrant to that person and his or her identity. Where the owner or the person in control of the premises is absent, the person authorised under the warrant must affix a copy of the warrant of the premises in a prominent and visible place.

An inspector may without a warrant enter any premises on the grounds specified above. An inspector who removes anything from any premises must issue a receipt for that thing to the owner or person in control of the premises and return that thing as soon as possible, after achieving the purpose for which it was removed. An inspector who is entering and searching any premises with a warrant or without a warrant may be accompanied by one or more police officers.

Power to take evidence

Section 35(1) of the Act provides that the Commission may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, whether or not such statement, document, information would otherwise be admissible in a court of law.

When can the power be used

If the Commission on reasonable grounds, believes that a certain person has knowledge of matters relevant to its investigation, the Commission may use this power.

The scope of the power

The Commission may take evidence on oath or affirmation from any person before it and for that purpose any member of the Commission may administer an oath or affirmation. The Commission may permit any person appearing as a witness before it to give evidence by tendering and if the Commission thinks fit, verifying by oath or affirmation, a written statement.

Limitations on the use of the powers of investigation under Part I and Part II of the Act

Disclosure of information

Section 55 of the Act limits a member of the Commission, or of a Committee of the Commission, the Secretary, any other employee of the Commission and any other person required or permitted to be present at any meeting of the Commission or of a committee or at any investigation in terms of the Act from publishing or communicating or in any other way disclose any information relating to the affairs of any person or undertaking that has come to such a person's knowledge as a result of the powers or performance of any duty or function under the Act or as a result of such person's attendance at such a meeting or investigation.

The limitation imposed by Section 55 of the Act does not apply to information disclosed for the purpose of the proper administration of justice or at the request of an inspector, the Chairperson or any other member entitled to receive the information or if the information is disclosed for the purpose of the proper administration or enforcement of the Act.

Time limits

An investigation into an alleged infringement of the Part I or the Part II prohibition, may not be initiated after three years from the date the infringement has ceased. This means that the Commission will have no powers to investigate a complaint relating to a conduct which has ceased three years ago.

Offences relating to the powers of investigation under Part I and Part II of the Act

Criminal liability is imputed to certain persons under Chapter 7 of the Act, which emanates as a result of failure to cooperate when the powers of investigation are exercised. They are a handful and it is an offence for a person to:

- Fail to attend before the Commission, without a reasonable excuse after having been duly summoned;
- Refuse to take an oath or affirmation required by the Commission, whilst such person is in attendance after being duly summoned;
- Refuse to answer any question which the Commission may lawfully, require after having taken the oath or affirmation;
- Give false evidence;
- Fail to produce any document or thing in his possession or under his control, lawfully required by the Commission;
- Does anything calculated to improperly influence the Commission or any member concerning any matter connected with the exercise of any power or the performance of any function of the Commission;
- Anticipate any decision of the Commission concerning an investigation in a way that is calculated to influence the proceedings or decision;
- Does anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law;
- Knowingly provides false information to the Commission; and
- Defames a member in his or her official capacity.

Any person convicted for the above offences is liable to a fine not exceeding N\$20 000 or imprisonment for a period not exceeding one year, or the fine and imprisonment. The magistrate's court has jurisdiction to impose any penalty for the above offences. ■

06 Annual Competition and Consumer Week Update



By Lovisa Hashikutuva
Researcher: Economics and Sector Research Division

The Commission’s much anticipated annual Competition and Consumer Week, an important information sharing platform, which began in 2012, aimed at sensitising the public on the importance of the Competition Law and policy compliance as well as fair competition was held in September 2014. The workshop, under the theme Competition Law, Policy and SMEs, intended to highlight the applicability of the Competition Law to Small and Medium Enterprises (SMEs), challenges faced by the sector. The week’s proceedings comprised of talk shows, media briefing, a workshop as well as a student public lecture.

