

NaCC COMPETITION

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# 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.



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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](mailto:info@nacc.com.na)  
[www.nacc.com.na](http://www.nacc.com.na)

# 01

## Editorial Note



By Dina Gowases  
Editor

Dear Readers,

The Commission's focus for the next strategic years are based on five central pillars acronymed, C.A.R.E, which stands for Centre of Excellence, Advocacy, Research, and Enforcement. The main aim is to provide a service to the people and try to find ways and means to bring that service closer to the people it serves. Therefore, the Commission places greater emphasis on human capacity building within and outside the Commission. The Chief Executive Officer of the Commission, Mr Mihe Gaomab II points out the vision of the Commission and the challenges it faces in the last segment of his two-fold foreword.

### **“The Economics and Sector Research division interrogates and assesses the competition and development issues in identified sectors”**

As usual, we bring you news on mergers and acquisitions as well as case investigations into restrictive business practices. This edition features mergers between Lolopark (Pty) Ltd. and Pointbreak Property Unit Trust; Paratus Telecommunications (Pty) Ltd. and Vox Telecom

(Pty) Ltd.; and Pointbreak Namibia Holdings (Pty) Ltd. and Ebank Holdings (Pty) Ltd. We highlight the outcome of these mergers and acquisitions. The Commission's determinations are available through the Government Gazette at the Ministry of Justice.

Case investigations into restrictive business practices were in the sugar sector and perishable products sector. The Commission also investigated allegations into price fixing and abuse of dominance. We have taken the liberty to elaborate on the processes and procedures involved in determining if an infringement has in fact occurred in the cases brought before the Commission.

The Commission is also tasked with embarking on research geared towards bringing a better understanding of the operations and set up of markets and market players in various sectors of the economy. The Economics and Sector Research division interrogates and assesses the competition and development issues in identified sectors. In this edition, we provide you with a brief summary of the results of the Retail Sector Inquiry and the policy recommendations that were made in this regard.

As usual, we provide an update on mergers and acquisitions as well as case investigations on restrictive business practices. The slot on competition terminology forms part of this edition to enlighten on the use of language applicable to competition regulation. —

# 02 Foreword By The CEO



By Mihe Gaomab II  
Chief Executive Officer

## Vision and challenges

For the next strategic horizon, the Commission will invest more time and resources in dealing with anti-competitive practices such as price fixing, dominance, exclusive agreements and exemption applications. The Competition Act 2 of 2003 is to be reviewed to make it stronger, cohesive and effective, and we are gaining ground on market enquiry provisions to analyse and understand the sectors better for enhanced enforcement.

Emphasis will be on five central pillars of success which are coined C.A.R.E., which stands for Centre of Excellence, Advocacy, Research, and Enforcement. The Commission aims to fulfill the following five key strategic objectives over the next five years:

- Ensure effective enforcement of the Competition Act as a contribution to creating competitive markets in line with Vision 2030.
- Expand the scope of competition regulation and strengthen the quality thereof.
- Enhance competition advocacy towards the fulfilment of sound competition principles and practices.
- Conduct action-oriented research on competition in support of evidence-based competition regulation and policy.
- Develop the Commission as a centre of operational excellence in competition regulation.

The following are key important matters that are needed by the Commission to be carried out in view of reaching the five key strategic objectives:

### **New strategic plan and annual performance business plan**

The success of any company depends largely on the appropriateness of its strategy and the annual

performance business plan, and the extent to which it is being implemented. The Commission has, in its formative stages, focused its resources on full staffing and immediate operational needs. The timeline of the initial strategy also came to an end in March 2014. To ensure the Commission has a clear corporate strategy with a future focus, as well as deal with other corporate challenges, one of the first priorities in 2014 was to prepare the new corporate strategic plan.

**“The success of any company depends largely on the appropriateness of its strategy”**

The strategic plan that contains the annual performance plan for 2014/15 was approved by the Board on 10 April 2014, which the current Board directed for review on its Key Performance Indicators (KPIs), which is currently under way. The new strategic and annual performance business plan is a result of a substantive input provided by its staff. Amidst all these, management has already embarked upon implementing some of the elements of the strategic plan in terms of its annual performance plan.

