Namibian Competition Commission

Media Statement

By

The Chief Executive Officer

Namibian Competition Commission,

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WINDHOEK

The Namibian Competition Commission is pleased to report on the development in the Commission with particular emphasis on our work during the third and fourth quarter of the 2015/16 fiscal year, in our quest to achieve our vision of safeguarding and protecting competition in the Namibian markets. As a Competition Authority, our responsibility is to implement and administer the competition law in order to promote and safeguard competition in the Namibian market. Competition law is to protect competition, not necessarily competitors. In this way, we maintain a competitive marketplace. And, a more competitive market means:

- Increased efficiencies and the encouragement of innovation. Competition drives companies to innovate and create new products and services to gain market share.

- The creation of incentives for product differentiation and improvements in the quality of goods and services provided. In that sense, competition policy helps to enhance consumer welfare by providing consumers with a wider choice at competitive prices.

- Increased competition between firms, resulting in efficiency and/or quality improvement, which in turn benefits consumers.

- Efficient use of resources, which is a pre-requisite for growth. Competition policy can also play a direct and important role in promoting economic growth and reducing poverty. Also, it stimulates innovation, productivity and competitiveness, contributing to an effective business environment, which will generate economic growth, employment, and the creation of possibilities for small and medium-sized enterprises.

The Commission, since its inception in 2009, has been guided and guarded by corporate governance principles and has followed through with the implementation and enforcement of the Competition Act 2 of 2003 without fear or favour.

In that light, the Second Strategic Plan was launched at the Stakeholder gala dinner in December 2015, and will guide the operations of the Commission over the next five years (2015/16 – 2019/20). The strategy places emphasis on the enforcement activities of the Commission and the use of advocacy as well as the promotion of compliance as the twin pillars of competition regulation. The strategy envisaged the promotion of a culture of compliance with the law that will be informed by research-based evidence, high quality analysis, decision-making and operational excellence.

The Corporate Service Division occupies a central role in the Commission's activities with particular focus on employees' wellness, recruiting, promoting and training. During the period under review, the Commission has successfully implemented the Performance Management System which sets out each employee's contribution towards attaining the goals of the strategic plan. With that the Commission believes that its human capital will continue to deliver in realising its mandate and thereby becoming a highly performing organisation.

The Commission is pleased to report that our staff complement has grown to 34 with specialist staff that was recruited to deal with the consequences of the increased workload over fully fledged Directorates namely; Restrictive Business Practices, Mergers and Acquisitions, Economics and Sector Research, and the Corporate Services Directorate.

Mergers and acquisition

The Namibian Competition Commission during the third[1] quarter and fourth[2] quarter in total adjudicated on 32 mergers. Of the 32 merger adjudicated on, 2 mergers were conditionally approved and 30

[1] 15 mergers
[2] 17 mergers

mergers unconditionally approved and no mergers were prohibited during the period under review.

The mergers that were conditionally approved were those that raised public interest concerns, specifically regarding their impact on employment. The conditioned mergers were the following:

- *Prposed merger between White Flower Investment Three (Pty) Ltd and Brukarros Meat Processors (Pty) Ltd*
- *Proposed merger between Lewis Stores Namibia (Pty) Ltd // The Business of Ellerine Furnishers (Namibia) (Pty) Ltd and Ellerine Retail (Namibia) (Pty) Ltd that trade as "Beares" and "Ellerines") in Namibia*

Although both mergers did not raise significant competition concerns they rose strong public interest concerns, which the Commision considered in relation with section 47 (2) and section 2 of the competition act.

The Commission further wishes to inform the public of one of the prominent cases still under investigation:

- *The proposed acquisition of SABMiller Plc ("SABMiller") by Anheuser-Busch InBev ("AB InBev")*

Summaries of the above cases are set out below.

1. *Proposed merger between White Flower Investment Three (Pty) Ltd and Brukarros Meat Processors (Pty) Ltd*

On the 9th of December, 2015, the Commission received a notification in terms of section 44(1) of the Competition Act, Act No. 2 of 2003, ("the Act") on the proposed acquisition of the entire issued share capital of Brukarros Meat Processors by White Flower Investments Three (Pty) Ltd.

The Commission noted that White Flower Investments Three (Pty) Ltd ("White Flower"), the primary acquiring undertaking is a private company incorporated in accordance with the laws of Namibia, and that White Flower is a dormant undertaking incorporated for purposes of facilitating the proposed transaction.