The event facilitated an open dialogue on challenges faced by SMEs relating to their growth and possible remedies as well as the importance of the Competition Law for the growth of SMEs. The forum brought together various stakeholders from

the law fraternity, organisations, SME associations and small to medium entrepreneurs, and industries to deliberate on how best the Commission can address the issues related to stakeholders through the Competition Law.

“The Commission’s much anticipated annual Competition and Consumer Week was held in September 2014”

SME representatives noted that access to funding, affordable work space, access to markets,

Continued on page 13



shortages of skilled employees, costs of doing business, bureaucracy, statutory obligations, tax regime and levies/fees were some of the major hindrances that had a negative impact on the growth of their businesses. The dialogue was not only skewed on one side but retained an equilibrium as participants aired some of the possible remedies to prolong the survivability of SMEs and enable them to venture into foreign markets, thus facilitate businesses growth. The need for SMEs to be supported/assisted by the Government through SME support programmes and strategic measures, as well as incentives to local entrepreneurs were some of the proposals echoed that could enable SMEs to compete on a level playing field internationally. Other suggestions included granting rebates in the form of double tax deductions for training or upgrading skills of employees, granting vouchers with favourable repayment terms and reduced interest rates to enable entrepreneurs to buy plants, equipments and tools needed to diversify their businesses and become more competitive.

“Participants aired some of the possible remedies to prolong the survivability of SMEs and enable them to venture into foreign markets”

The Ministry of Trade and Industry shared information on some of the initiatives offered under the Directorate of Industrial Development. These comprise of the Entrepreneurship Support Services Programme, Enterprise Level Strategies, Industry Level Strategies as well as Macro-Level Strategies whose aim is to promote entrepreneurship, facilitate access to finance, facilitate collaborative partnership and strategic business alliances, enhance product and service quality, attain sustainable growth of industries, increase employment, skills and knowledge, amongst others. The Commission

is also engaged in national policy and competition regulation development.

The last leg of the Competition and Consumer Week closed off with a student public lecture at the University of Namibia under the theme Competition Law, Policy and SMEs aimed at informing participants on the role of the Commission and how the Competition Law and policy relate to and or promote SME development. The lecture was attended by tertiary institution students and staff members specifically, in the faculties of law and economics. An essay competition, targeting students in the faculties of economy and law, focusing on identified topics related to competition issues, was held as part of the event. The essay competition winners were awarded certificates at the end of the lecture. The winners were:

- Taimi H.I.J Iileka, 2nd year LLB student, University of Namibia.
- Agripina T.M Kufere, 3rd year Economics student, University of Namibia.
- Ndeshimona R Andima, 2nd year LLB student, University of Namibia.

“The workshop concluded that more open dialogue and awareness is needed in fostering the lack of information and coordination experienced by SMEs across the regions”

The workshop concluded that more open dialogue and awareness is needed in fostering the lack of information and coordination experienced by SMEs across the regions. Regulatory authorities/ organisations should also continue to provide and manage programmes/initiatives that support the growth and development of SMEs to attain a competitive market/economy. —



07

Women are the future



By Mihe Gaomab II
Chief Executive Officer

The term “*Women are the Future*” is more pronounced in Namibia than it was ever before. The recent 50/50 quota does strengthen the need for highlighting the role of women after 21 March 2015 in the economic, social and political sphere.

Phases of women development

There are however well documented evidence based facts such as the High Level Panel that advocates for a Post Development Agenda 2015, and attests to the intricacies and manifestations that women have gone through for over the past three decades to get where they are today in the world. All has however not been done as per the women’s needs in terms of evolution, development, empowerment and advancement.

In the 1970s, research on African farmers noted that, far from being gender neutral, development was gender blind and could harm women. Out of this realisation emerged the Women in Development (WID) approach, which constructed the problem of development as being women’s exclusion from a benign process. Women’s subordination was seen as having its roots in their exclusion from the market sphere and their limited access to, and control, over resources. The key was then to place women ‘in’ development by legislatively trying to limit discrimination and by promoting their involvement in education and employment.