Once completed, the Commission has a Strategic Plan for the years 2014/15 to 2018/19 with a clear vision, mission, values, strategy and implementation programmes. The Commission has an annual performance business plan directly linked to the performance management system which is currently in implementation with its concerned staff.

Continued on page 03





### **Corporate structure, staffing and organisational development**

In terms of organisational growth, the structure follows strategy. As part of the above mentioned new strategic plan, the new strategy being proposed, will ultimately require a corporate re-organisation. Budget cost justified, the structure being proposed will bring the Commission in line with the international best practices of other Competition Authorities by re-orienting the Directorates in terms of effective and efficient enforcement, creating more emphasis on competition advocacy for stakeholder and client relations, developing a knowledge management system for ease of electronic information management and by revamping the Registry, and conducting a climate audit to ensure an inclusive and satisfying corporate atmosphere for its staff, and strengthening the employer employee industrial relations.

## **“Fit the right staff to right skills through a skills audit”**

All these interventions are necessary to ensure a corporate structure and staffing that would implement the enforcement provisions of the Competition Act and with confidentiality guaranteed to improve electronic and records information flow and transparency. It should be emphasized that the effective implementation of the Strategy Plan will require re-orientation to fit the right staff to right skills through a skills audit for the whole organisation for which identified skills gaps will be addressed through training interventions and training development.

Furthermore, re-organise the functional and reporting lines so that the whole Commission is re-aligned to its corporate strategy with staff with relevant skills and expertise to realise the annual performance business plan. This will be done with minimum interruption to the work flow process and employee rights accorded under the Labour Act and the relevant legislation.

The Commission has entered into a Recognition Agreement with the trade union, the Namibia Public Workers Union (NAPWU). Generally, the relationship is positive and cordial, but this being new, both parties are finding foothold between each other.

It should also be noted, that currently, the Com-

mission is experiencing difficulty not only to attract talented staff and to retain them as it is categorized as Tier 2 Regulatory SOE by the SOE Act provisions. As a result, it remains to be seen whether the positions for technical, professional and management positions would be retained as we are simply remunerating employees below the market as evident from the Market Survey done in 2013.

The Board of Commissioners, in order to redress this situation, is currently consulting the Minister as part of SOE Reform to address the concerns of the Commission, a non-profit-making, but public service driven organisation, which performs a specialised and highly technical and important role for competition regulation in Namibia.

### **Review of the Competition Act**

The Commission identified the need to review the Competition Act in line with its experience of applying the Act over the past years, developments in the fields of competition economics, law and policy, and other market dynamics have highlighted the limitations in some provisions of the law. The purpose of the review of the Act is thus, to bring it in line with international best practice in a manner that is relevant to the national context.

The review of the law and the expected changes provide significant opportunities for the Commission to strengthen its powers and functions as the Ministry of Trade and Industry seeks to enhance the prevailing competition policy regime. Furthermore, the reformed Competition Act is intended to provide greater clarity on matters of legal uncertainty. It is therefore, important to ensure that the Commission is able to influence the substance of the legal review based on its experience over the last five years so as to ensure that the competition regime is strengthened to ensure the Commission has a clear, sound and sharpened Competition Law that would cater explicitly on enforcement and market enquiry powers.

### **Awareness of NaCC**

There are perceptions by the public that would have a significant influence over the role and effectiveness of the Commission. In recent times, there has been a growing awareness of the Commission as a result of publicity and continuing stakeholder engagement. This is evident from the increase in enquiries and complaints from the public that impacts the workload of the Commission. Growing awareness also means that there is an increase in the expectation that the Commission will



effectively execute its mandate in a manner that benefits consumers with respect to lower prices and greater product choice.

The growing recognition of the role played by the Commission provides an opportunity to build support among members of the public based on educating the public on the mandate and functions of the Commission. The Commission, in turn, recognises the importance of building public support through developing favourable public sentiment.

There is need to ensure a more advocacy role and will do so for the foreseeable future to educate the public and inform them on the benefits and costs of a competition regime in Namibia. There is still need to deter anti-competitive behaviour and promote pro-competition behaviour in Namibia, hence justifying budgetary implications.

#### **Relevance of NaCC to improving competition in the different sectors**

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

There is no doubt that since its inception, the institutional growth of the Commission is moving in the right direction and its growth needs to maintain momentum to sustain its operations and perform beyond expectations. In absolute terms, the case load of the Commission has increased exponentially. This does not take into account the degree of complexity of cases and as a consequence, the volume of resources it will consume.