The Commission further noted that Brukarros Meat Processors (Pty) Ltd ("Brukarros"), the primary target undertaking is a private company incorporated in accordance with the laws of Namibia, with its principal business address at Farm Coebult, Keetmanshoop Namibia. Brukarros owns an abattoir facility and carries on the business of slaughtering, cooling and tanning of sheep (lamb) and to a lesser extent Game.

As merging parties do not operate within the same relevant market, the Commission found the proposed merger unlikely to result in a substantial lessening of competition or in any undertaking acquiring or strengthening a dominant position.

Public Interest considerations: The proposed transaction however raised public interest concerns with specific regard to employment. The target undertaking, Brukarros currently employs a total of 209 employees, and 10% of the employees were envisaged to be retrenched post merger. The Commission further noted that absent the proposed transaction, Brukarros faced shutting down completely and having all current employees lose their jobs.

Conclusion

Considering all the relevant information at its disposal the Commission resolved to approve the proposed merger between Brukarros Meat processors (Pty) Ltd and White Flower Investments (Pty) Ltd, with the following conditions:

1. That Brukarros shall limit the number of retrenchments to 10% of its current employees, for a period of two (2) years from the date of determination of the merger by the Commission.

2. That Brukarros reemploys retrenched employees part of the Paterson grading system grades A2 to A4, whenever making new appointments for a period of two (2) years from the date of determination of the merger by the Commission.

2. *Proposed merger between Lewis Stores Namibia (Pty) Ltd // The Business of Ellerine Furnishers (Namibia) (Pty) Ltd and Ellerine Retail (Namibia) (Pty) Ltd that trade as "Beares" and "Ellerines") in Namibia*

On the 20th of November, 2015, the Commission received a notification in terms of section 44(1) of the Competition Act, Act No. 2 of 2003, ("the Act") on the proposed sale of the retail businesses of Ellerine Namibia that trade under the "Beares" and "Ellerines" brands in Namibia as a going concern to Lewis Stores Namibia (Pty) Ltd. The proposed transaction involves Lewis Stores Namibia (Pty) Ltd ("Lewis Namibia") acquiring 21 stores trading under the ("Beares" and "Ellerines") brands

The Primary acquiring undertaking is Lewis Stores Namibia (Pty) Ltd ("Lewis Namibia"), a company incorporated in accordance with the laws of Namibia and ultimately controlled Lewis Group

Limited ("LGL"), a public company listed on the JSE Limited ("JSE") in South Africa.

The acquiring group, the Lewis Group is a household furniture and appliance retailer with operations in South Africa, Botswana, Lesotho, Namibia and the Kingdom of Swaziland. Lewis Namibia operates 27 ("Lewis") stores in 21 towns across Namibia, targeting the lower-to-middle income segments.

The primary target undertakings comprises of the business of Ellerines Furnishers (Namibia) (Pty) Ltd ("EF Namibia") and Ellerine Retailer (Namibia) (Pty) Ltd ("EF Retail Namibia"), both companies are incorporated in accordance with the laws of Namibia.

EF Namibia and EF Retail Namibia are 100% controlled by Ellerine Services (Pty) Ltd ("Ellerine Services"). Ellerines Services is 100% controlled by Ellerines Furnishers (Pty) Ltd ("EF"), which is in turn 100% controlled by Ellerine Holdings Limited ("EHL") which is a wholly owned subsidiary of African Bank Investments Limited ("ABIL").

The target group mainly trade through two trading brands, namely, “Ellerines” and “Beares”. In Namibia “Ellerines” brand comprises of 9 stores and the “Beares” brand comprise of 12 stores, totaling 21 stores. Beares and Ellerines stores predominantly sell household furniture’s and appliances targeting the lower to middle income customer segment.

<u>Background to the transaction:</u> The proposed transaction is as a result of a Board resolution taken on 7 August 2014, to voluntarily commenced business rescue proceedings under the South African Companies Act 71 of 2008 (the “South African Companies Act”), following a decision by African Bank Limited (“ABIL”), EF parent company, to cease providing funding to EF.

In terms of the business rescue process, once a business is in business rescue the business rescue practitioners (“BRP”) assume full management control of the company. They are also required to investigate the affairs of the company and attempt to raise post-commencement finance (“PCF”) in order to keep the business running.