The WID approach led to resources being targeted at women and made particularly women’s signifi-

[Continued on page 15](#)



cant productive or income generating contribution, more visible. A notable key initiative and deeper implementation of the Women In Development in Namibia must be put squarely on Ms Veronica De Klerk who pioneered and realised women development in Namibia as a result of this approach.

While WID advocated for greater gender equality, it did not tackle the real structural problem such as the unequal gender roles and relations that are at the basis of gender subordination and women's exclusion. This approach also focussed on what has been termed practical gender needs, such as providing better access to water, health and social service provision which would reduce the amount of time women and girls must spend in domestic activities and thus allow them more time for education or employment. There was no questioning why collecting water or working in the fields has been constructed as a female responsibility, or why improved access to water or fetching wood is a need of women and girls only.

In the 1980s, the Gender and Development (GAD) approach arose out of the critique of WID. GAD recognised that gender roles and relations are key to improving women's lives, with the term 'gender' suggesting that a focus on both women and men is needed. As the Namibian Women Summit advocated tirelessly over the past five years in Namibia, the need to understand how gender intersects with other characteristics such as age, ethnicity and sexuality has been noted. The GAD approach recognises that it is not sufficient to add women and girls into existing processes of development but there is also a need to problematise why they are excluded, advocating that the focus should be on addressing the imbalances of power at the basis of that exclusion.

GAD also questions the notion of 'development' and its benign nature, implying a need to shift from a narrow understanding of development as economic growth, to a more social or human centred development. GAD projects are more holistic and seek to address women's strategic gender interests by seeking the elimination of institutionalised forms of discrimination for instance around land rights, or ensuring the right of women and girls to live free from violence, for example.

The 1990s witnessed the 'rise of rights' as many Governments, NGOs and agencies adopted a rights-based approach to development. Rights increase the recognition that women's demands are legitimate claims. The most notable success for the women's movement has perhaps been the recognition of women's right to live free from

violence, and a broadening of understanding of violence against women from 'domestic' to 'gender based'. There was also a shift in understanding development as meaning economic development to a more holistic social development focus, yet economic growth remains the main driver.

For the majority of large development organisations and agencies, the WID approach has now largely been replaced by GAD, which has been institutionalised within the notion of gender mainstreaming. Mainstreaming involves ensuring that a gendered perspective is central to all activities, including planning, implementation and monitoring of all programmes, projects, and legislation. However, women's 'rights', particularly sexual and reproductive health rights, are not universally accepted as rights, and violence against women remains prevalent across the globe, and women still lack full and equal participation in economic and political spheres. Mainstreaming has yet to succeed and there is a need for a continued prioritisation of integrating women into development

Evidence on women for economic development

The most influential evidence on the importance of women for economic development has come from research used to support the World Bank's 'Gender Mainstreaming Strategy' launched in 2001. This research highlighted that societies that discriminate by gender tend to experience less rapid economic growth and poverty reduction than societies that treat males and females more equally, and that social gender disparities produce economically inefficient outcomes.

For example, the report further shows that if African countries had closed the gender gap in schooling between 1960 and 1992 as quickly as East Asia did, this would have produced close to a doubling of per capita income growth in Africa as it did in the Asian region. The report is unequivocal in its findings that the primary pathways through which gender systems affect growth are by influencing the productivity of labour and the allocative efficiency of the economy.

In terms of productivity, for example, if the access of women farmers to productive inputs and human capital were on par with men's access, total agricultural output could increase by an estimated 6 to 20 percent. In terms of allocative efficiency, while increases in household income are generally associated with reduced child mortality risks, the marginal impact is almost 20 times as large if the income is in the hands of the mother rather than the father. The notion that women are more likely



to “put their money to good use” to raise children or buy productive goods such as food and hardware for reselling are true than the men who tend to buy consumption items that are not productive at all.