## **“ Institutional growth of the Commission is moving in the right direction and its growth needs to maintain momentum”**

The expanding scope and volume of work has significant implications for the quality of the work of the Commission. In order to sustain and enhance the quality of its work, it is necessary to develop the supporting technical infrastructure to support the increasing workload without undermining the quality thereof. The technical infrastructure incorporates management systems such as the case, electronic document, and information and

knowledge management systems that are yet to be developed.

Furthermore, and increasingly, management capability such as investigation management and evidence management in which functions such as file planning, version control, registry activities are critical. In addition, careful consideration should be given to the existing information, communication and networking technology (ICTs) capabilities and the extent to which it will effectively meet future needs. Consideration should be given to the establishment of an effective ICT platform at the Commission in the form of knowledge management that would integrate with the current case management and documentation systems and applications.

#### **Engagement with sector regulators and stakeholder partnership**

There are a number of other economic regulators in Namibia that perform the role of economic regulation in the Namibian economy. This includes the Bank of Namibia (BoN), the Namibian Financial Institutions Supervisory Authority (NAMFISA), Electricity Control Board of Namibia (ECB soon to be an Energy Regulator), the Communication Regulatory Authority of Namibia (CRAN), Anti-Corruption Commission (ACC) and the Namibian Ports Authority (Namport).

The Commission is bound to consult and engage with these economic regulators in respect of competition matters in the sectors that these institutions regulate. In order to promote competition in these regulated sectors, it is necessary for the Commission to cooperate with these institutions. The Commission has already embarked on the establishment of Memoranda of Agreements (MOAs) and Memoranda of Understandings (MOUs) with all of these institutions.

We have also concluded agreements with other institutions such as NAMFISA and in the preparation phase with the Tender Board, in an effort to agree on the principles and the manner in which competition matters in these sectors will be regulated. These arrangements provide enormous opportunity for the Commission to integrate competition concerns into the economic regulation of these sectors.

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.

# 03 NEWS ON MERGERS AND ACQUISITIONS



## **The merger between Lolopark (Pty) Ltd. and Pointbreak Property Unit Trust Three**

**Introduction:** In August 2014, the Commission received a notification in terms of Section 44 of the Competition Act 2 of 2003, on the proposed acquisition of Lolopark (Pty) Ltd. by Pointbreak Property Unit Trust.

**Acquirer:** Pointbreak Property Unit Trust, is a trust registered in accordance with the laws of Namibia. Pointbreak Property Unit Trust Three is a Trust under the Pointbreak Property Unit Trust Scheme, established in terms of the Unit Trust Control Act 54 of 1981 and is controlled by Kano Prop (Pty) Ltd., a private company incorporated in

accordance with the laws of Namibia. Pointbreak Property Unit Trust controls about 6 property holding companies.

**Target:** Lolopark (Pty) Ltd. (LoloPark), is a private company incorporated in accordance with the laws of Namibia, with its principal business address at Erf No. 996, Olympia, Windhoek.

**Outcome:** The Commission was of the considered view that the proposed transaction was unlikely to lessen competition in any market or result in the acquisition or strengthening of a dominant position. The Commission resolved to approve the transaction without conditions.





### **The merger between Paratus Telecommunications (Pty) Ltd. and Vox Telecom (Pty) Ltd.**

**Introduction:** In August 2014, the Commission received notification in terms of section 44(1) of the Competition Act 2 of 2003, on the proposed acquisition of Vox Telecom (Pty) Ltd. (Vox) by Paratus Telecommunications (Pty) Ltd. (Paratus).

**Acquirer:** Paratus Telecommunications (Pty) Ltd., is a private company incorporated in accordance with the laws of Namibia. Paratus became operational in 2005 as an Internet Service Provider (ISP). On 20 March 2012, Paratus was granted a class comprehensive telecommunications operator's licence (Electronic Communications Service (ECS) and Electronic Communications Network Service (ECNS). ECS and ECNS are service and technology neutral licences provided to fixed line and mobile operators. Paratus supplies a range of connectivity products and services to corporate clients of all sizes.

The products and services provided to its clients vary based on the client's needs, size, location etc. It primarily offers wireless communications services, wired data services, voice communication services, portable products, hosting services, domain registration, and carrier services.