In this regard the BRPs invited bids for the entire issued share capital of, and claims against, EF, or alternatively some or all of the different divisions of EF, including its operations in South

Africa and elsewhere including Namibia. As a result Ellerines and Beares South African operations, EF's Dial-a-Bed division was acquired by Coricraft Group Proprietary Limited while its Bears division was acquired by Lewis Stores Proprietary Limited ("Lewis Stores South Africa"), a subsidiary of Lewis Group Limited. Due to lack of interest from potential purchases certain of EF's divisions, closed down and ceased operating in South Africa.

While EF's South African Divisions ceased operations, its entities in the rest of Africa have in the interim continued to operate on their own. EF's only continued to exist so that the BRPs may complete the sale/liquidation process of its remaining assets and operations, including the Namibian business.

In this regard, subsequent to South African purchase of the Bears Division in December 2014, and after a rigorous bidding process, Lewis was the successful final bidder for the operations in Namibia, Botswana, Lesotho and Swaziland. Lewis was the only party that agreed to take all assets, all the staff and all stores in the four countries.

Competition analysis: The Commission found that although, the merger will reduce the number of competitors in the market for the retail of household furniture's and appliances, the proposed merger is unlikely to substantially prevent competition post merger or result in any undertaking abusing its dominance in the market. To the contrary, by rebranding Ellerines stores into Beares, the proposed merger will increase competition by enabling Lewis Namibia through the Beares brand to enter and compete in the higher income market segment.

Public Interest considerations: The proposed transaction was further found to have no negative impact on employment. The primary target undertaking employs 259 (246 permanent employees & 13 temporary employees) employees and all will be retained post merger. Hence, no employees will be made redundant or be retrenched as a result of the implementation of the proposed merger. The Commission also considered the fact that absent the proposed transaction 259 employees are likely to lose their jobs.

Conclusion:

The Commission resolved to approve the proposed merger with conditions. The Commission's decision is based on grounds that the proposed transaction is not likely to substantially prevent or lessen competition in Namibia, as envisaged by section 47(2) of the Competition Act, 2003 as there remain effective competitors to merging parties post merger.

The Commission however, is of the view that the rebranding/repositioning of the "Beares" brand/stores to target a higher income customer segment in the market for the retail of household furniture and appliances might not be feasible in some parts of the country. Therefore, in an effort to protect employment the Commission approved the proposed merger subject to the following conditions:

1. There shall be no retrenchment of employees of the merged undertakings as a result of the merger for a period of two years. The term "merged undertakings" means Lewis Stores Namibia (Pty) Ltd *("Lewis Namibia")* and the businesses of Ellerine Furnishers (Namibia) (Pty) Ltd *("EF Namibia")* and Ellerine Retailer (Namibia) (Pty) Ltd *("EF Retail Namibia"),* trading under the names "Beares" and "Ellerines".

2. For the sake of clarity retrenchments do not include:

2.1 voluntary separation and voluntary early retirement *("voluntary separations")*; and

2.2 retrenchments which are merger specific, but agreed on with the Commission in writing after the approval of the merger *("merger specific retrenchments")*.

3. All employees transferred from Ellerines and Beares shall be employed by Lewis Namibia on terms and conditions of employment that are on the whole not less favourable to them than their existing terms and conditions of employment.

- *The proposed acquisition of SABMiller Plc ("SABMiller") by Anheuser-Busch InBev ("AB InBev")*

On the 26th of January 2016, the Commission received a notification in terms of section 44(1) of the Competition Act, Act No. 2 of 2003, ("the Act") on the proposed acquisition by Anheuser-Busch InBev of the entire issued and to be issued share capital of SABMiller Plc.

The primary acquiring undertaking is Anheuser-Busch InBev ("**AB InBev**") a private company incorporated in Belgium. AB InBev does not control any undertaking in Namibia.

AB InBev is active in the production, marketing and distribution of beer, non-alcoholic /near beer (low ABV) and soft drink products. AB InBev has a portfolio of over 200 beer and other malt beverage brands. It is submitted that AB InBev does not source raw materials, does not operate a brewery in Namibia, or Africa, and does not undertake its own distribution and sale of beer products. Its beer products are imported into Namibia and sold a third party distributor, namely DGB.

The primary target undertaking is SABMiller Plc ("**SABMiller**"), a publicly listed company with a primary listing on the London Stock Exchange and a secondary listing on the JSE Ltd.