Identification of women as being a reliable, productive and cheap labour force makes them the preferred workforce for textiles and electronic transnational corporations as evident from the employment of young women in specialised technology firms producing blue chips for computers in East Asia. Perception of women as ‘good with money,’ including being better at paying back loans, has led them to be targeted in microfinance programmes as evident with Grameen Bank. Recognition of women as more efficient distributors of goods and services within the household has led to them being targeted with resources aimed at alleviating poverty, such as cash transfer programmes as with the e-wallet or mobipay solutions in rural areas of Namibia.

The above shows how the justification for including women in development in economic growth has been an efficiency argument. However, the question begs whether this solves the equity concerns of women and men. Critics suggest this instrumentalist approach to engendering development, while bringing economic growth gains, will not fundamentally change the position and situation of women. It is important to note that while gender equality will help bring economic growth, economic growth will not necessarily bring gender equality. Advancing gender equality requires strengthening different dimensions of women’s autonomy such as economic and political autonomy, full citizenship and freedom from all forms of violence, and sexual and reproductive autonomy.

Limitations of women advancement

What are the constraints or limitations for women advancement in the world especially in the developing economies such as Namibia? The notion is that women in the development world are actually likely more empowered than those in the developed economies. This is because they are empowered at a subsistence level as being female headed households and empowered to take charge of the “caring economy” through raising children and to ensure that needs are met constantly and immediately. Women in Namibia especially in rural and informal settlements are empowered by circumstances to do good by doing something. This does not mean that women are advanced as a result. Compared to their women peers in the developed world that are faced by acute male chauvinism

and social pressures in the work and home place through “glass ceiling” and “sexual harassment” women in developing economies such as Namibia face the problem of “standing up for their rights” for economic advancement.

The world is also increasingly faced by gender crisis that deprives women of their economic advancement. It is well documented that changing domestic and professional roles does engender “masculine and femininity crisis” where women are critiqued as domesticating professionalism thus restricting their professional mobility whether vertical and horizontal, and men are being accused of high level of control on both the domestic and work front, culminating into risks of physical and sexual violence. One has to recognise that this world is indeed in economic transformation.

Hence this ‘crisis in masculinity and femininity’ is increasingly being recognised as an impediment to gender based management and mainstreaming of women in economic development and advancement. It is important that changes in men’s and women’s roles and positions through processes of globalisation and cultural and political pressures should be suggestive of a need to focus attention on transformative gender progress towards greater equality, to ensure men and women remain harm neutral.

Economic fundamentalism, policies and practices that privilege profits over people, also deny women their rights as workers and to work. While political culture is important for bringing change, women continue to have a limited voice at local and national levels, and women are not able to fully participate in formal systems of power. Hence the support to 50/50 to ensure that political discourse on quota allocations translates into real economic advancement for women in the work place as well as in the overall sphere of the Namibian economy.

Women advancement at the Commission

The Namibian Competition Commission seems to be ahead of its time to ensure the fulfilment of the 50/50 quota. The Commission has over 70% of women employed and 50% in Executive Management. The Commission sees women advancement on merit and skills and does not employ women because they are women. The Commission’s work is highly specialised and professionalised and hence skills deployment is of utmost importance.

NB: The article is based on a Speech presented to the Namibian Women Summit on 13 August 2014.

08 Mergers and Acquisitions Update

Determinations made by the Commission for the period of July 2014 to October 2014.