**“The products and services provided to its clients vary based on the client's needs, size, location etc”**

**Target:** Vox Telecom (Pty) Ltd., is a private company incorporated in accordance with the laws of Namibia. Vox does not control any undertakings and is currently fully owned by Vox Telecom Ltd. a company registered in South Africa (Vox SA).

Vox provides communications products and services to business customers of all sizes. Its main focus is the provision, installation and maintenance of PABX systems. It provides PABX solutions, infrastructure cabling and data network

solutions, telephony management solutions, conferencing solutions, and data solutions.

**Outcome:** The Commission concluded that the proposed merger was unlikely to result in a substantial lessening of competition or in any undertaking acquiring or strengthening a dominant position and does not raise any public interest concerns. The Commission resolved to approve the merger without conditions.

**“ Commission resolved to approve the merger without conditions”**

### **The merger between Pointbreak Namibia Holdings (Pty) Ltd. and Ebank Holdings (Pty) Ltd.**

**Introduction:** In November 2014, the Commission received a notification in terms of section 44 of the Competition Act 2 of 2003, on the proposed transaction between Pointbreak and Ebank Holdings (Pty) Ltd.

**Acquirer:** Pointbreak Namibia Holdings (Pty) Ltd. (Pointbreak Namibia), with its principal business address situated at c/o Sinclair and Schanzen Road, Windhoek, Namibia. Pointbreak Namibia is a wholly owned subsidiary of Pointbreak Group Holdings (Pty) Ltd. (Pointbreak Holdings).

**Target:** The primary target undertaking is Ebank Holdings (Pty) Ltd. (EBank Holdings), with its principal business address situated at c/o Sinclair and Schanzen Road, Windhoek, Namibia. Ebank Holdings is controlled by Pointbreak Namibia Holdings (Pty) Ltd. EBank Holdings owns and controls EBank, a licensed technology-based branchless banking institution in Namibia.

**Outcome:** Given that the proposed merger was unlikely to result in a substantial lessening of competition or in any undertaking acquiring or strengthening a dominant position, and did not raise any public interest concerns, the Commission resolved that the merger be approved without conditions.

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



# 04 NEWS ON RESTRICTIVE BUSINESS PRACTICES INVESTIGATIONS



By Cynthia Mukendwa  
Economist: Restrictive Business Practices

## Refusal to Deal

**Complainant:** Matrix 1-2-1 Commodity Marketing Pty Ltd. (Matrix)

**Respondent:** Consolidated Sugar Industries Namibia (Pty) Limited, Sugar Mark Namibia (Pty) Limited, The Tongaat Hulbert Group Limited and The South African Sugar Association.

This article seeks to inform readers on the analysis and treatment of a refusal to deal by the Namibian Competition Commission. For the purposes of this article, we refer to “refusal to deal” as conduct where one undertaking stipulates that they refuse to do business with another. The said conduct would concern a dominant firm or firm with significant market power.

Since the article deals with a conduct entered into by a dominant firm or a firm with significant

market power, it is best to start by defining what a dominant firm is according to the Competition Act 2 of 2003 as well as the Rules under the Competition Act, 2003 (the Rules).

**“This article seeks to inform readers on the treatment of a refusal to deal by the NaCC”**

According to the Act, dominance is dealt with in Section 26 (1) as “any undertaking on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or a part of Namibia, is prohibited.” Section 26 (2) provides further that abuse of a dominant position includes “directly or indirectly



imposing unfair purchase or selling prices or other unfair trading conditions; limiting or restricting production, market outlets or market access, investment, technical development or technological progress; applying dissimilar conditions to equivalent transactions with other trading parties; and making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts.”

## “Dominant firms should not engage in conduct that create barriers to market entry”

Rule 36 stipulates that an undertaking has, or two or more undertakings have, a dominant position in a market if *“it has or they have at least 45% of that market; it has or they have at least 35% but less than 45% of that market, unless it can show that it does not have market power; or it has or they have less than 35% of that market, but has or have market power.”*

Analysis of an abuse of a dominant position requires many factors such as market shares, market power, barriers to entry, effect of conduct as well as the thresholds.

According to Karbogaz, dominant firms should not engage in conduct that create barriers to market entry, complicate actual competitor’s activities, and prevent entry of potential competitors by foreclosing the market.