SABMiller is a multinational brewing and beverage company, headquartered in the United Kingdom. Through its subsidiaries, it is engaged in the manufacture, distribution and sale of various types of beverages, including brewing and hop farming activities, and offers beer, soft drinks and other alcoholic and non-alcoholic beverages. SABMiller has operations in 75 countries across Africa, Asia, Australia, Europe and Latin America.

In Namibia, SABMiller's operations relate to the sale of alcoholic beverages, in particular beer. During 2013 – 2014, SABMiller constructed a brewery in Okahandja, Namibia. The brewery is housed under SABMiller Namibia (Pty) Ltd – into which all of SABMiller's Namibian operations have now been consolidated.

Competition analysis: Both parties are active in the market for the sale alcoholic beverages (Clear beer). Based on preliminary investigations, although the market is highly concentrated with a few players, it seem unlikely that the proposed merger would result in a substantial lessening of competition or in any undertaking strengthening or acquiring a dominant position in the relevant market.

Public Interest considerations: The proposed merger is anticipated to have no negative impact on existing employment, as no retrenchments, or job losses are expected to result from the implementation of the proposed transaction.

Conclusion: The Commission will pronounce itself on the matter once it has finalised its investigations.

Restrictive Business practices

In the enforcement, the Commission has seen considerable progress, with finalisations of investigations with contraventions, in the glass, agro processing and the health industries. The following prominent cases have been handled during a period under review.

- *Law Society Exemption application*

The Secretariat has finalised the Law Society of Namibia's ("LSN") exemption application. The Commission's decision was published in the Government Gazette of 23 December 2015. The Commission's exemption decision is effective 1 July 2016 in order to allow the LSN sufficient time to bring their rules in compliance with the Commission's exemption decision. Those rules in respect of which an exemption was not granted will have to be either amended or abolished and those rules which were too broadly worded will have to be more narrowly tailored in order to comply with the Commission's decision.

- *Namibian Association of Medical Aid Funds and Others v The Namibian Competition Commission and Another:*

On 07th December 2014, the Commission concluded its investigations against NAMAF and 10 Medical Aid Funds in which it found that NAMAF and its fund members contravened section 23(1) read with sections 23(2) (a) and section 23 (3) (a) of the Competition Act.

Shortly after the Commission's decision was published in the government Gazette, NAMAF and the Funds brought an application before Court wherein they contest the Commission's jurisdiction on the basis that neither NAMAF, nor the Funds could satisfy the definition of an 'undertaking' as defined in the Competition Act. The Commission opposed this application. NAMAF's application was argued in the High Court on 26 November 2016. The High Court, in its judgment dismissed NAMAF and the medical aid fund's application and agreed with the Commission's arguments by ruling that NAMAF and medical aid funds are subject to the jurisdiction of the Competition Act. Following this judgment the Commission intends to now file its application interdicting NAMAF and the Funds from engaging in the unlawful conduct and to seek further appropriate redress mechanisms.

Research and advocacy

The research function of the Commission is embedded in the Economics and Sector Research Division which is responsible for evaluating the economic impacts of competition cases, market investigations and policy initiatives. During the period under review the Commission has set out its research agenda for the 2016/17 financial year to undertake market studies in the Housing industry, franchising and the construction industry.

The housing study will undertake a review into the current state of the housing sector in Namibia and existing impediments to its growth, and identifying any appropriated actions the Government might adopt in order to foster the sector's development. The review will also look at the role and place of regulation in the housing sector.

The Franchising Study will be carried out in conjunction with the Ministry of Industrialisation Trade and SME Development. The outcome of the study will seek to establish a basis for the development of the Namibian Franchising framework.

Similarly, the Construction study is aimed to examine whether the features in the construction industry distorts competition with particular emphasis on tender rigging, tender procedures ,the role of tender exemptions, market players and the level of competition and concentration in the industry. It will also try to establish if there are distortive effects on whether foreign and even foreign state owned construction companies outbid against domestic companies on the basis of subsidies or similar government support.

In its quest to achieve its mandate, the Commission is cognisant of the principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. That is why stakeholder engagement is core to our work.

It is imperative that market players and stakeholders embrace competition law as a policy tool to assist shape and drive the Namibian economic development and to continue supporting the efforts of the Competition Commission in enforcing the law.

Thank You!

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Signature: ____________________ Date: 1 April 2016

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