| Case Number | Primary Acquiring Firm | Primary Target Firm | Initial Date Filed | Status |
|----------------|--|--|--------------------|----------|
| 2014JUL0040MER | Grohe Luxembourg Four S.A (Grohe Luxembourg) | Main Street 1254 (Pty) Ltd. (Watertech Holdco) | 31/07/2014 | Approved |
| 2014JUL0041MER | Business Connexion Group Limited | Telkom SA Soc Limited | 04/08/2014 | Approved |
| 2014AUG0043MER | Frans Indongo Investment Trust | Brukarros Meat Processors (Pty) Ltd. | 13/08/2014 | Approved |
| 2014AUG0044MER | MHG International Holding (Mauritius) (MHG) | Sands Hotels (Proprietary) Limited (Sands Hotels) | 28/08/2014 | Approved |
| 2014AUG0048MER | Pointbreak Property Unit Trust Three | Lolopark (Pty) Ltd. | 28/08/2014 | Approved |
| 2014AUG0047MER | Paratus Telecommunications (Pty) Ltd. | Vox Telecom (Pty) Ltd. | 28/08/2014 | Approved |
| 2014AUG0046MER | ImproChem (Pty) Ltd. | Clariant Southern Africa (Pty) Ltd. in respect of its Water Treatment Business Unit & 50% shares in Blendtech (Pty) Ltd. | 29/08/2014 | Approved |
| 2014SEP0051MER | Bolton Footwear (Pty) Ltd. | Jordan Footwear Namibia Ltd. | 01/09/2014 | Approved |
| 2014SEP0052MER | Mincon Group PLC | Omina Supplies (Pty) Ltd. | 02/09/2014 | Approved |
| 2014AUG0049MER | Trustco Property Holdings (Pty) Ltd. | Farm Herboth's (Pty) Ltd. | 12/09/2014 | Approved |
| 2014SEP0058MER | Villa Hugel Development cc | Villa Hugel (Proprietary) Limited | 29/09/2014 | Approved |
| 2014OCT0060MER | Archie Graham | Be Prepared Investment Closed Corporation 141CC to 182 cc | 13/10/2014 | Approved |
| 2014OCT0062MER | Ethos Fund | Autozone | 16/10/2014 | Approved |
| 2014OCT0061MER | Messrs Ryno du Preez & John Raes | Andrico Investments Number 12 (Pty) Ltd. | 16/10/2014 | Approved |
| 2014OCT0063MER | Esja Holdings | Sinco Fishing // Yukor Fishing // Epango | 24/10/2014 | Approved |

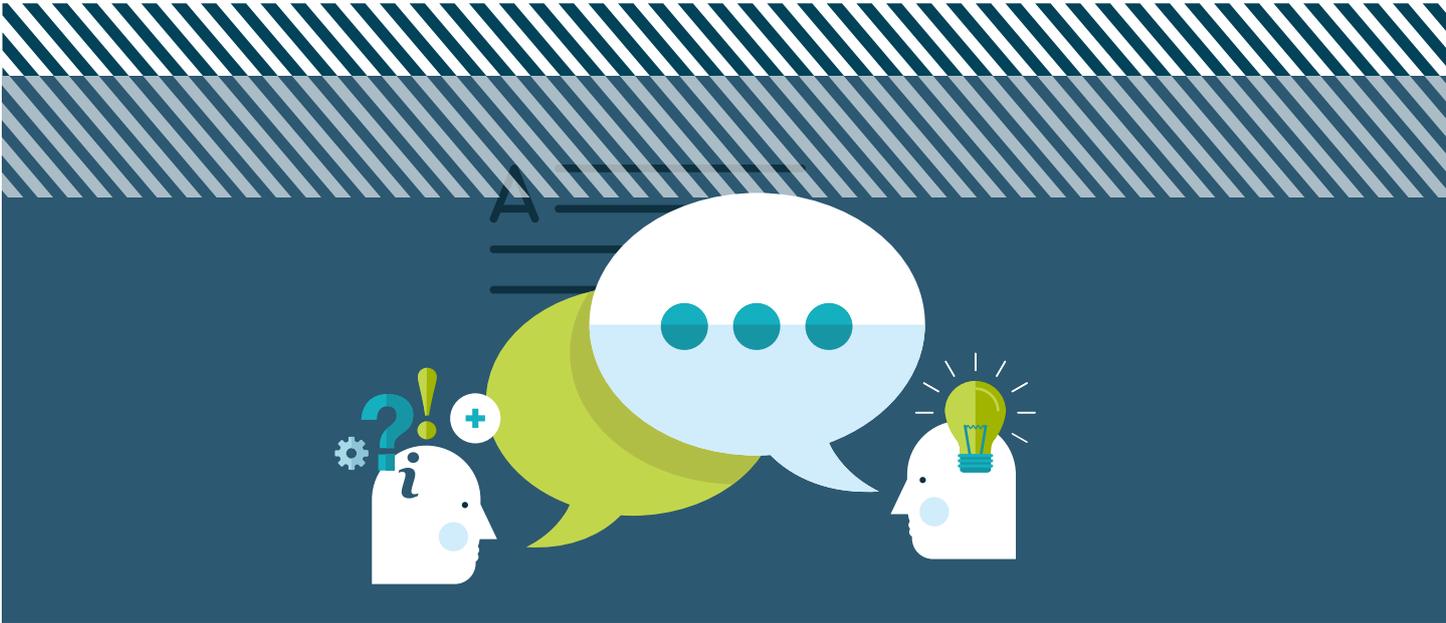
09 Update on Restrictive Business Practices Investigations