**In the matter between Matrix 1-2-1 Commodity Marketing Pty Ltd. (Matrix) and Consolidated Sugar Industries Namibia (Pty) Limited, Sugar mark Namibia (Pty) Limited, The Tongaat Hulett Group Limited and The South African Sugar Association, Matrix alleged the following:**

- Refusing to sell sugar to the complainant.
- Tongaat Hulett Group is limiting its sales into Namibia to its subsidiary who are direct competitors of the complainant.
- The complainant further alleges that they are unable to benefit from the rebate scheme with SASA due to the conduct.

The preliminary screening alleged, placed the alleged conduct to be a possible contravention of

Sections 23 (1), 23 (3) (f), and 26 (1), (26 (2) (b) (c) of the Act.

In assessing an abuse of dominance case, first it is necessary to establish the existence of a market where the alleged dominant undertaking is a player. The relevant market comprises of two elements: the relevant product market and the relevant geographic market (ABA, 2012, Market definition in Antitrust: Theory and Case Studies, ABA Publishing). The Commission defined the product market as the packing and distribution of refined white sugar. The geographic market was defined as national.

From the information collected, the Commission determined that cane growers in South Africa in the period 2008-2012 suffered the worst drought which saw a reduction in the quantity of raw sugar produced.

The decline in THG’s production of raw sugar over the years resulted in a significant shortfall in the quantity of raw sugar available for refining. This was said to have caused a severe constraint on THG’s ability to supply its customers both within SACU and SADC. The extent of the damage had been such that THG had to buy sugar from SASA for that period to meet their demand from existing customers.

Most producers within SACU such as Illovo Sugar, TSB Sugar, Gledhow Sugar and the Swaziland Sugar Association, all of who are substantial producers of white sugar were also affected and also turned down Matrix’s request for sugar supply for the same reasons.

THG’s supply for the years 2007-2012 was limited to existing customers and could not be extended to new entrants like the complainant.

Information before the Division strongly indicates that the THG and other suppliers of sugar in South Africa could not supply the complainant with sugar due to the shortfall experienced as a result of droughts. The Commission considered the reasons to be reasonable. The Complainant later indicated to the Commission that they were now able to source sugar from Brazil during the time of investigation and could address its sugar supply requirements.

Taking into consideration the reasons given by the respondents and the complainant indicating that they had been able to address its concern, the Commission decided not to investigate the matter further and recommended for a closure of the file in October 2014. ■





### Price Fixing and Abuse of Dominance

**Complainant:** Hallie Investments One Hundred and Fourty Two CC (Hallie).

**Respondent:** Puzzle Investments Number Thirty Six CC (Puzzle) and Caterplus Namibia (Pty) Ltd. t/a Blue Marine (Blue Marine).

The Commission received a complaint in May 2012 from Hallie alleging that Puzzle and Blue Marine jointly referred hereto as the respondents, jointly agree and fix prices at which the complainant would purchase perishable products from Blue Marine in contravention of Section 23(1) read with Section 23(3)(a) of the Competition Act 2 of 2003.

It was also alleged that the respondents are

engaged in a restrictive agreement in which Blue Marine is designated as the only supplier of Wimpy licensed products in Namibia and that this is allegedly in violation of Section 23(3)(e) of the Act. It was also alleged by the complainant that the respondents abuse their dominance in the market in two ways. First, by designating Blue Marine as the only supplier for Wimpy licensed goods in Namibia, and secondly the respondents allegedly, collectively agree and impose unfair selling prices in the form of excessive pricing in contravention of Section 26(1) read with Section 26(2)(a) of the Act.

The Commission conducted a pre-screening assessment and subsequently decided to conduct an investigation in February 2013. This notice of decision to investigate was served on the re-



spondents in September 2013. The respondents made written submissions to the allegations which were received by the Commission on 06 December 2013.

The complainant averred that the respondents are engaged in restrictive agreements in which Blue Marine is designated as the only registered supplier of Wimpy licensed goods in Namibia, that this limits market access and outlets. The complainant argued that if there were more than one registered supplier in Namibia, which would safeguard and stimulate competition, it would have no issues whatsoever.

The complainant also alleged that the respondents are engaged in price fixing. Arguing that prices are allegedly on average, 14% higher than similar pricing in South Africa for similar products and that the prices are sometimes higher than 30%.

The complainant also suggested that a policy of resale price maintenance is implemented and practiced and franchisees including Hallie Investments have to buy at those prices. The complainant concluded that the respondents are refusing to designate another licensed supplier of Wimpy products in Namibia. The complainant cited Sections 23(1), 23(2), 23(3) of the Act and Sections 26(1), 26(2) of the Act to reinforce its arguments on conducts alleged to be in violation of the Act.

The Commission identified the product market as Wimpy licensed perishable products. This is the product which is gleaned from the complainant's complaint. The respondents also identified the market as such. The Commission finds that there seems to be no issue with the identification of the market as Namibia.

## **“The Commission finds that there seems to be no issue with the identification of the market as Namibia”**

The Commission investigated the matter and found that, on the allegation of price fixing, Hallie, Blue Marine and Puzzle Investments are not in a horizontal relationship, in that they are not competitors. Section 23(3)(a) of the Act, does not find application because the prohibition sought

by the legislature in that section is between competitors. On the issue of minimum resale price maintenance, the Commission found that even if the allegation is placed under a restrictive vertical prohibited practice of resale price maintenance under Section 23 (3)(d) of the Act, the allegation will collapse. The relationship between the parties is not the one of a manufacturer and distributor but is that of a distributor and franchisees. Blue Marine is not a manufacturer, nor is Puzzle Investments. To cap it all, Puzzle Investments is not a distributor, but an agent for Famous Brands in the current relationship.

The allegation which relates to limiting of market access in violation of Section 23(3)(e) of the Act, by designating Blue Marine as the only supplier of Wimpy licensed products, it was the Commission's view that the agreement to that effect between Blue Marine and Puzzle Investments does not substantially limit market access for the competition. The basis for this finding is that, since the allegation by the complainant was that Blue Marine regularly runs out of stock thereby halting his business operation and limiting his market access, the Commission found that the complainant's hands are not tied as there is provision for an alternative supply as he is allowed to source elsewhere, when Blue Marine does not have stock.

## **“The Commission was of the view that there is no limitation of market access if the complainant is allowed to source elsewhere”**

On the allegation of abuse of dominance, certain allegations were made by the complainant. First, that the respondents are dominant in the market for the supply of Wimpy licensed products in Namibia. Secondly, the complainant also alleged that the respondents were abusing their dominance in that market by limiting market access. Again, reiterating what has been stated about limiting of market access under Section 23(3)(e) of the Act, the Commission was of the view that there is no limitation of market access if the complainant is allowed to source elsewhere.

The Commission concluded its investigation and found that there was no infringement of the Act. ■



# 05 Retail Sector Market Inquiry



By Dr. Michael Humavindu  
Director: Economics & Sector Research Division (ESR)

## Introduction

During the years 2013 and 2014, the Commission embarked upon its tryst of a Market Inquiry. The focus of the Market Inquiry was to look at the Retail Sector in Namibia and assess both the competition and development issues that are pervasive in the sector. The Inquiry also set the tone on how the ESR division will carry out such work in future and as a case study to eventually develop and adopt formal Market Inquiry Guidelines.

## Results of the Retail Sector Inquiry

A Report was submitted to the Ministry of Trade and Industry (MTI) in late 2014, comprising the following results:

- The report indicates evidence of difficulties that retailers face in distributing their goods in

a small and geographically dispersed market. Small Namibian independent retailers normally form buyer groups as a 'coping mechanism' to source goods at competitive prices from suppliers. In certain markets such buyer groups may be seen as engaging in anti-competitive behaviour, however in high distribution and logistics markets such as Namibia, there are efficiency gains as this represents a solution to a problem of a small demand that is widely dispersed across a vast country.

- The report also highlights difficulties faced by local manufacturers and suppliers in gaining access to consumers via the retail sector.
- The issue of rebate regimes as well as stocking local goods appear invariably, as some retailers do offer conducive terms whilst others do not. Therefore some form of 'Model Agreement' which could propose some minimum standards for such regimes could prove beneficial for the



various stakeholders affected.