Update on restrictive business practices investigations

| No. | Case Number | Complainant | Respondent | Status |
|-----|------------------|---|--|--|
| 1 | 2011AUG0084COMP | Yellow Square t/a Golden Transfers | Dr Weder, Kauta & Hoveka inc // First National Bank Namibia (FNB) | Closed - Decision not to investigate - Form 3 |
| 2 | 2013MAR0004COMP | Jade McClune, newsdeck manager of the Namib Times | Namib Independent Newspaper | Closed - No contra-vention (Section 33(2), Rule 15(12)(b)) |
| 3 | 2013APR0002EXEMP | Application for exemption in respect of certain restrictive practices in terms of section 27(1) (Namibia) co, Limited | Tullow Kudu Limited - Namcor - Cieco E&P (Namibia) Co, Limited | Closed - Finalized by RBP Division-Assessment of application and report drafting concluded |
| 4 | | Unlawful operators in the Namibian ICT Market | | Closed - Advisory opinion sought |
| 5 | 2013AUG0006COMP | Urban Legend Investments cc (cc/2011/1787) | | Closed - Falls under different Jurisdiction |
| 6 | 2012FEB0001COMP | Thorsten Hubner - Namit cc | Namibian Network Informatin centre cc, Omadhina Internet Services cc, Ondis Internet Services cc | Closed - Decision not to investigate - Form 3 |
| 7 | 2012MAR0002COMP | Alieta Elizabeth Wiese t/a support.com | Pastec Distribution & Training cc | Closed - Decision not to investigate - Form 3 |
| 8 | 2012MAY0003COMP | Hallie Investments no 142 cc & 1 other | Puzzle Investments no 36 cc & 3 others | Closed - Investigation concluded – findings were that Part I and Part II of the Act, have not been infringed |
| 9 | 2012JUNE0004COMP | LLD Diamonds Namibia (Pty) Ltd. | The GRN, De Beers Society Anonyme, Diamond Trading Comapny, Namdeb Daimond Holdings (Pty) Ltd., Namdeb Diamond corp, De Beers Marine Namibia | Closed - Decision not to investigate |

10 Competition Terminology



Competition

Rivalry in which every seller tries to get what other sellers are seeking at the same time: sales, profit, and market share by offering the best practicable combination of price, quality, and service. Where the market information flows freely, competition plays a regulatory function in balancing demand and supply. (Source: <http://www.businessdictionary.com>)

Relevant market

It identifies the extent of effective competitive constraints in the market, in terms of product/services, time and location.