- South African retailers through bundling of goods together are able to overcome the logistical challenges more efficiently through their distribution centres (in Namibia or South Africa) but Namibian suppliers are not able to overcome this challenge as they are not able to achieve critical mass in partnerships.
- There are very few complaints about restrictive business practises such as minimum order quantities, exclusive dealing requirements, resale price maintenance, standard payment terms, demands for prominent shelf placement and category management schemes.
- There is evidence, very little or no industry wide sector development plan that could help drive the sector towards competitiveness and enable the envisaged Retail Charter to ensure a more efficient relationship between Namibian

suppliers and the local retail sector.

- Buyer power and its concomitant impact on local producers and suppliers manifest itself as the biggest concern. Such practices by retailers act as a significant entry barrier for many smaller suppliers. This situation can potentially lead to greater concentration in the food manufacturing and retail sector, which might become a concern for consumers and the Government. It could well act against the Government's objectives to promote small and medium enterprises, and it could become a major challenge to the empowerment ambitions of the country.

### Policy Recommendations

Based on the results of the Market Inquiry, the NaCC submitted the following Policy Recommendations to the Ministry of Trade and Industry (MTI):

Recommendation	Exposition
Code of Practice	An improved balance between 'buyer power' and 'seller power' must be advocated and closely monitored, to ensure that unfair influence is avoided. This can be achieved through the design of a voluntary Code of Practice. The NaCC is currently collaborating with the Namibia Manufactures Association and a few retailers to review a few supplier-retailer agreements and propose fair elements in a Code of Practice framework. This is a technical approach beyond the vision-based Retail Charter and is complementary to it. The Code would also serve to prevent retailers from altering contracts and using suppliers' intellectual property to develop their own product labels. If the Voluntary Code materialises, the NaCC will be required to monitor contractual discussions and ensure that parties comply and honour their commitments. The draft National Competition Policy also makes provisions for the support of sectoral Codes of Practice.
Confidential Rebates	There is a need for an in-depth analysis of confidential rebates and their economy-wide impacts. Where local suppliers are weak and very fragmented with little negotiating power, the rebates can be quite high up to 12%. This makes it very difficult for small suppliers to stay in business because these rebates cannot be easily recovered from list prices. Confidential rebates are also not conducive to competitiveness since rebates are normally granted to the large retailers who have the necessary bargaining power to negotiate them. This makes it even more difficult for small retailers to compete with larger retailers. The fiscal implications, as in potential tax revenues lost, of such confidential rebates are not well documented in Namibia.
Retail Sector Development Plan	A comprehensive Retail Sector Development Plan by the MTI would ensure indigenous retailers competitiveness with the aim to become viable and profitable enterprises. Such a plan will consist of a series of action plans to help local retailers and manufacturers to upgrade and rationalise their operations. The forthcoming National Policy on Small and Medium Enterprises of the MTI may provide further impetus for such sectoral development plans as well as targeted support schemes and incentives. The Sectoral Plan will also ensure a meeting of mind between the sector and Competition Policy to ensure that 'coping mechanisms' of indigenous retailers that could be seen as 'anti-competitive practices' are provided some relieve.

### Conclusion

Given the Market Inquiry results and policy recommendations, there is an obvious task for Government to continue to monitor prices but also to monitor the specific nature of the manufacturer-retail structure that might limit competition and participation in the economy. ■■■

# 06 Mergers Update



## Determinations made by the Commission for the period of August 2014 to February 2015.

Case Number	Primary Acquiring Firm	Primary Target	Initial Date Filed	Status
2014NOV0066MER	Business Venture Investments No. 1852 (Pty) Ltd.	Retailability (Pty) Ltd.	11/11/2014	Approved
2014NOV0069MER	Platform Speciality Products Corp.	Arysta Lifescience Limited	18/11/2014	Approved
2014NOV0070MER	Bryve Resources (Pty) Ltd.	Shaw River Manganese Limited	20/11/2014	Approved
2014NOV0071MER	Pointbreak Namibia Holdings (Pty) Ltd.	EBank Holdings (Pty) Ltd.	24/11/2014	Approved
2014NOV0072MER	Willem Baartman	Johannes Jacobus Petrus Opperman	26/11/2014	Approved
2014NOV0073MER	Thomas Ehbrecht	Hotel Deutsches Haus cc	27/11/2014	Approved
2014DEC0074MER	WP Transport (Pty) Ltd.	HS Properties (Pty) Ltd.	01/12/2014	Approved
2014NOV0064MER	Anderson Trust	Camelthorn Properties (Pty) Ltd.	02/12/2014	Approved
2014DEC0075MER	Preferred Investment Property Fund	Aloe Investments Number Seventy Five (Pty) Ltd.	02/12/2014	Approved
2014DEC0076MER	Preferred Investment Property Fund	PPH Otavi (Pty) Ltd.	12/12/2014	Approved
2014DEC0083MER	Ascendis Health Limited	Lexshell 834 Investments Proprietary Limited	18/12/2014	Approved
2014DEC0082MER	Lixil Group Corporation	Grohe Group S.A.R.L	19/12/2014	Approved
2014DEC0080MER	Hangala Properties (Pty) Ltd. and The Trustees of the Preferred Investment Property Fund	BV Investments One Hundred and Fifty Seven (Pty) Ltd.	23/01/2015	Approved



# 07 Update On Restrictive Business Practices Investigations



No.	Case	Complainant	Respondent	Status
1	2012JUNE0004COMP	LLD Diamonds Namibia (Pty) Ltd.	The GRN, De Beers Society Anonyme, Diamond Trading Company, Namdeb Daimond Holdings (Pty) Ltd., Namdeb Diamond Corp, De Beers Marine Namibia	Closed - Decision not to investigate
2	2012OCT0008COMP	Municipality of Swakopmund	DMA Holdings cc & 3 others	Investigation concluded. No contravention found
3	2011APR0065COMP	Matrix 1-2-1 Commidy Marketing (Pty) Ltd.	Consolidated sugar industries (Pty) Ltd. and 3 others	Closed - Decision not to investigate - Form 3
4	2014FEB001COMP	Starlite Wholesale Prepays (Pty) Ltd.	Mobile Telecommunication Ltd.	Closed - Complainant withdrew the case
5	2014APR0001LP	Stand alone poker licence		Closed - Incomplete Information
6	2014JUNE003COMP	Fabian Martens	Hifi Corporation Maerua Mall	Closed - Alleged conduct does not fall under realms of the Part I and Part II prohibitions of Chapter 3 of the Act

# 08 Competition Terminology



## **Abuse of a dominant position (also called misuse of market power and single firm conduct with respect to monopolisation)**

It is not illegal to be a monopoly (i.e. a single firm in a dominant position) per se, but governments do regulate monopolies more closely than other companies since, on their own, they possess the power to easily engage in business practices which may be particularly harmful to consumers or to other competitors. Whether or not a company is a monopoly is part of the Competition Law analysis and depends on factors such as the definition of the product market and the geographic market. The Competition Law provisions on abuse of dominant position deal with the actions of both single-firm monopolies as well as a group of dominant firms.

The Competition Law regulates the behaviour of firms in dominant positions to ensure that they do not, or are not likely to, behave anti-competitively or substantially lessen competition in a market. The purpose of this kind of regulation is to preserve competition within markets and promote effective competition, and not necessarily to protect individual competitors.

## **Exclusive agreements**

Practices whereby a supplier requires or induces a customer to deal only with primary products designated by the supplier (can also be termed single branding agreements, exclusive purchasing, exclusive dealing, requirement contracts or non-compete obligations) or to refrain from dealing with products except as supplied by the supplier

(such as through limited distribution, resale price maintenance or market partitioning).

## **Refusal to supply (refusal to deal)**

This involves the situation where a buyer cannot obtain supplies of a product on usual trade terms from a dominant firm and is, as a result, substantially affected in its ability to conduct business, and competition is thereby adversely affected. This can essentially be a company boycotting a supplier or a customer. The competition authorities may decide that the dominant firm has an obligation to supply to other firms, especially if the dominant firm offers an “essential facility”.

## **Exploitative pricing practices**

An example of this would be price discrimination, where goods are sold or purchased at prices not related to cost. One form of price discrimination is discounts or rebates which aim to bind customers to the producer, rendering it too difficult for new competitors to enter the market.

## **Tie-in agreements (also termed tying agreements, tied in agreements, product tying or bundling)**

Practices whereby the supplier requires that the customer purchase a second (tied) product from the supplier of a first (tying) product. This may be written into the contract or done through some other means. The supplying firm uses its market power in relation to the tying product to induce the customer to buy the tied product.

(Source: <https://www.translegal.com>)



# NOTES

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