Product market

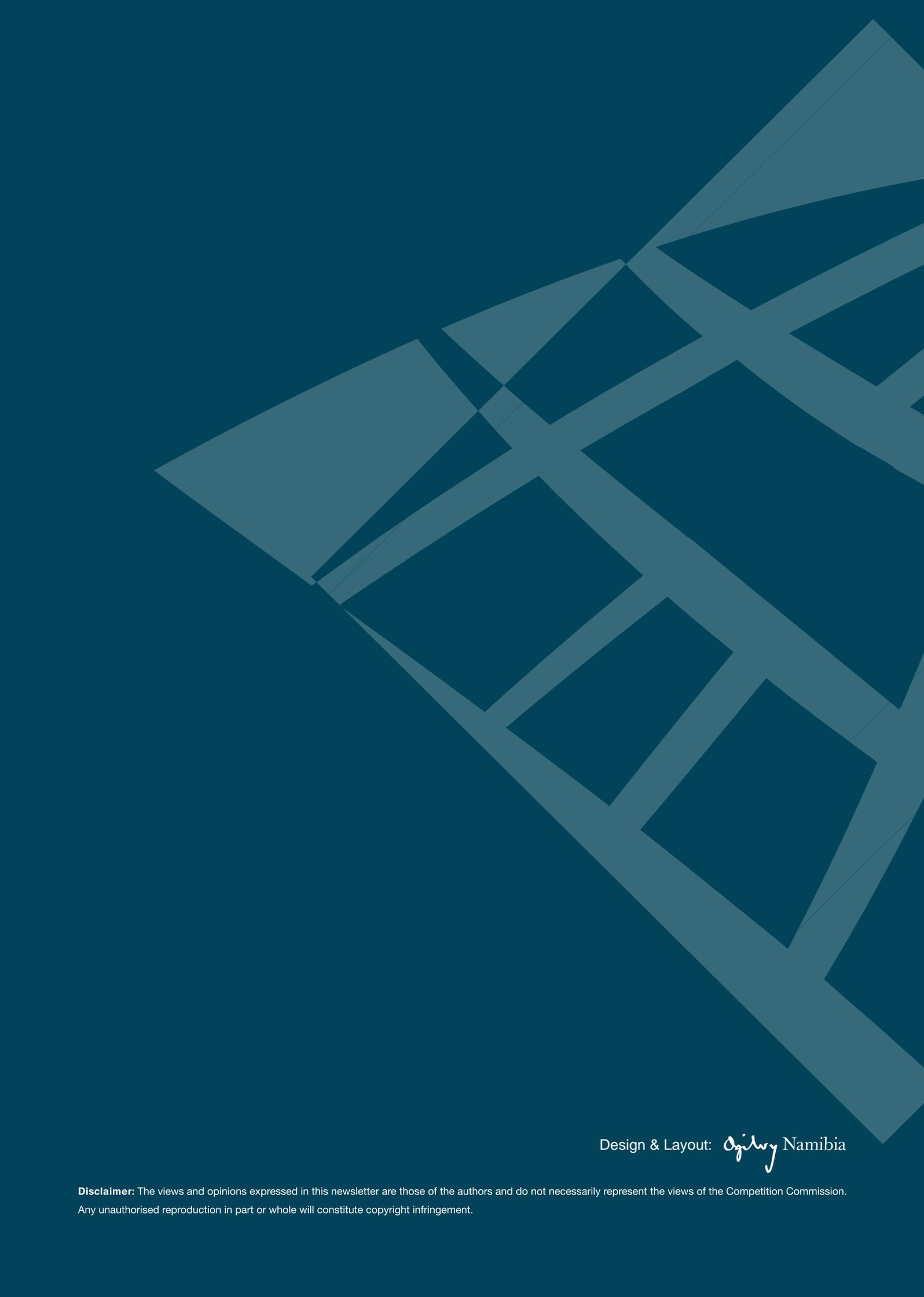
It includes all products that are close substitutes for one another – both in consumption and production.

Geography market

It is determined on the basis of customers' or consumers' ability to switch purchase between suppliers of substitute products in case of a price hike. (Source: Sonia Gasparikova, "Enforcing the Competition Law in Namibia: A Toolkit", 2008, CUTS International, India)

NOTES

A series of horizontal dotted lines for writing notes.



Design & Layout: *Agilvy* Namibia

Disclaimer: The views and opinions expressed in this newsletter are those of the authors and do not necessarily represent the views of the Competition Commission. Any unauthorised reproduction in part or whole will constitute copyright infringement.